Neutral Citation Number: [2024] UKUT 252 (AAC) **Appeal No. UA-2024-000883-HS**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

London Borough of Islington

Appellant

- v -

A Parent

Respondent

Before: Upper Tribunal Judge Stout
Hearing date(s): 16 August 2024
Mode of hearing: By video

Representation:
Appellant: Mr B Harrison (counsel)
Respondent: In person

On appeal from:
Tribunal: First-Tier Tribunal (Health Education and Social Care) (Special Educational Needs and Disability)
Tribunal Case No: EH206/23/00055
Tribunal Venue: By video
Decision Date: 20 March 2024

RULE 14 Order

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the respondent in these proceedings, or her son. This order does not apply to: (a) the respondent; (b) any person to whom the respondent discloses such a matter or who learns of it through publication by the respondent; or (c) any person exercising statutory (including judicial) functions where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

SUMMARY OF DECISION

SPECIAL EDUCATIONAL NEEDS (85)

The effect of section 39(4) of the Children and Families Act 2014 (CFA 2014) is that parental preference for a school (approved under section 41 of the CFA 2014) should be complied with unless the school is unsuitable or the child's attendance at the school would be incompatible with the efficient education of others or the efficient use of the local authority's resources. This case was concerned with the latter exception under section 39(4)(b)(ii) for incompatibility with the local authority's resources. The local authority had proposed that C should attend a special academy school in its area which had a vacant place; parental preference was for a community special school in a neighbouring local authority which said it was oversubscribed. The local authority respondent to the appeal provided evidence as to the cost of its preferred placement and brought the Headteacher of that school to the hearing as a witness. The local authority provided email and letter evidence from the parent's preferred school and the neighbouring authority as to the costs of placement at that school, but the neighbouring authority and parent preferred school had refused to provide a witness for the hearing. The First-tier Tribunal directed itself that the burden of proof was on the local authority to prove the true costs of the two placements. It found the local authority's evidence "unreliable" and accordingly rejected it and ordered that the school of parental preference should be named in Section I.

Held:- The Tribunal had erred in law in placing a burden of proof on the local authority. The Tribunal's task on appeal is to 'stand in the local authority's shoes' and apply section 39(4) properly to the facts of the case before it, exercising its inquisitorial jurisdiction as appropriate to ensure it has the necessary evidence on which to fairly determine the appeal. The Tribunal's rejection of the local authority's evidence was perverse. It had also proceeded unfairly because it had failed to raise its concerns with the parties at the hearing. In any event, if the Tribunal had concerns about the reliability of the local authority's evidence or required further detail, it needed to consider exercising its case management powers to require the parties and/or the third party local authority and school to provide further documentary evidence or to order a witness from the third party local authority or school to attend the hearing. Only the Tribunal in this case had the power to direct the third party local authority and school to provide evidence; the local authority respondent did not have that power. On the facts of this case, it was perverse for the Tribunal not to

delay resolution of the case or adjourn the hearing for that further evidence as the prejudice to the parent and child of delay would have been minimal whereas the potential prejudice to the local authority was that it was required to fund C's placement at a school at very significant additional cost to the public purse.

The case was remitted for re-determination by a fresh Tribunal. The Upper Tribunal was unable to remake the appeal because, despite having heard oral evidence about the suitability of the local authority's school, the First-tier Tribunal had declined to make any findings about the suitability of that school or what additional resources might be required to make it suitable. These matters were still in issue between the parties and required witness evidence.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

DIRECTIONS

1. **The case is remitted to a fresh Tribunal panel for redetermination in accordance with the law as set out in this decision. The panel should not include the judge or any panel member who heard the case previously.**

2. **The remitted hearing should be expedited.**

These Directions may be supplemented by later directions by a Tribunal Caseworker, Tribunal Registrar or First-tier Tribunal Judge.

REASONS FOR DECISION

Introduction

1. The London Borough of Islington (the local authority) appeals against the decision of the First-tier Tribunal sent to the parties on 20 March 2024. The respondent to this appeal is the parent of the child (C) with whom the proceedings under section 51 of the Children and Families Act 2014 (CFA 2014) are concerned. I will refer to her in these proceedings as “the parent”.

2. This is a case where the sole issue of substance between the parties determined by the Tribunal at first instance was whether naming the special school preferred by the parent in Section I of C’s Education, Health and Care Plan (EHCP) would be “incompatible with the efficient use of resources” for the purposes of section 39(4)(b)(ii) of the CFA 2014. The parties were also in dispute as to the suitability of the local authority’s preferred school, but the Tribunal did not determine that issue.

3. The First-tier Tribunal found in favour of the parent so far as the "efficient use of resources" argument was concerned and named the parent's preferred school in Section I.

4. The local authority now appeals to the Upper Tribunal. I granted permission to appeal by decision sent to the parties on 12 July 2024 and this final hearing has been heard on an expedited basis in order if possible to resolve the question of C's education before the start of the new academic year.

5. The structure of this decision is as follows:-

The Upper Tribunal hearing

6. This hearing was conducted by video (Kinly CVP). There were some difficulties with the hearing. The parent had not been sent my directions of 11 July issued with the grant of permission to appeal and had not filed a response to the appeal as a result until she made a written submission by email on the morning of the hearing. Quite rightly, no objection was made to that by the local authority and I have read and taken full account of it.

7. The parent had had sufficient notice of the hearing, but she had had difficulty arranging childcare during the summer holidays and as a result joined the hearing by mobile from the house of a family member (who was looking after her child). She had been unable to print the documents required for the hearing and could not view them on her phone. As a result of a difficulty with her phone, she was also located in the garden during the hearing.

8. This was far from ideal and in many cases it would not have been appropriate to continue in such circumstances. However, the nature of the appeal was such that there were very few documents that needed to be referred to, the issues were clear and I was reasonably confident, having had the opportunity of speaking with the parent and reading her submission that she was familiar with the documents and the arguments and able to deal with the hearing with the arrangements we were able to make (see below). Even so, if it had not been the desire of the parties and the Tribunal to deal with the appeal speedily in view of the potential impact on C's education if the proceedings are not resolved by September, the hearing may have been adjourned.

9. As it was, both parties consented to proceeding despite the circumstances. We addressed the difficulties by having the Tribunal's clerk show the documents referred to on screen. The parent confirmed she could see and read the documents. She confirmed that if she wanted to view any other documents during the hearing she would ask and we would arrange for that to happen. After discussion, I was satisfied that although she was in the garden, the parent was able to concentrate on the proceedings. Mr Harrison took his submissions slowly. The parent confirmed that she was willing to proceed in this fashion and would prefer to do that rather than adjourn or try to deal with the matter in writing. At regular intervals she also confirmed that she was able to follow the submissions and read the documents. She herself made helpful, detailed submissions in response and dealt with all the points I expected her

to deal with (and more). She confirmed at the end of the hearing that she felt she had been able to participate fully despite the difficulties.

10. I was satisfied that the hearing overall was fair and that neither party (and especially the parent) had been disadvantaged by the unusual way in which the hearing was conducted

Legal framework

Legislative provisions

11. Section 39 of the CFA 2014 provides (emphasis added to indicate the parts of particular relevance to this appeal):-

> **39 Finalising EHC plans: request for particular school or other institution**
> (1) This section applies where, before the end of the period specified in a notice under section 38(2)(b), a request is made to a local authority to secure that a particular school or other institution is named in an EHC plan.
> (2) The local authority must consult—
> (a) the governing body, proprietor or principal of the school or other institution,
> (b) the governing body, proprietor or principal of any other school or other institution the authority is considering having named in the plan, and
> (c) if a school or other institution is within paragraph (a) or (b) and is maintained by another local authority, that authority.
> (3) The local authority **must secure that the EHC plan names the school or other institution specified in the request, unless** subsection (4) applies.
> (4) This subsection applies where—
> (a) the school or other institution requested is unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned, or
> (b) the **attendance of the child** or young person at the requested school or other institution **would be incompatible with**—
> (i) the provision of efficient education for others, or
> (ii) **the efficient use of resources**.
> (5) Where subsection (4) applies, the local authority must secure that the plan—
> (a) names a school or other institution which the local authority thinks would be appropriate for the child or young person, or
> (b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.
> (6) Before securing that the plan names a school or other institution under subsection (5)(a), the local authority must (if it has not already done so) consult—

> (a) the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and
> (b) if that school or other institution is maintained by another local authority, that authority.
> (7) The local authority must, at the end of the period specified in the notice under section 38(2)(b), secure that any changes it thinks necessary are made to the draft EHC plan.
> (8) The local authority must send a copy of the finalised EHC plan to—
> (a) the child's parent or the young person, and
> (b) the governing body, proprietor or principal of any school or other institution named in the plan.

12. Section 9 of the EA 1996 provides (emphasis added again):

> **9. Pupils to be educated in accordance with parents' wishes.**
> In exercising or performing all their respective powers and duties under the Education Acts, the Secretary of State **and local authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with** the provision of efficient instruction and training and **the avoidance of unreasonable public expenditure**.

Case law on resources / public expenditure

13. Both section 39(4) of the CFA 2014 and section 9 of the EA 1996 need in principle to be considered where, as in this case, the two schools in issue are maintained schools: see *O v Lewisham LBC* [2007] EWHC 2130 (Admin) at [11]-[16] *per* Andrew Nicol QC (as he then was). As was explained in that case (by reference to the previous legislative regime under the EA 1996), section 39(4) is considered first. If, as a result of applying section 39(4) the parent's choice of school is named in Section I, that is an end of a matter. If not, the Tribunal must still go on to have regard to the parent's wishes as required by section 9 EA 1996 when deciding what school it is appropriate to name under section 39(5) of the CFA 2014. (In contrast, where the parent's preferred school is an independent school not approved by the Secretary of State under section 41 of the EA 1996, so that it cannot be the subject of a request within the terms of section 38(3), then section 39(4) does not apply and only section 9 of the EA 1996 needs to be considered.)

14. It is well established that the Tribunal is required both under section 39(4)(b)(ii) of the CFA 2014 and section 9 of the EA 1996 to weigh the educational advantages of the parents' preferred placement against the additional cost. When applying section 39(4) the additional costs to be considered are those to the particular local education authority concerned (i.e. the local authority's education function only). In the case of section 9, what is relevant is the additional costs to the public purse more generally, i.e. including the local authority's social services function and any other costs to any other public body. Following a period during which there were conflicting authorities on these points, the difference between section 39(4) and section 9 in this respect was determined by the Court of Appeal in *H v Warrington BC* [2014] EWCA Civ 398, [2014] ELR 212.

15. The nature of the balancing exercise to be carried out was first authoritatively explained by Sedley LJ in *Oxfordshire v GB* [2001] EWCA Civ 1358, [2002] ELR 8 at [16]-[18] as follows:-

> 16. In cases like the present, the parental preference for an independent school over an available state school, while perfectly reasonable, may have difficult cost implications for the LEA. In that event it is for the LEA, or on appeal the SENT, to decide whether those cost implications make the expenditure on the independent school unreasonable. This means striking a balance between (a) the educational advantages of the placement preferred by the parents and (b) the extra cost of it to the LEA as against what it will cost the LEA to place the child in the maintained school. In cases where the state system simply cannot provide for the child's needs, there will be no choice: the LEA must pay the cost. In cases where the choice is between two independent schools, it is accepted on all hands that the second criterion is simply the respective annual fees, whatever the comparative capital costs or other sources of income of the two establishments: for example, the one with lower fees may have private or charitable funding, but this will have no bearing on the quantum of public expenditure involved in a placement there. In cases where the choice is between two maintained schools, by Schedule 27, paragraph 3, the Act substitutes a test of suitability to the particular child, efficiency in education (for example because of possible disruption) and efficient use of resources. The latter will intelligibly include comparative on-costs, such as transport and personal support …
>
> 17. If so, there is no intelligible reason why a comparison of public expenditure as between an appropriate independent school and an appropriate maintained school should be at large. Mr Friel, indeed, defends the quantification of the cost of School

> MH, the independent school, as the bare annual fee, that is to say, the cost to the LEA's annual budget of placing M there. In our judgment exactly the same is true of the cost of placing M in the hearing-impaired unit of School L: the question is what additional burden it will place on the LEA's annual budget. That means, generally speaking, that the existing costs of providing School L and of staffing it and its hearing-impaired unit do not come into account.
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> 18. This is not to say that there may not be particular cases in which some other method of comparison needs to be used in order to meet s.9. But as a matter of purposive construction of the section, it seems to us that what Parliament has called for in the ordinary run of cases is a consideration of the burden which the respective placements will throw on the annual education budget when matched against their educational advantages and drawbacks for the child in question. Costs which either the private provider or the LEA would be incurring with or without the proposed placement are accordingly not in general relevant. ...

16. As Sedley LJ in the *Oxfordshire* case made clear, it is the marginal (additional) cost which is relevant when comparing placements. Further guidance on how to work out the additional cost in the context of maintained schools and the applicable funding regime was given by Judge Mitchell in *Hammersmith and Fulham LBC v L and F* [2015] UKUT 523 (AAC), [2015] ELR 528. In that case, having considered the funding regime in detail at [41]-[66], the Upper Tribunal reached the following conclusions about the costs to be taken into account when comparing the costs of independent schools with the cost of maintained schools for the purposes of section 9 of the EA 1996. In summary, the Upper Tribunal held:

    a. The age weighted pupil unit (AWPU) (i.e. the c £4,000 allocated per child at a maintained mainstream school, sometimes referred to as Element 1 funding) should be counted as part of the 'additional' costs of the placement. This is because the school's budget will be calculated by the local authority from time to time by reference to pupil numbers, regardless of the school's pupil admission number (PAN) or the notional size of the school: see ibid [8], [48]-[50] and [114]-[128];

    b. Pre-funded places at maintained special schools or "SEN-reserved places" at maintained mainstream schools are treated differently, however (£10k of funding at present, often referred to as Element 1 and 2 funding). A child taking up a pre-funded place will be using an

existing resource and will not represent an additional cost. However, if the pre-funded places have all been allocated so that placement of the child at the school will attract additional funding, then that will be an additional cost to take into account: see [8], [59]-[60] and [126];

c. Likewise, any "top-up funding" above paid by a local authority to a school as a result of the attendance of that particular child (often referred to as Element 3 funding) should be counted as an additional cost ([142]-[144]).

17. The Upper Tribunal in the *Hammersmith and Fulham* case noted the funding arrangements in relation to local authority's 'notional SEN budget', i.e. the first £6,000 that every maintained mainstream school is expected to fund of a child's special educational needs provision (Element 2 funding), but the Upper Tribunal did not decide whether or in what circumstances that notional budget should be counted as an additional cost or not: ibid, [51]-[56] and [142]-[146]. This point does not arise for decision in the present case either.

18. The present case involves a special academy school. There has been no equivalent consideration at Upper Tribunal level of the funding arrangements for academy schools or special academy schools, but I observe that although the arrangements for funding academy schools generally are different (with such schools funded centrally rather than by the local authority), the arrangements for high needs funding for academy special schools are similar to the arrangements for funding maintained special schools[1], with the same amount of Element 1 and 2 funding, and Element 3 top-up funding then being provided by the commissioning local authority. The parties in this case do not suggest that the fact that the local authority's preferred school is an academy makes any difference to the way the case should be approached.

19. The relative costs of the two placements over time must be considered, where relevant: *Southampton City Council v Tony Michael* [2002] EWHC 1516 at [16]-[20].

20. The First-tier Tribunal does not have jurisdiction to order the local authority to provide transport to a school, or to provide transport in any particular form, but

[1] https://www.gov.uk/government/publications/high-needs-funding-arrangements-2023-to-2024/high-needs-funding-2023-to-2024-operational-guide

it should take into account the cost of transport to the respective placements when considering the cost implications of the placements. Where parents offer to provide transport to a school, but the school would otherwise be the more expensive school, the parents' preferred school may be named in Section I on the condition that the parent pays transport, with the LA school also named as the school to be attended if the parent does not provide transport: *Dudley Metropolitan BC v Shurvinton* [2012] EWCA Civ 346, [2012] ELR 206.

The nature of the First-tier Tribunal's jurisdiction and the burden of proof

21. The First-tier Tribunal in appeals under section 51 of the CFA 2014 exercises an inquisitorial jurisdiction. In general terms, that means that the Tribunal bears a greater responsibility than it does in an adversarial jurisdiction for ensuring that it has the necessary evidence before it to enable it to determine the case properly, having regard to the overriding objective. Judge Jacobs explains the nature of the jurisdiction in *DH and GH v Staffordshire County Council* [2018] UKUT 49 (AAC). Having referred to the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI No 2699) (the First-tier Tribunal Rules), Judge Jacobs continued as follows:

> 22. The overriding objective does not necessarily provide a definitive answer to the issue of the extent of the tribunal's positive obligation to look into matters. What it does do is provide a framework for consideration of that issue. The tribunal may find it helpful to set out that framework in its reasons, but it should by now be embedded in the way judges and members think so that its application is instinctive. Just to give an example, assume that there is more evidence that could have been obtained or provided. The tribunal will consider: whether the cost and delay of adjourning are justified (rule 2(2)(a) and (e)); whether the evidence is necessary to allow full participation in the proceedings (rule 2(2)(c)); the existence and quality of any representation available to the parties; whether the tribunal should use its special expertise to help the party identify relevant evidence or to avoid the need for further evidence (rule 2(2)(d)); and whether one or other of the parties has provided all the evidence available to them (rule 2(4)). Having considered those and, no doubt, other matters, the tribunal has to exercise its judgment to decide on balance how to proceed.

23. The tribunal has case management powers, which are used in different ways in different jurisdictions. The special educational needs jurisdiction uses its powers to try to ensure that all the evidence is available for the tribunal in advance of the hearing. That in part reflects the nature and detail of the evidence and the need for the parties and the tribunal to have time to study it in advance. As part of that process, the tribunal may use a case management hearing to direct the parties on what needs to be provided and when. Mr Wolfe showed me a copy of the order made in this case on 16 May 2017.

24. It is not unusual for evidence to be produced late or further evidence to be provided at the start of the hearing. It is also possible that some of the evidence that was directed to be provided is not made available. Mr Wolfe told me that this is what happened in this case. The tribunal has power to adjourn for this evidence to be made available, but this does not mean that the proceedings are necessarily defective if the evidence is not made available as directed and the tribunal proceeds on what is available; that is the effect of rule 7(1). The tribunal has to decide what steps if any to take, given the way that the issues develop during the hearing and the need for the tribunal to decide on the circumstances obtaining at that time. It has power under rule 7(2)(a) to waive any requirement imposed by a direction.

25. I trust that the previous paragraphs are sufficient to show that there is no simple answer to what a tribunal has to do in any case. That will depend on the particular circumstances of the individual case.

26. There is nothing inconsistent in what I have said with the authorities cited to me by Mr Wolfe. In *W v Gloucestershire County Council* [2001] EWHC Admin 481, Scott Baker J commented on the lack of evidence before the tribunal:

> 15. … if there was inadequate information about the proposed school placement, the tribunal should have taken the necessary steps to obtain it, if necessary adjourning to do so. Tribunals, so it seems to me, cannot proceed on a purely adversarial basis, but have a duty to act inquisitorially when the occasion arises by making sure they have the necessary basic information on which to decide the issues before them, rather than rely entirely on the evidence adduced by the parties. The tribunal will usually have much greater relevant expertise than the parents who appear before them.

> Those remarks are carefully qualified – 'when the occasion arises' and 'necessary basic information' – and would now be caught by rule 12(2)(c) and (d).
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> 27. And in *R (JF) v London Borough of Croydon* [2006] EWHC 2368 (Admin), Sullivan J criticised the local authority's failure to provide evidence:
>
> > 11. I find the first defendant's attitude to this case very troubling indeed. It betrays a complete failure to understand the role of a Local Education Authority in hearings before the Tribunal. Although the proceedings are in part adversarial because the Authority will be responding to the parents' appeal, the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the Local Education Authority should be placing all of its cards on the table, including those which might assist the parents' case. It is not an adequate answer to a failure to disclose information to the Tribunal for a Local Education Authority to say that the parents could have unearthed the information for themselves if they had dug deep enough. That decision is consistent with the authorities on the proper non-contentious role of public decision-makers that dates back at least to Commissioners of Inland Revenue v Sneath [1932] 2 KB 362 at 382. It would now be caught by the rule 2(4) duties and be subject to the points I have made about the tribunal's exercise of its case management powers.

22. In the *W v Gloucestershire County Council* case cited by Judge Jacobs in the foregoing passage, the issue was a lack of evidence before the FTT about the effect of the child transitioning to a new school (see [25]). At [26], Scott Baker J held that:

> 26. In my judgment, they made an error of law in this regard, notwithstanding that the primary responsibility was on the appellant to ensure that the tribunal had the relevant information. The missing information was in my judgment so crucial that the tribunal should, if necessary, have adjourned in order to obtain it.

23. In *R (J) v SENDIST* [2005] EWHC 3315 (Admin), Lloyd Jones J (as he then was) accepted, at [32], that this inquisitorial duty applies to special educational needs and disability tribunals 'in general'.

24. Another feature of appeals under section 51 of the CFA 2014 (and regulation 43 of the Special Educational Needs and Disability Regulations 2014 made thereunder) is that there is, for the most part, no particular statutory 'test' that the Tribunal should apply before allowing the appeal. There is no requirement, for example, for the Tribunal to find that the local authority has made an 'unreasonable' decision. Rather, the legislation (specifically, here, section 39 of the CFA 2014 and section 9 of the EA 1996) is drafted so as to impose obligations on the local authority. On appeal, case law has established that the Tribunal's task is to 'stand in the shoes' of the local authority and apply the legislation as if it were the local authority, i.e. as a first instance decision-maker. This is what Sullivan J was alluding to in the passage from *R (JF) v London Borough of Croydon* cited by Judge Jacobs above when he said that the role of the local authority in such proceedings is to "assist the tribunal" by making all relevant information available. Judge S M Lane in *EC v North East Lincolnshire* [2015] UKUT 0648 (AAC) described the Tribunal's task so far as consideration of placement costs in the following terms (emphasis added):

> 22. The FtT's approach to the question of unreasonable expenditure under section 9 was also flawed. In deciding whether the expenditure of public money would be unreasonable, **the Local Authority – and the F-tT standing in its shoes – must carry out a balancing exercise**. In *Oxfordshire County Council v GB et ors. [2001] EWCA Civ 1358* Sedley LJ described it as follows [quote from paragraph 16 of *Oxfordshire* already set out above]…
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> 23. The fact that the school chosen by the parents is more expensive than the Local Authority's choice is not, in and of itself, determinative of whether the extra cost of sending the child there would amount to *unreasonable* public expenditure. The benefits provided by the more costly school (judged in light of the legislative framework in which SEN tribunals operate) must be looked at holistically and the full picture may justify the extra cost: Haining v Warrington Borough Council [2014] EWCA Civ 389 ; *O v London Borough of Lewisham [2007] EWHC 2130 (Admin)* , per Deputy HCJ Nicol (as he then was). This does not necessarily mean that the extra cost must outweigh, or even balance the added benefits equally. In *O v London Borough of Lewisham* at [44], for example, it was posited that even a

> difference in cost of approximately £3500 per year might not be seen as unreasonable expenditure when the whole picture was considered.
>
> 24. In my view, the F-tT over-compressed, and thereby oversimplified, **the nature of the balancing exercise it had to perform**.

25. *AJ v London Borough of Croydon* [2020] UKUT 246 (AAC), the First-tier Tribunal had named the secondary school proposed by the local authority in Section I. This was a maintained special school to which the local authority proposed to move the child at secondary transfer, whereas parents wished their child to continue at the independent mainstream school he had been attending for his primary education. The First-tier Tribunal considered that parents had produced insufficient evidence of the suitability of the child's current school and named the school proposed by the local authority. The Upper Tribunal (Judge West) found that the Tribunal had made a number of errors of law.

26. In particular, Judge West considered a submission about the burden of proof in relation to the approach a Tribunal had taken to an appeal where what was in issue between the parties was whether the parent's choice of school was 'unsuitable' so as to displace the local authority's duty to name the school in section 39(4)(a).

27. Judge West doubted whether there was a burden of proof in this inquisitorial jurisdiction, but accepted that if there was a burden, then it lay on the local authority to show that the parent's choice of school was 'unsuitable' rather than on the parent to show that their choice of school was 'suitable'. Given the way the decision is expressed (i.e. on the basis of a 'doubt' as to law on the burden of proof rather than a determination on that point), the *ratio* of Judge West's decision must be the other basis on which he decided that point of the appeal, which was that the Tribunal's decision was in error of law because it was inadequately evidenced (i.e., as I understand the decision, 'perverse'). Judge West also went on to hold that the Tribunal should have exercised its inquisitorial jurisdiction to obtain the evidence it needed for itself. The relevant paragraphs of the decision are as follows:-

> 123. I am bound to say that I doubt that there is a burden of proof in an inquisitorial jurisdiction such as this, in contrast to the position where the jurisdiction is

essentially adversarial, but I shall proceed on the basis that there is in principle such a burden of proof.

124. I do not accept Mr Glenister's submission that the Appellant's case involved an impermissible shifting of the burden of proof. On first principles, it fell to the Council to demonstrate that Wickham Court was no longer suitable as a placement for G. That was the school which he was already attending and would in any event attend for nearly two more terms after the amendment of his EHCP, but the local authority was now contending that it was no longer suitable. It was for the Council to make good its contention.

125. It seems to me, however, that the Tribunal did proceed on the basis that it was for G's mother to prove that Wickham Court was suitable, rather than for the Council to prove that it was not suitable. In that regard, insofar as there is a burden of proof in an inquisitorial jurisdiction such as this, I am satisfied that the Tribunal fell into error.

126. I therefore turn to the alternative hypothesis that the Tribunal was not considering the burden of proof was simply considering whether it was satisfied that whatever placement was named in Section I was suitable for G.

129. The duty cast on the local authority in a special educational needs case is as set out by Sullivan J in JF, namely that the role of an education authority as a public body at such a hearing is to assist the Tribunal by making all relevant information available. Its role is not to provide only so much information as will assist its own case. At the hearing, the local authority should be placing all its cards on the table, including those which might assist the parents' case.

130. Mr Glenister submitted that there was no duty cast on the local authority to obtain further evidence, let alone evidence to rebut its own evidence. Yet that is in fact precisely what JF requires the local authority to do in the appropriate case. Its duty is to assist the Tribunal by making all relevant information available, not only so much information as will assist its own case, but also that which might assist the parents' case by undermining its own evidence. That is not to require the authority to embark on an evidence gathering exercise willy-nilly and regardless of context, but one dependent on the facts of the individual case to provide all such information as is relevant to the decision under appeal.

131. Mr Glenister suggested that the scope of the Council's duty was perhaps equivalent to the "duty of candour" which was demonstrated by the cases in which the duty had been cited.

132. It is of course correct that in JF the Council had misrepresented that its preferred school was accredited by the National Autistic Society and was "not a school for children with emotional and behavioural difficulties" when it was registered under that category with the Department for Education and that in *LS v Oxfordshire CC* the local authority had failed to disclose imminent conversion of its preferred school to an academy. Mr Glenister is therefore correct that both cases concerned a failure to disclose a particular fact or to correct a misrepresentation.

133. However, there is nothing in the terms in which Sullivan J laid down the duty in JF to suggest that the duty is limited in the manner contended for by Mr Glenister. On the contrary, the scope of the duty is not qualified in that way, as the subsequent decision of Upper Tribunal Judge Wikeley in *LS* makes clear…

135. I do not therefore accept Mr Glenister's proposition that there was no authority suggesting that the principle extended to a duty to obtain further evidence, let alone evidence which rebutted the local authority's own evidence. …

137. For these reasons I conclude that the Tribunal did fall into error in proceeding as if (insofar as there is a burden of proof in an inquisitorial jurisdiction such as this) the burden lay on the Appellant to show that Wickham Court was suitable given that her son had attended Wickham Court for several years and without its suitability having been previously questioned by the Council. In the alternative, that it was simply deciding whether it was satisfied that whatever placement was named in Section I was suitable for G, I find that the Tribunal could not have been so satisfied in the light of the psychologist's report as it stood and that it should have obtained positive evidence on the point from Claire Morgado and provided it to the Tribunal, but that it did not do.

…

151. The overarching question which the Tribunal had to consider in this context was whether there was sufficient evidence on which it could properly decide the appeal. If it does, I accept that "the question of whether it should have performed an inquisitorial function in seeking further evidence does not arise," as Lloyd-Jones J said in J v. SENDIST at [33]. Where, however, there is inadequate information

> to reach a decision, then the Tribunal cannot proceed on a purely adversarial basis, but has "a duty to act inquisitorially when the occasion arises by making sure they have the necessary basic information on which to decide the appeal before them, rather than rely entirely on evidence adduced by the parties" as Scott Baker J held in W v Gloucestershire at [15], a duty which Lloyd-Jones said in J at [32] was a duty cast on special educational needs and disabilities tribunals in general. …
>
> 153. In the light of the conclusion which I have reached in relation to the third ground of appeal, I am therefore satisfied that the Tribunal did not have adequate information on which to decide the case and that, acting inquisitorially, it should have adjourned in order to obtain it.

28. Finally, Mr Harrison submits that where an issue as to fairness arises, it is for me as the Upper Tribunal to judge what fairness required in all the circumstances. This is not an issue on which a margin of appreciation is to be accorded to the First-tier Tribunal. With the caveat that there is often a fine line between what is a matter of case management (in respect of which the First-tier Tribunal enjoys a wide margin of discretion) and what is a matter of fairness, I accept that submission. As Sedley J (as he then was) explained in *R v Cheshire Council, ex parte C* [1998] ELR 66, at 73-74:

> The power to adjourn is a fundamental aspect of the obligation resting on all decision-making bodies to hear both sides, for this necessarily means giving each party a fair opportunity to put its case and to contest what others are saying. Accordingly a power to adjourn where the interests of fairness require it will ordinarily be implied by the courts wherever it is not expressly or necessarily excluded. In many cases, the present included, rules having the force of law make express provision at large for the tribunal to adjourn a hearing. As an aspect of procedural fairness the exercise of this power is classically a free-standing public law obligation and justiciable as such. It is not a simple discretion challengeable only upon what have become known as Wednesbury grounds…
>
> It follows that in the ordinary case, where the power of adjournment is at large, there is no true margin of appreciation for the tribunal: the court itself will decide on the relevant material whether fairness required an adjournment.

The Upper Tribunal's approach to appeals

29. The Upper Tribunal may only allow an appeal under s 12 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) if it finds that the decision of the First-tier Tribunal involved an error of law.

30. Errors of law include misunderstanding or misapplying the law, taking into account irrelevant factors or failing to take into account relevant factors or failing to give adequate reasons for a decision. An error of fact is not an error of law unless the First-tier Tribunal's conclusion on the facts is perverse. That is a high threshold: it means that the conclusion must be irrational or wholly unsupported by the evidence. An appeal to the Upper Tribunal is not an opportunity to re-argue the case on its factual merits. These principles are set out in many cases, but see in particular *R (Iran) v SSHD* [2005] EWCA Civ 982 at [9]-[11].

31. In scrutinising the judgment of a First-tier Tribunal, the Upper Tribunal is required to read the judgment fairly and as a whole, remembering that the First-tier Tribunal is not required to express every step of its reasoning or to refer to all the evidence, but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made: cf *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672 at [57] (a case dealing with the employment context, but equally applicable here). That case also makes the point (at [58]) that where the First-tier Tribunal has correctly stated the law, the Upper Tribunal should be slow to conclude that it has misapplied it.

The evidence in this case

32. In this case, the school that the parent wanted named in Section I of T's EHCP was The Garden School, a community special school in the London Borough of Hackney. The school proposed by the local authority was The Bridge School, an academy special school situated within the London Borough of Islington.

33. In a (standard-form) direction made by the First-tier Tribunal at the start of the appeal, the local authority had been directed to provide (FTT bundle, p 10):

> Details of the comparative costs of the educational placements proposed and supporting evidence from the educational placement of those costs. This must include any relevant transport costs.

34. The local authority sought to comply with that order. In the local authority's original response to the appeal, it gave the costs of C attending the Garden School as "approximately £65,432.92. The cost of transport is approximately £28,500. The total cost is: £93,932.92". The response gave the cost of C attending the Bridge School as "approximately £18,906.56", with the cost of transport being "approximately £5,500" and the total cost therefore £24,406.56. The response was accompanied by (electronically) signed documents, dated 11 September 2023, produced by the local authority (pp 198-199) giving the costs of transport to the two schools. There was also at p 318 evidence in the form of a letter from the school itself that The Garden School was oversubscribed and that placement cost for the 23/24 academic year would be £58,204.52.

35. The First-tier Tribunal's decision records that it also admitted by way of late evidence a local authority's position statement with costs table dated 21 February 2024 and updated position statement with costs table dated 1 March 2024. Each position statement set out a large differential in cost between the two placements. The February statement contained a table of costs as follows:

	The Bridge School	The Garden School
Element 1 – base funding	~~£4000~~	~~£4000~~
Element 2 – SEN support	~~£6000~~	~~£6000~~
Element 3 – top up funding	£18 906.56	£67 393.144
Transport Costs	£7000	£30 210 or £20 1406
TOTAL	£25 906.56	£97,603.14 or £87,533.14

36. The March statement contained a table of costs as follows:-

	The Bridge School	The Garden School
Element 1 – base funding	~~£4000~~	~~£4000~~
Element 2 – SEN support	~~£6000~~	~~£6000~~
Element 3 – top up funding	£18 906.56	£70000
Transport Costs	£7000	£30 210 or £20 140
TOTAL	£25 906.56	£100 210 or £90 140

37. By way of supporting documentation, the local authority provided, and the Tribunal admitted:

    a. An email from its Contracts and Payment Officer dated 19 February 2024 stating that the cost of a place at the Bridge School for the coming academic year was:

> Element 2 funding - £10,000 p/a
> Element 3 funding - £18,906.56 p/a
>
> If you require the specific costs for this named pupil, then you will need to refer to the consultation response to see if any additional funding has been requested *[The consultation response at p 127 of the bundle did not include any request for additional funding.]*

    b. An email from its Travel Assistance Commissioning Officer dated 20 February 2024 setting out updated transport costs to the two placements. This explained that if attending The Bridge School, C would be able to join the existing school bus. Ordinarily, this would mean no additional cost to the local authority as the bus was running already, but the Travel Assistance Commissioning Officer stated that the cost would be £7,000 per year. The email explained that C could

not join existing transport to The Garden School. Transport was accordingly costed on the basis of him being provided with transport solely for him, either with a personal assistant (the £30,210 figure) or without (the £20,140 figure).

c. An email from an Operations Manager in the SEND Service for the London Borough of Hackney stating that the Garden School was already 12 pupils over its published admission number and that the cost of a placement "would be in the region [of] £70k per annum (pending a formal assessment on needs)" and that Hackney would not be providing a witness for the hearing.

38. At the hearing, the local authority was represented by Mr Harrison as it was before me. The Headteacher of The Bridge School (Ms Rabinairian) attended as a witness. The Garden School was opposing being named in Section I on grounds that it would be incompatible with the provision of efficient education for other children and had not provided a witness for the hearing. The First-tier Tribunal's decision records that efforts were made by counsel to secure the attendance of someone from The Garden School 'on the day' without success.

39. The First-tier Tribunal refers in its decision to Mr Harrison having given it certain further information 'on instructions' during the course of the hearing. In the grounds of appeal to this Tribunal Mr Harrison explains that he had actually given the First-tier Tribunal more detailed information than it records in its decision. The parent does not dispute that he did and so I record for completeness the further information that Mr Harrison provided to the Tribunal as set out in the local authority's grounds of appeal:

> 17.(a) Despite chasing the Garden School again, a representative from the senior leadership team was unable to attend the hearing. The Acting head teacher explained that this was because of staff shortages.
>
> (b) The Garden School's banding starts at £52,000 and goes up to £70,000. The determination of where a given pupil falls within those two bands is based on their assessment of the child's EHC Plan. That is the school's assessment process (not the Local Authority's) and the Local Authority relies on information provided by the school (and the London Borough of Hackney: the area in which the Garden School is situated) in this regard. Their assessment of C's EHC Plan placed him at the top end of this banding.

> (c) The Garden School is currently above PAN, so the Element 1 and 2 costs (of £10,000), contrary to the position statements filed on behalf of the Local Authority, should also have been taken into account as an additional cost to the Local Authority.
>
> (d) Transport costs (in the form of a taxi) would range between £20,140 and £30,210 (depending on whether or not a PA is required) as set out in the email exchange between Ms Hall and Ms Eibisch on 19 and 20 February 2024 (as appended to the Local Authority's position statement dated 21 February 2024). This is because C could not be added to an existing transport route. …
>
> 19.(a) The Bridge School was not above PAN, so the Element 1 and 2 costs (of £10,000) should remain discounted.
>
> (b) The Bridge School had made no request for additional provision that would have taken the costs above that which were provided by Elicia Oswald in her email dated 19 February 2024 (as appended to the Local Authority's position statement dated 21 February 2024).1 The Element 3 cost of £18,906.56 (which had been reproduced in both of the Local Authority's position statements filed in advance) therefore remained accurate. If an additional PA was requested to assist C to settle in, the cost would be c. £7,600 based on 7.5 hours per week (i.e. unstructured times) across the school year.
>
> (c) Transport costs were £7,000 since existing transport (in the form of a mini-bus) was available which already had an appropriate adult on board. Whether or not a taxi was required instead would need to be the subject of a further application to the Local Authority, which would apply its travel funding guidelines. No such application had been made at that point. If such an application was successful, the travel costs would be comparable with The Bridge School, so between £20,140 and £30,210.

The parties' positions before the First-tier Tribunal

40. In view of The Garden School's position as set out in the letter and other documents received from it, and it being already oversubscribed for September 2024 by 12 places, the local authority had intended to defend the

appeal on the basis that naming The Garden School would be incompatible with the efficient education of other children as well as on costs grounds. In the event, as The Garden School had not provided a witness, the local authority opted to defend the appeal solely on costs grounds and did not ask for an adjournment to obtain a witness from The Garden School.

41. The parent's position was (and remains) that The Bridge School is not suitable for C and/or that additional costs not yet counted by the local authority would need to be expended in order to make it suitable for C, such as on the provision of individual support. She remains concerned about how C will be safeguarded from his father if being transported to The Bridge School. She was (and remains) willing to provide transport to The Garden School but not The Bridge School.

The First-tier Tribunal's decision

42. The First-tier Tribunal's decision in this case is headed "Consent Order". This is clearly an error as the decision is a final decision that did not go by consent.

43. Although the local authority was not disputing the suitability of The Garden School, the Tribunal at [16]-[19] explained that it had considered the evidence regarding The Garden School and was satisfied that it was a suitable school.

44. Although the only school witness that the Tribunal had at the hearing was Ms Rabinairan from The Bridge School, and although the Tribunal heard evidence and submissions from the parties about the suitability of The Bridge School, the Tribunal made no determination as to the suitability of The Bridge School, deciding the whole appeal on the basis of the costs issue, which it dealt with as follows.

45. The Tribunal directed itself as follows as to the burden of proof:

> 20. The LA has the burden of proving that the placement of parental preference constitutes an inefficient use of resources within the meaning of s39(4) CFA 2014. In order to do this, it is required to produce evidence as to the costs of C's attendance at the two placements in order that the Tribunal may make findings on the costs of each, determine how much extra it would cost to place C at the Garden School (the marginal cost), and then decide whether such would constitute inefficient use of resources.

46. The Tribunal then reviewed the evidence I have identified above, noting as it went along that it considered it had received no or inadequate explanations for the figures given, as well as that the figures provided by the local authority had changed during the course of the appeal. At [27] it found as follows in relation to The Garden School:

> 27. Mr Harrison confirmed in submissions that the £70,000 figure was based on a banding system and that this figure was from the higher end of that banding. He further submitted that his instructions were that the higher end of banding was applied based on C's existing EHCP paperwork. This did not include in-person assessment or C having visited the school. This, together with the caveat provided in the email from Mr Collins that it is not based on an assessment of C's needs, is not sufficient evidence to prove the true cost of placing him at the Garden School.

47. At [29] the Tribunal noted as follows in relation to the Element 3 costs for The Bridge School:

> The LA's Position Statements of 21 February 2024 and 1 March both give the Element 3 cost of the Bridge School as being £18,906.56. The source email referred to in the footnote says "if you require the specific costs for this named pupil, then you will need to refer to the consultation response to see if any additional funding has been requested". Mr Harrison was asked about that by the panel and took instructions over lunch. He said in submissions that his instructions were, in terms, that the Element 3 figure was correct and had any further costs been required then this would have been set out. We have to be careful to give appropriate weight to that as a submission rather than as evidence.

48. In relation to transport costs, the Tribunal noted that the parent would be willing to transport to The Garden School "if necessary", but she was not willing to transport to The Bridge School and she also feared C being 'spotted and followed' on the bus by his father (who the parent regards as her abuser) ([30]). The Tribunal also noted a lack of clarity over the calculation of the £7,000 cost for transport to the Bridge School. It noted at [32] that the local authority's counsel had submitted that a taxi with/without PA could be arranged for approximately equal cost to both schools.

49. At [33]-[37] the Tribunal concluded as follows:

> 33. The LA's given costs for both schools are estimates only, and not based on assessments for C and/or his particular needs. The Garden School's most recent Element 3 costs are an estimate taken from the higher end of a 'banding' system, but no evidence is before the Tribunal on the details of that system or why C should be at the higher end of it. No-one from the LA or the Garden School attended the hearing to provide evidence that would explain the position in the required detail.
>
> 34. On the LA's own evidence (for example the statement of Ms Finan and the email of Mr Collins), the estimated cost of the Garden School for this academic year varies by nearly £12,000. The Bridge School estimated cost could logically be higher once it has carried out an assessment of C and his particular needs. There is no satisfactory explanation in evidence as to why the two schools which are so similar and almost equidistant could potentially have costs which are so different.
>
> 35. We find that the limited evidence provided to the Tribunal on placement costings is unreliable. We are unable to calculate the marginal cost in those circumstances. In the circumstances where the actual cost of placing C at the Garden School is so uncertain, we find that the LA has not proven that placing C at the Garden School would constitute inefficient use of resources.
>
> 36. Based on Mr Harrison's submission that the LA would be able to arrange a taxi for C which would be approximately the same cost for either school, which would be expected in circumstances where they are almost equidistant, we find that there is no additional cost to the LA in terms of transport. There would also logically be no additional cost to the LA if [the Parent] were to take C to the Garden School herself. We accept her evidence that taking C to the Bridge School by minibus would be a risk to his safety given the possibility that he would be spotted and followed by his father.
>
> 37. The LA has made several attempts at providing costing information over the life of the case but has not adequately detailed or explained the

> costings provided. Having regard to the Overriding Objective, we consider that it would not be fair or just to adjourn the case for a further attempt to be made at obtaining evidence to explain the placement costs, when this appeal has already been live since June 2023 and where the LA has already had ample time to gather the appropriate evidence, necessary assessments and to arrange witness attendance at the hearing.

The grounds of appeal

50. The local authority raised three grounds of appeal which Mr Harrison labelled as follows:-

> A. The FTT's finding that it was effectively unable to determine the cost of naming the Bridge School in Section I was irrational;
> B. The FTT made an error of law and/or adopted an unfair procedure by failing to: (i) give effect to its inquisitorial jurisdiction; and/or (ii) allow the Local Authority to make representations before effectively striking out its case and disposing of the appeal;
> C. The FTT made an error of law by: (i) finding that the costings for the Garden School needed to be based on an in-person assessment of C's needs (rather than a paper-based assessment) and/or (ii) gave insufficient reasons as to why a paper-based assessment of C was insufficient in this case.

51. It is convenient to take those grounds out of order, with Ground B first as Ground B deals with the nature of the Tribunal's jurisdiction when dealing with the "efficient use of resources" test in section 39(4)(b)(ii) and the errors of legal principle that the local authority argues the Tribunal committed.

My analysis

Ground B: The FTT made an error of law and/or adopted an unfair procedure by failing to: (i) give effect to its inquisitorial jurisdiction; and/or (ii) allow the Local Authority to make representations before effectively striking out its case and disposing of the appeal

The parties' submissions

52. The local authority submits, with reference to the legal authorities and principles I have set out above, that the Tribunal in this case failed properly to exercise its inquisitorial jurisdiction and/or to act fairly when it proceeded to determine the appeal on the basis of its view that the local authority had provided insufficient evidence as to the costs of either placement. The local authority submits that the Tribunal should in those circumstances have exercised its inquisitorial jurisdiction to ensure that it obtained the evidence it considered it needed as to the costs of each placement, whether by asking Ms Rabinairan at the hearing for further details about the costs of The Bridge School, issuing a witness order for the attendance of a representative from The Garden School or the London Borough of Hackney in order to obtain details about the costs of The Garden School or by adjourning the hearing and making directions for the parties or The Garden School or the London Borough of Hackney as third parties to provide the information it considered it was missing. At the very least, submits Mr Harrison, the Tribunal should have raised its concerns with him at the hearing so that the local authority had had an opportunity to make representations before taking what he submits was in substance the draconian step of 'striking out' the local authority's case under section 39(4)(b)(ii). He points out that under rules 8(4) and (5) the Tribunal could not actually have exercised strike-out powers in this case without affording the local authority that opportunity and that the Tribunal's approach to the case effectively struck out the local authority's case in breach of those rules.

53. The parent in response resists the appeal and submits that the Tribunal was right to find that the local authority had had sufficient opportunity to provide the costs information required. She further submits that the local authority had indicated at the beginning of the hearing that it did not seek an adjournment of the case. Mr Harrison in response to this latter point explained (and the parent did not dispute) that the discussion at the start of the hearing had been about the absence of any witness from The Garden School and the implications of

that for the local authority's case that placing C at The Garden School would be incompatible with the efficient education of others. There was no dispute that the Tribunal did not at the hearing explain that it was unable to make findings as to the cost of either placement and canvas with the parties what should be done about that.

My analysis

54. As I identify further in this judgment, there were a number of errors in the Tribunal's approach, but these principally stem, it seems to me, from what the Tribunal said at [20] about the local authority bearing the burden of proving that the placement of parental preference would constitute an inefficient use of resources, and from the Tribunal proceeding to decide the case in accordance with that self-direction as if these were purely adversarial proceedings. This self-direction led the Tribunal to approach the case on the basis that if it decided that it was not satisfied about the 'reliability' of the local authority's evidence on costs, the local authority's 'defence' to the appeal must fail. This was an erroneous approach.

55. The parties before the Tribunal have their cases that they advance to the Tribunal on those issues, but proceedings under section 51 of the CFA 2014 are not to be treated as if they were civil contract or negligence claims in the ordinary courts. This Tribunal recognised that when it considered the question of the suitability of The Garden School for the purposes of section 39(4)(a). Despite the fact that the local authority was not contending that The Garden School was unsuitable, the Tribunal recognised that its task was to decide that issue for itself and it did so, giving reasons why it was satisfied that The Garden School was not unsuitable.

56. When it came to section 39(4)(b)(ii), however, the Tribunal reverted to treating the proceedings as if they were ordinary adversarial civil proceedings, imposing a formal burden of proof on the local authority rather than assuming responsibility for the decision itself. That was incorrect.

57. Judge West in *AJ* doubted whether a burden of proof existed in this inquisitorial jurisdiction and in my judgment his doubts were well-founded because applying a burden of proof on either party is inconsistent with the legal authorities as to the nature of the Tribunal's role on an appeal under section 51. As the authorities above indicate, the Tribunal's role on appeal is to 'stand in the shoes' of the local authority in applying the legislation. In other words,

the 'burden' (such as it is) is on the Tribunal to apply the legislation to the case before it and it must ensure that it has the necessary evidence in order to enable it to do that. Of course, the 'burden' on the Tribunal is not boundless as Judge Jacobs explained in *DH and GH v Staffordshire*. The Tribunal must apply the overriding objective and may sometimes have to fulfil its task as best it can with limited evidence, but the task of applying the legislation properly to the evidence before it remains that of the Tribunal.

58. The parties have responsibilities too. They must comply with the Tribunal's directions as to evidence and, if they have particular cases that they wish to advance, they must put forward the evidence required to advance those cases. Even in this jurisdiction, it is not for the Tribunal actively to seek out evidence or arguments that do not obviously or necessarily need to be produced or resolved in order for the case to be properly determined. The local authority, as a public body also bears an especial responsibility to assist the Tribunal as Sullivan J explained in *R (JF) v London Borough of Croydon* by providing the Tribunal with the evidence that it needs fairly and properly to determine the case (whether or not that evidence advances or undermines any 'case' that the local authority itself is advancing in those proceedings).

59. That said, there is an evidential 'burden' built into section 39(4) itself. Section 39(4) creates a statutory presumption that parental preference as to placement will prevail, which is only displaced if, on the balance of probabilities, the Tribunal considers that the school or other institution will be unsuitable for the child, or that naming it would be incompatible with the efficient education of others or the efficient use of resources.

60. It may also be appropriate in some cases for a Tribunal to refer to there having been a 'burden' on one party or another in terms of the production of certain evidence. The maxim 'he who asserts must prove' has a role to play in this jurisdiction as in others, but it is a rule of evidence and fairness that may or may not run with the grain of the legislation depending on the facts of the particular case. Thus, Judge West in *AJ* at [32] observed that in that case where it was the local authority who was seeking to name an alternative placement for the child, while the parents wished him to continue his secondary education at the same school he had attended for his primary education, it was the local authority seeking to set aside the status quo and that was one reason why Judge West held that, if there was a burden of proof, the Tribunal in that case erred in placing it on the parents to show that their choice of school was

suitable. In contrast, if the situation in that case had been reversed and parents were seeking to argue that a school at which a child had been placed for some time was now unsuitable so that it could not be relied on by the local authority as a cheaper placement so as to defeat parental preference on resources grounds, then it might be fair and reasonable for the Tribunal to approach the case as if there was an evidential burden on the parents to show that the placement had become unsuitable. It may also be relevant to consider which party has the most ready access to the evidence in question; adverse inferences may be drawn where a party unreasonably fails to produce evidence they could be expected to obtain; on the other hand, it may be unfair to place an evidential burden on a party to obtain evidence that it is not in their power to obtain.

61. That latter point is of particular relevance in this case because The Garden School preferred by the parent is not in this local authority's area but in the London Borough of Hackney. This local authority had no power to compel or direct Hackney or The Garden School to produce evidence on costs (or anything else); it had no responsibility for determining those costs, nor could it reasonably be expected to be in a position to explain them. It is relatively frequently the case in this jurisdiction that one of the schools in issue in an appeal is a school for which the local authority that is responding to the appeal has no responsibility. That this is so merely underscores the legal position as I have outlined it above, i.e. that the primary responsibility lies on the Tribunal to ensure that it has the necessary evidence to determine the case in accordance with the legislation. Unlike the local authority, the Tribunal has power under rule 5(3)(d) of *The Tribunal Procedure (First-Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008* (SI 2008/2699) to order not only the parties but also third parties to produce documents and information and power under rule 16 to summons witnesses and order any person to produce documents or answer any questions relating to an issue in the proceedings.

62. I am therefore satisfied that in this case the First-tier Tribunal erred in law. It erred in law in:

    a. directing itself that the burden of proof was on the local authority to demonstrate that naming the parent's preferred school would be incompatible with the efficient use of resources, rather than

recognising that it was its responsibility as Tribunal to stand in the shoes of the local authority in applying section 39(4);

b. failing to exercise (or at least to consider exercising) its case management powers to obtain the necessary evidence on costs of both placements at the point that it decided that the evidence it had been supplied with was "unreliable".

63. So far as the exercise of its case management powers is concerned, the Tribunal should, if it was dissatisfied with the local authority's evidence in relation to The Bridge School have asked more questions of the local authority at the hearing. As it is (for reasons I come to below), it was in my judgment irrational for the Tribunal in this case to have had concerns about the costs of placement at The Bridge School, but if it did then fairness required it to put its concerns to the local authority at the hearing (or, if it thought of the concerns only in the course of deliberation, to give the local authority a further opportunity in writing or at an adjourned hearing to address those concerns). Similarly, if the Tribunal had (rational) concerns about the evidence as to costs for The Garden School then it needed to make orders to Hackney or The Garden School requiring them as third parties to the proceedings to provide the evidence that it required, either in documentary form or by witness attendance at a subsequent hearing.

64. In this particular case, the Tribunal does indicate at [34] that it has considered whether or not to adjourn but has decided against doing so, but the reasons it gives are in my judgment infected by its erroneous view as to its role and the burden of proof. If this Tribunal had properly considered the exercise of its case management powers in accordance with the overriding objective, I cannot see how it could have decided otherwise than to delay resolution of the proceedings in order to obtain the necessary evidence. The hearing took place in March 2024 and concerned C's placement for September 2024. There had been no previous adjournments. Although the Tribunal is right that the local authority had had ample time to obtain the necessary evidence, the evidence that the local authority had obtained about The Bridge School was all it needed to obtain and the evidence it had obtained about The Garden School was all that it had been provided with by Hackney or The Garden School. Whereas the Tribunal as noted has powers that enable it to compel Hackney or The Garden School to provide additional evidence or a witness, the local authority did not. There was in any event plenty of time for further evidence to be

obtained with no significant detriment to either party likely to be caused by an adjournment or delay.

65. On the other hand, had the Tribunal properly considered the exercise of its discretion, it would have had to take into account the very significant prejudice to the local authority of not adjourning given that it would result in the school of parental preference being named in Section I with the attendant significant additional cost to the local authority that would entail if the evidence already before the Tribunal on cost proved to be correct once the Tribunal had obtained the further evidence it considered it needed. Of course, it would also be relevant for the Tribunal to consider that adjourning or delaying would mean that the parent may lose the opportunity of getting her preferred school named in Section I as a result of what the Tribunal perceived to be the shortcomings in the local authority's evidence. But if the true position is that when section 39(4) is properly applied in this case the parent is not entitled to her preferred school then all she will have lost is a 'windfall' victory. That is not a prejudice that can reasonably be given much weight in the context of section 39(4)(b)(ii) which is concerned with ensuring that scarce public resources are not spent on an individual child's education when a cheaper suitable alternative is available.

66. At this point, it is appropriate to make some observations about the nature of the evidence on costs that was already before the Tribunal in this case. The Tribunal had evidence before it in the form of emails and letters from Hackney and The Garden School that on their face constituted evidence that the cost of placement at The Garden School would be at least circa £67,000 to the public purse, i.e. the circa £57,000 quoted by The Garden School in its first letter, plus the £10,000 Element 1 and 2 placement cost. In line with the guidance of Judge Mitchell in the *Hammersmith and Fulham* case, as the evidence indicates that The Garden School is oversubscribed, the Tribunal was bound to take into account that £10,000, even though the local authority got that point wrong in its own submissions. (It is right to note that the parent disputes this evidence of oversubscription, and this is a matter that will need to be determined when the case is remitted, but on the face of the evidence before the Tribunal there was no reason for Hackney's email on this point to be doubted.) Of course, if the more recent information from Hackney was accurate, the cost would be approximately £80,000.

67. In comparison, The Bridge School was not oversubscribed and accordingly the only additional cost that would flow from the public purse to pay for C's placement there would be the Element 3 top-up cost of £18,906.56. It did not matter whether these figures were approximate or not, since there is no requirement for the local authority to prove or the Tribunal to determine what the *"true cost"* of either placement would be (contrary to the approach this Tribunal took). All that is required is that the Tribunal consider whether placement would be incompatible with the efficient use of resources. The cost differential that matters therefore is the differential that the Tribunal is satisfied will exist on the balance of probabilities. If there are a range of possible costs, the Tribunal needs to decide what the costs or range of costs will be on the balance of probabilities and then weigh any difference against the advantages of the more expensive placement. In this case, the evidence before the Tribunal was that the cost differential between the two placements would be between £48,000 and £62,000 per year in terms of the placement costs. Further, the *Southampton* case requires cost over time to be considered. As both schools in issue have secondary provision so that C (who is going into Year 3 in September) may potentially remain in place for a decade that is potentially a difference in public expenditure on his education of between £480,000 and £620,000 over his time at school.

68. As to transport costs, the Tribunal might reasonably have worked on the basis that, as a result of the parent's offer to provide transport to The Garden School so that, in line with the *Dudley v Shurvinton* case, transport costs to The Garden School could be ignored and only the cost of transport to The Bridge School counted. However, I observe that the Tribunal's approach to the cost of transport to The Bridge School was also erroneous in this case as it is not for the Tribunal to determine what transport the local authority should provide. The First-tier Tribunal has no jurisdiction over the local authority's transport functions. When the Tribunal comes to decide transport costs when the case is remitted, the Tribunal will need to consider what on the balance of probabilities the cost to the local authority of transporting C to The Bridge School will be assuming it complies with its legal obligations in relation to the provision of transport. If in fact the local authority will place C on an existing school bus so that his attendance at The Bridge School will not increase the local authority's existing costs of transporting children to the school, there will be no cost for the Tribunal to take into account.

69. In the circumstances, even if the Tribunal had concerns about the detail or reliability of the local authority's cost evidence in this case, it still needed when considering whether or not to adjourn or delay resolution of the case to obtain the evidence it considered was missing to take into account that the potential prejudice to the local authority of not adjourning or delaying would be that it might have to incur an additional £48k-£62k per annum on C's education for the next decade. That is a significant sum of public money.

70. In short, in the circumstances of this particular case, it was in my judgment perverse for the Tribunal, given that it was not satisfied with the costs evidence it had, to refuse to adjourn or delay to ensure that the case could be properly determined. The balance of prejudice in this case fell so firmly in the local authority's favour that there was no other reasonable conclusion open to the Tribunal. Further, in reaching its decision not to adjourn or delay the Tribunal acted procedurally unfairly by not giving the parties an opportunity to make submissions on the question. The Tribunal also left out of account a number of relevant factors that I have identified above, including: the lack of any real prejudice to the parent or C of delaying resolution of the appeal by a few weeks; the fact that only the Tribunal and not the local authority had the power to compel Hackney/The Garden School to provide the further information required; and the very significant prejudice to the local authority (and the public purse) of proceeding to determine the appeal as if there no difference in cost between the two placements when the evidence indicated it was (probably) between £48k and £62k per annum.

Ground A: The FTT's finding that it was effectively unable to determine the cost of naming the Bridge School in Section I was irrational

71. I can deal with this ground of appeal much more briefly. The local authority argues that the Tribunal perversely regarded the evidence as to cost of placement at The Bridge School to be an "estimate" and perversely speculated that the cost could be higher once the school had carried out an assessment of C and his particular needs.

72. The parent did not specifically address this aspect of the appeal in her submissions, but I have directed myself that if she had been represented her advocate would likely have submitted in response to this that the Tribunal is an expert Tribunal and is entitled to bring to bear on the case its specialist knowledge and if it considers that a school might be likely once a child has

arrived at the school and been assessed to ask for more money for that child, it is entitled to take that view.

73. However, such a submission would not have availed the parent in this case. I agree with the local authority that the Tribunal's approach to The Bridge School costs was perverse for the following reasons.

74. First, the local authority is right that although the £18,906.56 cost of The Bridge School was described in the local authority's first response to the appeal as an approximate cost, in the two more recent position statements it was not so described and the local authority had confirmed at the hearing that this was the Element 3 cost. The Tribunal could not therefore rationally have concluded that this figure was an "estimate" based on its position at the hearing.

75. Secondly, the Tribunal's view that the email attached to the position statement raised some question mark over whether additional funding was required was also perverse. It stated: "If you require the specific costs for this named pupil, then you will need to refer to the consultation response to see if any additional funding has been requested", but (as noted above) The Bridge School's consultation response was in the First-tier Tribunal bundle at p 127 and it did not include any request for additional funding. The Tribunal overlooked this.

76. Mr Harrison accepts that at the hearing that Ms Rabinairan did suggest that the school might request additional funding for additional 1:1 support of 7.5 hours per week while C settled in, and that he informed the Tribunal this would have cost £7,600 for the first year. If that evidence had been accepted by the Tribunal (it does not mention it in the decision), that would have increased the costs slightly for the first year. Otherwise, there was no rational basis on which the Tribunal could have rejected the figures given by the local authority.

77. Thirdly, the Tribunal's suggestion that once the school had assessed C the costs might be higher was pure speculation on its part. There was no evidence on which that finding could be based. Even if the Tribunal considered that on the balance of probabilities the costs of The Bridge School would turn out to be higher than the local authority currently thought, it would need to have explained the basis for that conclusion and identified the level of cost that it considered would be incurred on the balance of probabilities so as to be able to carry out its duty of applying section 39(4) of the Act to the facts of this case. Its failure to do so is a further symptom of its incorrect approach to its

jurisdiction dealt with under Ground B above. It has also resulted in a perverse conclusion on the facts about the costs of The Bridge School.

Ground C: The FTT made an error of law by: (i) finding that the costings for the Garden School needed to be based on an in-person assessment of C's needs (rather than a paper-based assessment) and/or (ii) gave insufficient reasons as to why a paper-based assessment of C was insufficient in this case.

78. This ground can also be dealt with shortly. The local authority submits that it was perverse for the Tribunal to conclude that the costs given for The Garden School were unreliable because they were based on a paper assessment rather than an in-person assessment. Mr Harrison submits it was a matter for the school to determine how it would assess costs. The parent again made no specific submission, but the same point about the Tribunal's expertise could likely have been made on her behalf as before.

79. Again, I consider that this ground of appeal is made out, albeit for slightly different reasons to those put forward by the local authority. The same points as I have made above in relation to Ground B apply again here. I accept that the Tribunal could legitimately apply its expertise and knowledge of this field to suggest that costs might be different once C has actually been assessed in person by a school or has started to attend it. Schools might always ask for more (or, more rarely, less) money once a child has actually started at the school. However, the task for the Tribunal is to decide, on the balance of probabilities on the basis of the evidence before it, whether placing the child at the school of parental preference will be incompatible with the efficient use of resources. It was no answer to that task for the Tribunal to refuse to determine what the costs were likely to be merely because they thought they might change in the future. It was, in short, perverse for the Tribunal to reject the evidence that it did have about cost and determine the case on the entirely speculative basis that, in the event of eventualities about which it had no evidence at all (including possible future in-person assessment) the costs would be different.

80. Further, to the extent that the Tribunal's decision is to be read as a conclusion that, as a result of the things that it speculatively considered might change the costs of the two placements, on the balance of probabilities there would be no significant difference in cost between the two placements that is also perverse. There was simply no evidential basis for a conclusion that what was on its face

a very large difference between the cost of the two placements would, on the balance of probabilities, turn out not to be a difference at all once both schools had fully assessed C.

81. Having said all that, I do share the Tribunal's puzzlement (as it put it at [34]) about "why two schools which are so similar and almost equidistant could potentially have costs which are so different". However, while that was a legitimate reason for approaching the evidence about The Garden School with a degree of scepticism, it was not of itself a basis for rejecting the evidence. The Tribunal's task is to find what the difference (or approximate difference) in the costs of the two placements will be on the balance of probabilities. The fact that it considers those costs to be unreasonable or inadequately explained will not normally be a basis for finding that those are not the actual costs, any more than it would be for concluding that the price of some expensive item in a shop was not actually the price you would need to pay in order to buy it. That is especially so where the school in question is not one the local authority is responsible for funding, as is the case with independent schools and schools not in the local authority's area. Unless the Tribunal is able to conclude that on the balance of probabilities the independent school or the other local authority will not actually charge the respondent local authority the amount that they have said they will charge, then the only possible conclusion is that the cost quoted will in fact be the cost to the respondent local authority, and (as the *Warrington* case confirmed) that is the cost that is relevant under section 39(4)(b)(ii).

82. The position is somewhat different under section 9 of the EA 1996 where what is relevant is public expenditure more generally. As noted above in the legislative framework section, the Court of Appeal in *Warrington* confirmed that if the parent's school of choice is not named under section 39(4), then section 9 of the EA 1996 must be considered when deciding what school it would be appropriate to name under section 39(5). In many cases, the two tests will produce the same result but in a case such as this where one school is not in the respondent local authority's area there may be a different result. For example, if the local authority that is responsible for the school in question would make a saving as a result of a place being taken and paid for by the local authority that is respondent to the appeal under section 9 that saving would fall to be offset against the additional expenditure incurred by the respondent local authority. I raised this point with Mr Harrison at this hearing. He was not in a position to say whether there would be a different result under

section 9 of the EA 1996 in this case, but this is a matter on which the local authority will need to reflect as it is important that local authorities do not seek to defend appeals on costs grounds unless there is a proper basis for doing so.

Conclusion: why this appeal must be remitted to the First-tier Tribunal rather than being remade by the Upper Tribunal

83. For the reasons set out above, I find that the Tribunal's decision involved errors of law and under section 12(2)(a) and (b)(ii) of the TCEA 2007 I set the decision aside and remit it to the First-tier Tribunal to be redetermined by a fresh panel.

84. It is with a heavy heart that I allow the appeal in this case because I am conscious that doing so is potentially seriously prejudicial to C. He is due to start at one of these schools in September. Since the Tribunal's decision was issued on 20 March 2024, he and his parent have believed that he will be going to The Garden School in September. His parent was unaware until relatively late in the day that the local authority was appealing the First-tier Tribunal's decision, not having been copied in (it seems) on the local authority's application for permission to appeal to the First-tier Tribunal.

85. The local authority took nearly the full permitted 28 days to lodge an application for permission to appeal on 16 April 2024. Owing to what I understand are great pressures of work in the First-tier Tribunal, that application was not decided by the First-tier Tribunal until 5 June 2024. The local authority then took until 2 July 2024 to lodge its renewed application for permission with the Upper Tribunal.

86. With a view if at all possible to ensuring that the delays to that point did not prejudice C's start at his new school, I granted permission on 12 July 2024 and listed the full appeal hearing on an expedited basis for 16 August 2024.

87. I had hoped that if the appeal was allowed I would be in a position to remake the decision so that the parties would know before September 2024 which school C would be going to. Dealing with a question of costs alone is the sort of issue that could normally be remade at Upper Tribunal level. Unfortunately, however, that is not possible because the First-tier Tribunal failed to make any determination about the suitability of The Bridge School or what, if any, additional resources or provision would be required for C at that school in order to make it suitable. On the parent's case, these are all matters that are in

dispute. They require witness evidence to resolve. These issues were canvassed before the First-tier Tribunal, but the First-tier Tribunal opted not to make any findings about The Bridge School because it decided to dispose of the appeal by rejecting the local authority's case on costs in the erroneous way I have dealt with above.

88. This is most unfortunate as where a First-tier Tribunal has heard evidence on a point of substance, it should normally make findings on that evidence so that in the event of an appeal such as this time, cost and public resources do not need to be wasted in an unnecessary rehearing. As it is, the First-tier Tribunal's decision not to complete its fact-finding function in this case means that the appeal must be remitted. I do so with a direction that the remitted hearing should be expedited so that C should if possible not be prejudiced any further than he has already been by what has happened in these proceedings. However, it seems to me to be almost inevitable that what has happened is now going to disrupt C's start at his new school. Nonetheless, his case should on remission be heard as speedily as possible, albeit taking account of the many other cases that no doubt also urgently need to be determined by the start of this next academic year, some of which may be of even greater priority.

89. I hope that it is unnecessary to add that the local authority of course remains under a duty (by virtue of section 19 of the EA 1996 if need be) to ensure that C is provided with suitable education while this appeal is resolved.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 20 August 2024