Neutral Citation Number: [2025] UKUT 226 (AAC)
Appeal No. UA-2024-001561-HS

RULE 14 ORDER

THE UPPER TRIBUNAL ORDERS that, save with the permission of this Tribunal:

No one shall publish or reveal the name or address of C, who is the child involved in these proceedings, or any information that would be likely to lead to the identification of them or any member of their family in connection with these proceedings (including the names of the relevant schools).

Any breach of this order is liable to be treated as a contempt of court and may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007. The maximum punishment that may be imposed is a sentence of two years' imprisonment or an unlimited fine.

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

AA

Appellant

- v -

LONDON BOROUGH OF HOUNSLOW

Respondent

Before: Upper Tribunal Judge Stout
Hearing date: 2 July 2025
Mode of hearing: In person

Representation:
Appellant: Sunil Chothi (SEND Advocate)
Respondent: Joseph Thomas (counsel)

On appeal from:
Tribunal: First-tier Tribunal (Special Educational Needs and Disability)
Tribunal Case No: EH313/24/00014
Tribunal Venue: By video
Decision Date: 9 July 2024

SUMMARY OF DECISION

SPECIAL EDUCATIONAL NEEDS (85)

The appellant (C's parent) expressed a preference for a maintained mainstream school (School O); the local authority named a maintained mainstream school with an autism resource base (School S) in Section I of C's EHC Plan. The appellant wanted C to have a 'mainstream experience' rather than being placed in a base. The Tribunal applied section 39(4) of the Children and Families Act 2014 (CFA 2014) and found School O to be unsuitable, in particular because C would be in an ordinary mainstream class of 30 pupils; the Tribunal named School S. The appellant argued that the Tribunal had erred in law by failing properly to apply the so-called 'right to mainstream' in section 33 of the CFA 2014 and/or by failing to consider section 9 of the Education Act 1996 (EA 1996).

The Upper Tribunal gives guidance on the interpretation and application of relevant statutory provisions. The Upper Tribunal holds that the First-tier Tribunal did not err in its application of section 33, which is not a 'right to a mainstream experience'. Section 33(2) places a duty on the local authority to name a mainstream school when the application of section 39(4) has resulted in parent's preferred school being rejected, unless naming a mainstream school is incompatible: (a) with the wishes of the parent; or (b) provision of efficient education to others. Naming School S complied with that duty because parental preference was for mainstream (albeit not that particular school) and the local authority was not relying on the exception in section 33(2)(b) for incompatibility with the efficient education of others so the duty in section 33(4) to take reasonable steps to avoid the incompatibility did not apply.

The Tribunal erred in law by failing to consider section 9 of the EA 1996 when deciding which school it was 'appropriate' to name under section 39(5). However, the error was not material as it was inconceivable in this particular case that the application of section 9 would have made any difference.

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 dismiss the appeal. The decision of the First-tier Tribunal did not involve a material error of law.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with the interpretation and application of what is often referred to as 'the right to mainstream' in section 33 of the Children and Families Act 2014 (CFA 2014). Two mainstream schools were in issue in this appeal. The local authority proposed School S, a mainstream maintained primary school with

an autism resource base. Parental preference was for School O, an 'ordinary' maintained mainstream primary school. The Tribunal concluded that School O was unsuitable for the appellant's child (who I will call C) and named School S in Section I of the C's Education Health and Care Plan (EHC Plan).

2. Permission to appeal was granted by Judge Davies following a hearing on 4 March 2025 on one ground, being that:

> "The Tribunal did not pay sufficient regard to parental preference for School O. School O was not subject to sufficient challenge to its ability to take reasonable steps to facilitate C's attendance / avoid incompatibility."

Background and the First-tier Tribunal's decision

3. At the time of the First-tier Tribunal hearing on 3 July 2024, C was aged 4 years and 5 months. She has a diagnosis of Autism Spectrum Disorder (ASD) and Developmental delay. She has difficulties with speech and language as well as social communication, emotional and sensory regulation. She had attended various nursery/pre-school provisions from autumn 2023 and had been receiving Applied Behavioural Analysis (ABA) provision at home since February 2022. In her most recent nursery placement she had been supported by an ABA tutor for 2 hours per day. She was otherwise in a group where the staffing ratio was 3 staff to 12-15 pupils, although some attend mornings only. C was due to start Reception in September 2024. (In the event, I am told that, as the appellant's appeal did not succeed at the Tribunal, she has kept C out of school so that C has not yet started at primary school.)

4. Before the First-tier Tribunal, the appellant and the local authority proposed two different models for C's education. The appellant sought a placement in a maintained mainstream primary school at School O, together with ABA provision of 32.5 hours per week during term time and 15-20 hours per week during holidays. The local authority, however, decided to name School S, a maintained mainstream primary school with a specialist ASD resource base. The appellant envisaged that, at School O, C would spend most of her time in a mainstream class of approximately 30 children, albeit supported at all times on a 1:1 basis. The proposal at School S was that C would spend most of her time in the resource base, which was a class of five children, but would have opportunities for interacting with peers in the mainstream classes. School S is 'in borough' (2.5 miles from parents' home); School O is 'out of borough' (3.1 miles from parents' home). The First-tier Tribunal confirmed at [14] of its decision that the appellant was 'seeking transport costs'. The significance of that was that, if cost was in issue, the First-tier Tribunal would have had to take into account the cost of transporting C to School O; the appellant was not offering to provide transport herself.

5. The Tribunal decided that ABA provision was not reasonably required for C, but that she did require 25 hours of teaching assistant support, as well as occupational therapy, speech and language therapy and daily small group

interventions. As to placement, the Tribunal concluded that School O was unsuitable and that School S should be named. It is appropriate to set out the whole of the Tribunal's reasons on this issue:-

> 28. The LA relied on the oral evidence of [Ms F] of School S to show that a suitable school was available, as well as her written evidence. Her evidence was that the school can meet needs and make the provision in section B and F of the EHC Plan. [C] would be in small class with 5 other pupils and 1 full time teacher and TA and one nearly full time TA. There is a high ratio of staff to pupils. The experience of the staff is that they are a specialist unit for pupils with ASD. They understand the communication and related difficulties associated with ASD. The assessment and transition plan was realistic. [C] will have the opportunity to access the mainstream as soon as she is ready. She will in any event be able to go on outings with the relevant group in the mainstream.
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> 29. The rate at which this happens is flexible and will depend on how [C] copes. This is eminently sensible. Mr Chothi seemed to suggest that this did not constitute mainstream provision, which is what the Appellant wants. This is plainly wrong. This is placement at a mainstream school, albeit in a unit within the school. [Ms F] was a persuasive witness and there was no reason to doubt her knowledge and commitment. With the 25 hours of 1:1 support as well as OT and SLT provision, there is no reason why [C] should not flourish. [Ms F] spoke about the provision and supervision at lunch times for eating in the centre, which will benefit [C]. The school is rated Good and outstanding for personal development and Early Years provision which is what [C] will be in.
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> 30. [AA's] preference is for [School O]. No witness attended from that school but the bundle contains a statement from [the] Headteacher dated 16.1.2024 [239-240]. The Tribunal considered the letter from [School O] which states that [AA] has stated that Richmond Borough allow ABA therapists to support children in settings. [The Headteacher] makes clear that [School O], is not an ABA school and it does not follow or support ABA therapies. She refers to class sizes of 30 pupils. She states that the classes are oversubscribed. There is a waiting list and if [C] were to attend she would be number 31. She speaks about being tight on space and the adverse impact on other pupils. There is not sufficient information on this point) to meet [C's] toileting needs. Additional support would be needed. There are no therapists on site for SLT and OT provision. Mr Frank stated that he had spoken to the school today and their position remains unchanged. [AA] suggested that she had spoken to the school recently and they had no problem with accommodating ABA support. This would be a major shift from the position in the letter, and from the no change discussion Mr Frank referred to. From the limited information available, the Tribunal do not consider that a class size of 30 pupils is suitable for [C]. The small group work in her plan in class sizes of 4-5 pupils may not be achievable, even if the additional 1:1 support was available to her. She displays sensory sensitivities and sensory avoidant

> behaviours and struggles with certain sounds and noises. A class size of 30 is bound to cause her sensory difficulties. Mr Chothi suggested that the parental preference for this mainstream school was conclusive. It is not. The Tribunal has concerns that the school is not suitable for [C's] age, ability and aptitude on the basis of the limited information available to it. [AA] expressed a serious preference for [School O] and serious concerns that [C] would mimic negative behaviours from other children with SEN needs and she wanted a mainstream school as a consequence. It is not beyond possibility that she may pick up and mimic negative behaviours from children in a mainstream setting. Moreover, with the level of 1:1 support the opportunity for doing so will be greatly reduced. [School O] had an Outstanding Ofsted rating but this is noted to be from 2014. Even if [School O] had the resources available to implement 1:1, OT and SLT support/therapies would not be available on site as is the case with [School S], which is an important benefit for [C]. The size of the classes, lack of onsite provision for therapies and lack of specialist provision for a child with ASD make this school unsuitable. School S is suitable and can meet the needs and provision in the EHC Plan and shall be named in section I.

Legal framework

6. There was (in the end) a large measure of agreement between the parties as to the general legal framework, but I need to set it out in full because the interpretation and application of sections 33 and 39 of the CFA 2014 is not straightforward and there is significant scope for misunderstanding.

7. The predecessor provisions to section 33 of the CFA 2014 were contained in sections 316 and 316A of the Education Act 1996 (EA 1996); the predecessor provisions to section 39 CFA 2014 were to be found in section 324 and Schedule 27, paragraph 3 to the EA 1996. No one suggests there is any material difference between the predecessor provisions and the current ones so far as concerns the issues in this appeal and the case law on the predecessor provisions remains applicable to the CFA 2014.

Section 39 CFA 2014

8. Section 39 of the CFA 2014 makes provision for dealing with parental requests to a local authority that a particular school or other institution falling within section 38(3) be named in Section I of child or young person's EHC Plan: see *LB Hillingdon v SS and ors* [2017] UKUT 0250 (AAC), [2019] AACR 9. Section 38(3) includes all maintained schools and nursery schools, academies, further education institutions, non-maintained special schools and other institutions approved by the Secretary of State under section 41 of the Act. Section 39 provides:

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.

9. There are thus three bases on which a parental request for a particular school or other institution falling within section 38(3) may be refused by a local authority under section 39(4):

   a. *Suitability for the child* - it is not suitable for the age, ability, aptitude or special educational needs of the child or young person concerned;
   b. *Efficient education of others* - the attendance of the child or young person would be incompatible with the provision of efficient education for others; or
   c. *Cost* - the attendance of the child or young person would be incompatible with the efficient use of resources.

10. Unless one of those bases applies, the local authority must name the school of parental preference: section 39(3).

11. If one of those bases applies, then section 39(5) requires the local authority to name a school or type of school that it considers to be 'appropriate' for the child or young person. What is 'suitable' and what is 'appropriate' will often be one and the same. In *C v Buckinghamshire County Council & The Special Educational Needs Tribunal* [1999] ELR 179 Thorpe LJ at 189 observed as follows:

> … it is clear from s 324(4)(a) of the Education Act 1996 that the LEA has a duty to ensure that a child with special educational needs is placed at a school that is 'appropriate'. It is not enough for the school to be merely adequate. To determine if the school is appropriate, an assessment must be made both of what it offers and what the child needs. Unless what the school offers matches what the child needs, it is unlikely to be appropriate. The assessment of the child's needs necessarily imports elements of a welfare judgment. If there are two schools offering facilities and standards that exceed the test of adequacy, then I would hope that ordinarily speaking the better would be judged appropriate, assuming no mismatch between specific facilities and specific needs. Parental preference obviously has a part to play in the assessment of what is appropriate. In a case where there appears to be parity of cost and parity of facilities, parental preference may be the decisive factor. But it would be wrong to elevate parental preference to the height that Mr Bowen appeared to contend for in his submissions. A bare preference might be ill-informed or capricious. In practice, parental preference may mean a fair opportunity to the parents to contend by evidence and argument for one school in preference to another. Therefore, preferences must be reasoned to enable the parent to demonstrate that they rest on a sound foundation of accurate information and wise judgment.

12. However, in *R (an Academy Trust) v Medway Council* [2019] EWHC 156 (Admin) Philip Mott QC (sitting as a Deputy High Court Judge) held at [94(ix)] that in principle a school could be 'appropriate' for the purposes of section 39(5) even

though it was not 'suitable' for the purposes of section 93(3). One such situation, he observed in that case, is where the so-called 'right to mainstream' in section 33 of the CFA 2014 is engaged. The full passage from his judgment in that case is set out in the next section of this decision.

Section 33 CFA 2014

13. Section 33 provides:

> **33 Children and young people with EHC plans**
>
> (1) This section applies where a local authority is securing the preparation of an EHC plan for a child or young person who is to be educated in a school or post-16 institution.
>
> (2) In a case within section 39(5) or 40(2), the local authority must secure that the plan provides for the child or young person to be educated in a maintained nursery school, mainstream school or mainstream post-16 institution, unless that is incompatible with—
> (a) the wishes of the child's parent or the young person, or
> (b) the provision of efficient education for others.
>
> (3) A local authority may rely on the exception in subsection (2)(b) in relation to maintained nursery schools, mainstream schools or mainstream post-16 institutions in its area taken as a whole only if it shows that there are no reasonable steps that it could take to prevent the incompatibility.
>
> (4) A local authority may rely on the exception in subsection (2)(b) in relation to a particular maintained nursery school, mainstream school or mainstream post-16 institution only if it shows that there are no reasonable steps that it or the governing body, proprietor or principal could take to prevent the incompatibility.
>
> (5) The governing body, proprietor or principal of a maintained nursery school, mainstream school or mainstream post-16 institution may rely on the exception in subsection (2)(b) only if they show that there are no reasonable steps that they or the local authority could take to prevent the incompatibility.
>
> (6) Subsection (2) does not prevent the child or young person from being educated in an independent school, a non-maintained special school or a special post-16 institution, if the cost is not to be met by a local authority or the Secretary of State.
>
> (7) This section does not affect the operation of section 63 (fees payable by local authority for special educational provision at non-maintained schools and post-16 institutions).

14. By sub-section (1), section 33 only applies where: (a) parental preference for a school falling within section 38(3) CFA 2014 has been defeated on one of the bases in section 33(4) so that the local authority is required to name the school it thinks is 'appropriate', as required by section 39(5); or (b) where either parental preference was for a school not falling with section 38(3); or (c) where no parental preference was expressed so that the local authority's duty to name an 'appropriate' school under section 40(2) applies.

15. The effect of section 33 is to place a duty on the local authority in those circumstances to name a maintained nursery school, mainstream school or mainstream further education institution in Section I of a child or young person's EHC Plan. That duty may be lifted if one of the exceptions in section 33(2) applies.

16. The first exception is where compliance with the duty is incompatible with the parent's wishes (section 33(2)(a)). However, the section is (in contrast to section 39) not structured as a duty to give effect to parental preference: cf *Bury Metropolitan Borough Council v SU* [2010] UKUT 406 (AAC) at [19] *per* Judge Ward. Rather, it is a duty on the local authority to name a particular type of school/institution even if the parent expresses no preference at all.

17. In order for the duty to be lifted on the basis of the first exception that it is incompatible with a parent's wishes, it is necessary for the naming of "a" (i.e. "any") mainstream school to be incompatible with a parent's wishes: see [70] of the Court of Appeal's judgment in *R (MH) v The Special Educational Needs and Disability Tribunal and London Borough of Hounslow* [2004] EWCA Civ 770. As the Court of Appeal held in that case (at [72]-[82]), the effect of what is now section 33 of the CFA 2014 is that the local authority is required to name mainstream as the 'type' of school, and has a discretion (but not a duty) to name a particular mainstream school. The Court of Appeal explained at [77] that although it was normally desirable for a particular school to be named, section 33 does not create a right for a parent to insist on placement at a particular school of their choice (see [80]).

18. The second exception is where compliance with the duty is incompatible with the efficient education of others (section 33(2)(b)). On the face of section 33, the local authority can only rely on that exception in relation to mainstream schools in its area generally if it shows that there are no reasonable steps that it could take to prevent the incompatibility (section 33(3)). In relation to a particular mainstream school, the local authority can rely on the exception in section 33(2)(b) only if it shows that there are no reasonable steps that either it or the governing body/proprietor/principal of the school could take to prevent the incompatibility (section 33(4)).

19. Since the Court of Appeal's decision in *MH* the effect of section 33 and its interaction with section 39 has been considered in a number of cases. It seems to me that Philip Mott QC's judgment in the *Medway* case provides the most helpful guidance as regards the issues that arise in the present appeal and I set out [94]-[96] of his judgment in that case in full here:-

94. First I should set out the legal route through what can at first glance seem to be the minefield of sections 33 and 39 of the 2014 Act.

i) The only route to section 33 is via section 39(5) or section 40(2). Section 40(2) deals with the case when there has been no request for a specific school, so does not apply here.

ii) Section 39(5) is not engaged unless subsection (4) applies. Subsection (4) only applies where one of two conditions is satisfied:

a) The school requested is unsuitable for the age, ability, aptitude or special educational needs of the child; or

b) The attendance of the child at the requested school would be incompatible with the provision of efficient education for others [meaning other children at that school], or the efficient use of resources.

iii) In all other cases, where subsection (4) does not apply, section 39(3) imposes an absolute duty on the local authority to name the requested school.

iv) Section 39(5) requires a local authority to name a school (if it names one, rather than merely specifying a type of school) which is "appropriate" for the child. That obligation must be looked at, not in the context of the section 39(4) exceptions relating to the school, but in the context of the section 33(2) duty on the local authority. That is a duty to provide for mainstream schooling unless that is incompatible with the wishes of the parents (which will not arise in a section 39(5) case as that section deals with cases where the parents have requested a particular school), or is incompatible with the provision of efficient education for others (again, meaning other children at the same school).

v) There is no "suitability" exception in section 33(2). Nor is there an "efficient use of resources" provision as a free-standing exception. Indeed, if education of the child in a mainstream school is currently incompatible with the efficient education of other children there, the local authority will be under a duty to spend money to overcome that incompatibility up to a reasonable level. This is, in short, the effect of the "reasonable steps" requirement in subsections (3), (4) and (5) of section 33, together with section 42.

vi) In support of this interpretation I was referred to two Upper Tribunal decisions, *Bury Metropolitan Borough Council v SU* [2011] ELR 14 and *Harrow Council v AM* [2013] UKUT 0157 (AAC). I have also considered the Court of Appeal decision in *R (MH) v The Special Educational Needs and Disability Tribunal and London Borough of Hounslow* [2004] EWCA Civ 770, cited in both Upper Tribunal decisions. In view of the agreement

among counsel in this case, I need not set out those decisions extensively. However, they appear to me amply to support the conclusions urged upon me by Mr Cross.

vii) The result of this is that "appropriate" in section 39(5) is not a shorthand for "not excused by section 39(4)". In other words, it does not import a present suitability provision by implication. An "appropriate" school instead refers to one which allows the local authority to comply with its very strict, though not absolute, obligation under section 33(2).

viii) That conclusion is inconsistent with the provisional view of Upper Tribunal Judge Jacobs in *ME v London Borough of Southwark* [2017] UKUT 0073 (AAC), at paragraphs [13] and [14]. But that view was expressed without argument, and in my judgment does not stand up to the argument presented to me by Mr Cross, which I hope I have shortly but accurately encapsulated above.

ix) It follows that, as a matter of legal theory, a requested school which escapes being named under section 39(3), as a result of being unsuitable in the terms of section 39(4)(a), could still be named as an appropriate school under section 39(5) which is subject to the constraints imposed by section 33.

95. My initial instinct was to the contrary, and accorded with the provisional view of Judge Jacobs. How could a school which was "unsuitable" for the special educational needs of the child in question be "appropriate" for that same child? To be appropriate, a school must be able to match what the child needs (see per Thorpe LJ in *C v Buckinghamshire CC & Special Educational Needs Tribunal* [1999] ELR 179). The answer is that the right to mainstream schooling is a stronger right than the right to request a particular school. The right to request a school can be displaced where that school is unsuitable. The duty to provide mainstream schooling somewhere cannot be displaced by the unsuitability of a particular school, or even of all schools in the area. The local authority has to make a school appropriate, if necessary by spending money to do so. So a school which is currently "unsuitable" may nevertheless become "appropriate" once upgraded.

96. No doubt in many cases, where the particular local authority has within its area another school which is already suitable, the requested school is likely to escape being named, because the cost of making it "appropriate" (which to that extent imports a suitability criterion at the end of the upgrading process) would be unnecessary. But there may well be circumstances where the requested but unsuitable school would nevertheless be named in the final EHC plan. Two examples may suffice, though they are by no means exhaustive.

i) If the local authority has a number of mainstream schools, none of which is currently suitable for the particular child, that is no

> answer to its duty under section 33 to provide mainstream schooling. One of the schools must be made suitable, and therefore appropriate, at the local authority's cost. The decision as to which school should be chosen for this process will be a matter for the local authority. It has no duty to choose the one requested by the parents of the particular child, but it may do so. What it cannot do is to consider each school in turn against the section 39(4) criteria and, discarding them one by one, announce that no school in its area is left to be considered appropriate under section 39(5).
>
> ii) The requested unsuitable school may be less suitable than another school in the same area. That other school may be suitable without modification, but may be full. The local authority, looking at its broad duties to provide mainstream schooling, may lawfully decide that it is time to upgrade another school to cater for an increasing cohort of children with special educational needs, or for children with a particular type of educational need. That may lead it in due course to name the requested school as being appropriate, despite it escaping automatic naming under section 39(3) by being currently unsuitable within section 39(4).

20. Where section 33 applies only a mainstream school can be named by a local authority as 'appropriate' for a child under section 39(5), unless one of the two specific exceptions in sections 33(2)(a) and (b) apply. Neither suitability or resources provide the local authority with any 'defence' to a parental preference for a mainstream school, either in general or in relation to a particular school. Phillip Mott QC in the *Medway* case reasoned that this is because, if section 33(2) requires a mainstream school to be named for a child that is not suitable, the local authority comes under a duty to expend resources to make it suitable. Attractive though his reasoning is in this respect, I must sound a note of caution about it for two reasons:

    a. First, as the Court of Appeal noted in *MH*, when section 316 of the EA 1996 was originally enacted, the duty to educate in mainstream applied only if that was compatible with the child "receiving the special educational provision which his learning difficulty calls for": see [20] of *MH*. It is only since the amendment of the EA 1996 by the Special Educational Needs and Disability Act 2001 (SENDA 2001) that the statutory provisions have had essentially the form that they now have in section 33 of the CFA 2014. In *MH* at [79] the Court of Appeal cautioned against interpreting section 33 in a way that might reintroduce 'suitability' requirement that Parliament had removed in 2001. Judge Ward in *Bury Metropolitan Bury Council v SU* at [22]-[29] affirmed that approach (rejecting my argument as counsel in that case that the duty on a parent under section 7 of the EA 1996 to cause their child to receive suitable education made any difference to the way that section 33 should be interpreted and applied);

b. Secondly, Philip Mott QC did not identify which specific statutory provisions he had in mind as the source of the proposition that the local authority comes under a duty to make a specific mainstream school suitable for a child. The duty is not to be found in sections 33(3)/(4) since the 'reasonable steps' those subsections require to be taken are steps to prevent incompatibility with the efficient education of others, not steps to prevent incompatibility with the efficient education of the child in question.

21. That said, I agree with Philip Mott QC in general terms that there are safeguards that will in most cases ensure that a child whose parent wishes them to be educated in a mainstream school even though that is unsuitable for them does not receive a wholly inappropriate education. First, as Judge Ward noted in *SU* at [23], where the local authority is relying on the exception in section 33(2)(b) for incompatibility with the efficient education of others, *"it might not be reasonable to take steps to limit the incompatibility with the efficient education of others if the effect of doing so would be a material adverse effect on the ability of the pupil with special educational needs to receive the provision he requires"*. Secondly, it may be possible to read into the duty on the local authority under section 39(5) to name an 'appropriate' school an implicit obligation to make a school appropriate if there are no alternatives; such a reading would be consonant with the local authority's explicit general duty in section 27 of the CFA 2014 to keep under review the educational provision in the area and consider whether it is sufficient to meet the needs of children in the area. Thirdly, the governing body/proprietor of a maintained mainstream school is under a duty by virtue section 66 of the CFA 2014 to use best endeavours to meet the special educational needs of children in the school. Fourthly, all schools must comply with their obligations under the Equality Act 2010 (EA 2010) to make reasonable adjustments for, and not discriminate against, disabled pupils.

The role of section 9 EA 1996

22. As noted above, on the face of the CFA 2014, parental preference for a school or other institution falling within section 38(3) can only be defeated on one of the three specific bases identified in section 39(4), and parental preference for a mainstream school can only be defeated if the local authority can rely on the section 33(2)(b) exception. In either case, however, if parental preference is defeated by one or other of these routes, the local authority's duty under section 39(5) to name an 'appropriate' school or type of school (or other institution) remains.

23. At that stage the general duty in section 9 of the Education Act 1996 (EA 1996) to consider parents' wishes in relation to the education of their children comes into play. Section 9 provides as follows:-

> **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.

24. The effect of section 9 is therefore that regard must be had to a parent's wishes, but only insofar as that is compatible with the provision of efficient instruction and training or the avoidance of unreasonable public expenditure. If the parent's wishes are not compatible with those matters, then there is no duty to have regard to them.

25. It is well established that section 9 needs to be considered when deciding whether a school is 'appropriate' for the purposes of section 39(5) of the CFA 2014: see *C v Buckinghamshire County Council and The SENT* [1999] ELR 179 (on the EA 1996 regime) and *S v Worcestershire CC (SEN)* [2017] UKUT 92 (AAC) at [88] (on the CFA 2014 regime).

26. It is also established that section 9 is relevant in cases where parental preference is for mainstream, as Judge Ward explained in *KC v London Borough of Hammersmith and Fulham* [2015] UKUT 179 (AAC). In that case, the parent had expressed a first preference for a special school, but a fallback preference for a mainstream school. Regarding the preference for a mainstream school, Judge Ward held:

> 19. At that point, therefore, when the fallback preference had been triggered, a local authority wishing to persist with placement in a special school would not be able to say that placement in a mainstream school would be incompatible with the wishes of the parent for the purposes of s.316(3) (even though there would not [*the 'not' appears to be a typographical error*] have been such incompatibility earlier, when the parent's preference had been for a non-mainstream school). The fallback preference could be defeated if the authority could show that a mainstream placement would be incompatible with the provision of efficient education for other children, but that is not suggested to be the case here. Therefore, given the fallback preference had been expressed and the acceptance of its validity, the local authority was bowing to the inevitable in agreeing to mainstream provision.
>
> 20. The key questions in this case are, having arrived at this point in the analysis, (a) whether section 9 has any further life and (b) if it does, how it falls to be applied.
>
> 21. Mr Bowers' submission was initially that s9 is relevant at earlier stages, but not thereafter. First, it requires to be applied to the original school preferred by the parent, R Academy, as it was, to the disadvantage of that preference. Then, he says, s9 has to be applied to a comparison of the parent's fallback (T Academy) and the authority's preferred school (S High School), which would equally be to the disadvantage of the preference for T Academy. Thereafter, that is said to be the end of the relevance of section 9.

22. I acknowledge that the Court of Appeal in *MH* said that it was necessary to apply sch 27 para 3 at the outset and that that provision has no further relevance when a s316 exercise is being undertaken. It would however be in my view an over-simplification to treat sch 27 para 3 (when a qualifying preference is expressed for a maintained school) and s9 (when the preference is for a non-maintained school) as direct equivalents and from that to argue that the relevance of s9, like that of sch 27 para 3, is confined to the front end of the logical process. The former is a provision applicable within a defined procedure, which – subject to defined exemptions - cuts across other provisions so as to create rights: cf. *MH* at [69]). The latter merely sets out a principle to which a local authority is required to have regard, among other considerations. It also is subject to defined exemptions but its field of application is far wider (the exercise of functions under the Education Acts) and it operates outside the ambit of a defined procedure.

23. At this point the thought process is still heading towards the ultimate naming of a school under s324(4). The field of enquiry has been moved on under the impact of s316 and the fallback preference expressed, but to the extent that questions of parental preference continue to arise, I can see no reason to conclude that just because s9 has already been applied to a logically prior situation, that is the end of the scope for its application. Suppose that it has been accepted because of s316 that a mainstream school needs to be named: if there are two candidate schools, otherwise equal in all respects, why should s9 not be applied to confer additional weight on the parent's preference? Further, because s9 involves something of a balancing exercise, there may be cases where parental preference tips the balance where the schools are not in all other respects equal. Not to apply it would appear to be to fly in the face of the breadth of section 9, acknowledged in *Mulla v Hackney Learning Trust* [2014] EWCA Civ 397; [2014] ELR 350.

24. While I agree with Mr Bowers that it is not the function of s9 to reintroduce into consideration of whether a mainstream placement is required factors which ss316 and 316A have clearly excluded, I do not accept that the limitations of ss 316 and 316A on when mainstream education need not be provided so impinge upon the ground covered by s9 that they will in all circumstances deprive the latter section of further effect, which appeared to be the ground to which he moved in the course of argument. When s316 applies and is given effect to via s324(4) it is those provisions which delimit an authority's powers and duties: s9 provides a mandatorily relevant factor to be taken into account in exercising them but cannot rewrite their extent. In *Bury MBC v SU* [2010] UKUT 406(AAC); [2011] ELR 14 I expressed the view at [28] and [29] that s9 cannot constrain the operation of s316 and I remain of that view for the reasons given; but that is not to say that s9 may not still be of relevance in cases where full effect has been given to s316, yet questions of parental preference may still remain: that was not the situation in *Bury*. For instance, there might be two mainstream schools,

> one costing £60,000 per year and one £80,000 a year to provide for a pupil with special educational needs in a manner which avoided incompatibility with the provision of efficient education for other children. Those substantial costs will not in general terms be relevant to the decision to place the child in a mainstream school as opposed to a special school: see e.g. *Bury* at [23], and *Harrow LBC v AM* [2013] UKUT 0157 (AAC). But as to which of the two, if the parent's preference is for the more expensive, s9 continues to have an obvious role. As regards the proviso in s9 that regard is to be had to the wishes of the parents "so far as that is compatible with the provision of efficient instruction and training", that is - to the extent that other children are concerned - substantially saying the same as does s316(3)(b) and thus there may be limited scope for the proviso to apply once it has been determined that the provision required by s316 is to be mainstream. Insofar as there is a difference (i.e. notably as regards the provision of efficient instruction and training in relation to the pupil concerned), I do not see any necessary conflict in applying section 9 in a context where, having first applied s316 and 316A in accordance with their terms, one has arrived at the conclusion that mainstream education is required and the only issue is as to which of two schools it should be provided at.
>
> 25. I do not see the above views as inconsistent with the observations of the Court of Appeal at [80] of *MH*. Where the Court observed (strictly, obiter) that
>
> > "In the context of the s316 process, the Tribunal must, in our judgment, consider all candidates for nomination on an equal footing, whether they are proposed by the parent or by the LEA…"
>
> it was doing so in the context of emphasising that the rights conferred by sch27 para 3 did not apply to the s316 process. It does not appear that it was invited to consider s9 and it did not do so.

27. It is thus clear from Judge Ward's decision in that case that, where the application of the 'right to mainstream' in section 33 still leaves two mainstream schools 'on the table', the local authority/Tribunal must return to section 39(5) and name an 'appropriate' school or type of school. At that stage, section 9 will be relevant to deciding which school it is 'appropriate' to name in Section I.

28. As Judge Ward also notes in that case, the duty under section 9 is a duty to 'have regard', not an obligation to achieve a particular outcome. It does not create any 'right' (defeasible or otherwise) to have a particular school named in an EHC Plan. The nature of the duty in section 9 was held to be as follows by the Court of Appeal in *Haining v Warrington Borough Council* [2014] EWCA Civ 398, [2014] AACR 28 at [31]:

> 31. None of these points persuades me that the natural meaning cannot have been intended by Parliament. The starting point is that section 9 does not impose a duty on a local authority to act in accordance with

parental wishes (provided that to do so would be compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure). It is a duty to "have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents" subject to those qualifications. As Denning LJ said in *Watt v Kesteven County Council* [1955] QB 408 at p 424:

> "Section 76 [of the 1944 Act the predecessor of section 9 of the 1996 Act] does not say that pupils must in all cases be educated in accordance with the wishes of their parents. It only lays down a general principle to which the county council must have regard. This leaves it open to the county council to have regard to other things as well, and also to make exceptions to the general principle if it thinks fit to do so."

29. That said, I observe that, as Judge Mitchell put it in *LB of Hammersmith and Fulham v L* [2015] UKUT 523 (AAC), [2016] AAC 18 at [40], *"cases tend in my experience to be argued on the basis that, if there is no unreasonable expenditure, effect will be given to parental preference"*. That approach can be traced back at least to the decision of the Court of Appeal in *Oxfordshire CC v B* [2001] EWCA Civ 1358, [2002] ELR 8 where, at [16]-[18], Sedley LJ held that what section 9 requires is for a balance to be struck between the educational advantages of the placement preferred by the parents and the extra cost to the local authority. Subsequent authorities (such as *EH v Kent County Council* [2011] EWCA Civ 709 and the *Hammersmith and Fulham* case) have considered in detail how costs should be calculated, on the premise that the proper calculation of the costs of the two placements will be determinative. However, it seems to me that this is because in most such cases the local authority will not be advancing any alternative rational reasons for refusing to comply with parental preference. It does not mean that the effect of section 9 is anything other than a 'have regard' duty, as the Court of Appeal confirmed in *Haining*.

30. Finally, as regards section 9, I need to deal with the meaning of "incompatible with the provision of efficient instruction and training" in that section. It has been held that this encompasses both the efficient instruction of the child themselves and others with whom they will be educated: *R (Hampshire CC v R)* [2009] EWHC 626 (Admin), [2009] ELR 371 at [30]-[36] *per* Stadlen J. Judge Jacobs in *ME v London Borough of Southwark* [2017] ELR 209 drew together the authorities on this issue as follows (albeit that case was concerned with incompatibility with the efficient instruction and training of other children at the school):

> [20] *Essex County Council v SENDIST and S* [2006] EWHC 1105 (Admin), [2006] ELR 452 was an efficient resources case. Gibbs J at [29] described 'incompatible' as a strong term, if anything stronger than 'prejudicial to', although nothing turned on the difference in that case.
>
> [21] In deciding whether attendance would be incompatible with the efficient education of others, the test to be applied is whether the impact of attendance would be 'so great as to be incompatible with the provision

of efficient education' to others: *Hampshire County Council v R and SENDIST* [2009] EWHC 626 (Admin), [2009] ELR 371, at [47]. It is not sufficient to show that attendance would have some impact. It is necessary to identify what that impact would be and then consider whether that would be incompatible. This applies to s 33(2)(b) and 39(4)(b).

[22] Upper Tribunal Judge Mesher considered this issue further in *NA v London Borough of Barnet* [2010] UKUT 180 (AAC), [2010] ELR 617, also an efficient education case. he said:

> '[33] Mr McKendrick … accepted that it was not enough … that the quality of education provided for other children would be reduced from the very highest standard to something a little lower. But, on the other hand, he submitted, it did not have to be shown that no meaningful education at all would be provided for some other child or, as the head teacher had put it in his statement, the admission of the child in question would tip the school into failure.
>
> [34] I agree with Mr McKendrick in that respect … "Efficient education" indicates a standard, not the very highest desirable standard or the very basic minimum, but something in between … Although "incompatible" is indeed a very strong word, indicating that there is no way of avoiding the admission of the single child involved reducing the quality of education provided to some other children with whom he would be educated below that standard, its force must be applied in the context of that standard.
>
> [35] I do not think that the Upper Tribunal should go any further in attempting to define the standards embodied in "efficient education". I merely draw attention to the guidance in para 40 of the Inclusive Schooling document that it means:
>
> "providing for each child a suitable and appropriate education in terms of a child's age, ability, aptitude and any special educational needs he/she may have."
>
> [36] What I take in particular from this section of discussion is that the test of incompatibility with the efficient education of other children under paragraph 3(3) is also quite a sophisticated one. It must in my judgment be applied by reference to the circumstances only of the child in question and other children who are already known or predicted to be in the category of those who would be educated with the child. Although the overall context of the school will be relevant, especially in relation to whether adjustments can be made elsewhere to avoid an incompatibility that would otherwise arise, the circumstances of other children who might possibly be admitted, particularly as the result of other outstanding

> appeals, cannot be taken into account. Depending on the circumstances of particular cases, it will often be necessary for a tribunal to identify just what difference it finds that the admission of the single child would make before it can go on to make the judgment about whether the degree of impact.'

What is a 'mainstream school'

31. Section 33 of the CFA 2014 requires the local authority to name a maintained nursery school, mainstream school or mainstream post-16 institution, subject to the exceptions discussed above. Those terms are defined as follows in section 83(2) of the CFA 2014:

> "mainstream post-16 institution" means a post-16 institution that is not a special post-16 institution;
>
> "mainstream school" means—
> (a) a maintained school that is not a special school, or
> (b) an Academy school that is not a special school;
>
> "maintained school" means—
> (a) a community, foundation or voluntary school, or
> (b) a community or foundation special school not established in a hospital;
>
> "post-16 institution" means an institution which—
> (a) provides education or training for those over compulsory school age, but
> (b) is not a school or other institution which is within the higher education sector and which is solely or principally concerned with the provision of higher education;
>
> "special post-16 institution" means a post-16 institution that is specially organised to make special educational provision for students with special educational needs;

32. By section 83(7), Part 3 of the CFA 2014 is to be read as if it was part of the EA 1996, so that the definitions in the EA 1996 apply. The EA 1996 defines "school" and "special school" as follows (these need to be read together with the definitions of "primary" and "secondary education" in section 2, which I also set out):-

> **4 Schools: general.**
> (1) In this Act (subject to subsections (1A) to (1C)) "school" means an educational institution which is outside the further education sector and the wider higher education sector and is an institution for providing—
> (a) primary education,
> (b) secondary education, or

(c) both primary and secondary education,
whether or not the institution also provides part-time education suitable to the requirements of junior pupils or further education.

337 Special schools
(1) A school in England is a special school if it is specially organised to make special educational provision for pupils with special educational needs, and it is—
(a) maintained by a local authority,
(b) an Academy school, or
(c) a non-maintained special school.

2 Definition of primary, secondary and further education.

(1) In this Act "primary education" means—
(a) full-time or part-time education suitable to the requirements of children who have attained the age of two but are under compulsory school age;
(b) full-time education suitable to the requirements of junior pupils of compulsory school age who have not attained the age of 10 years and six months; and
(c) full-time education suitable to the requirements of junior pupils who have attained the age of 10 years and six months and whom it is expedient to educate together with junior pupils within paragraph (b).

(2) In this Act "secondary education" means—
(a) full-time education suitable to the requirements of pupils of compulsory school age who are either—
(i) senior pupils, or
(ii) junior pupils who have attained the age of 10 years and six months and whom it is expedient to educate together with senior pupils of compulsory school age; and
(b) (subject to subsection (5)) full-time education suitable to the requirements of pupils who are over compulsory school age but under the age of 19 which is provided at a school at which education within paragraph (a) is also provided.

(2A) Education is also secondary education for the purposes of this Act (subject to subsection (5)) if it is provided by an institution which—
(a) is maintained by a local authority or is an Academy, and
(b) is principally concerned with the provision of full-time education suitable to the requirements of pupils who are over compulsory school age but under the age of 19.

(2B) Where—
(a) a person is in full-time education,
(b) he receives his education partly at a school and, by virtue of arrangements made by the school, partly at another institution or any other establishment, and

(c) the education which he receives at the school would be secondary education if it was full-time education at the school,

the person's education, both at the school and at the other institution or establishment, is secondary education for the purposes of this Act (subject to subsection (5)).

(3) Subject to subsection (5), in this Act "further education" means—
(a) full-time and part-time education suitable to the requirements of persons who are over compulsory school age (including vocational, social, physical and recreational training), and
(b) organised leisure-time occupation provided in connection with the provision of such education,

except that it does not include secondary education or (in accordance with subsection (7)) higher education.

(4) Accordingly, unless it is education within subsection (2)(b) or (2A), full-time education suitable to the requirements of persons over compulsory school age who have not attained the age of 19 is further education for the purposes of this Act and not secondary education.

(5) For the purposes of this Act education provided for persons who have attained the age of 19 is further education not secondary education; but where a person—
(a) has begun a particular course of secondary education before attaining the age of 18, and
(b) continues to attend that course,

the education does not cease to be secondary education by reason of his having attained the age of 19.

(6) In subsection (3)(b) "organised leisure-time occupation" means leisure-time occupation, in such organised cultural training and recreative activities as are suited to their requirements, for any persons over compulsory school age who are able and willing to profit by facilities provided for that purpose.

(6A) In the context of the definitions of secondary education and further education, references in this section to education include vocational, social, physical and recreational training.

(7) References in this section to education do not include references to higher education.

33. In *MA v LB Kensington & Chelsea* [2015] UKUT 186 (AAC) the Upper Tribunal (Judge Levenson) upheld the decision of the First-tier Tribunal that an autism resource base attached to a maintained mainstream primary school was not a separate special school, but part of the mainstream school so that the local authority had complied with the requirements of what is now section 33 by naming that school in Section I of the EHC Plan.

34. In view of the issue that arises on this appeal, I observe that, as is apparent from those statutory provisions, the duty in section 33 relates to the naming of a particular type of institution, not to the provision of a particular type of education. A school that is as a whole not 'specially organised to make special educational provision for pupils with special educational needs' is in principle a mainstream school, even if it chooses to 'specially organise' itself to make special educational provision for some of its pupils with special educational needs in separate classes to its other pupils. I note, however, that, if the distinction between mainstream and special schools (and the section 33 duty) is not to be rendered nugatory, care needs to be taken to ensure that an institution in reality operates as a separate special school (even if co-located/co-managed with a mainstream school), is not classified as a 'mainstream school'.

The grant of permission to appeal in this case

35. Permission to appeal was granted on a limited basis by Judge Davies following an oral hearing. The grounds of appeal as drafted in the notice of appeal were not specifically numbered. Judge Davies summarised the appellant's position at the permission hearing as being that there were two grounds of appeal as follows:-

    a. Although School S is a mainstream school it would not offer a 'mainstream experience' to C as she would be taught in a specialist autism unit within the school;

    b. The Tribunal did not pay sufficient regard to parental preference for School O. School O was not subject to sufficient challenge to its ability to take reasonable steps to facilitate C's attendance / avoid incompatibility.

36. Mr Chothi's arguments as regards those two grounds of appeal were summarised by Judge Davies in her decision at [11]-[14].

37. Judge Davies refused permission to appeal on the first ground on the basis that Mr Chothi accepted the ASD resource base at School S was part of the same institution as the mainstream school and that therefore placement in the ASD base counted as mainstream for the purposes of section 33 CFA 2014, following the approach in *MA v London Borough of Kensington and Chelsea*. Judge Davies adopted the reasoning of Judge McCarthy (who refused permission to appeal in this case at First-tier level) that *"the right to a mainstream education is different from a right to be educated in a typical mainstream classroom in England"*. I add (in the light of the observation I have made above about the care that needs to be taken in deciding whether an institution counts as a mainstream or a special school for the purposes of the legislation) that in this case, it is clear that the ASD resource base operates as part of the mainstream school, with the children from the base joining with the children from the mainstream classes for certain activities, and the plan in C's case being to work towards further elements of integration with the mainstream classes.

38. Judge Davies granted permission on the second ground, observing as follows:

> 38.The Tribunal found [School O] to be unsuitable for C [30] noting its large class size, lack of space, lack of onsite SLT and OT therapy. This finding was based on [the Headteacher's] letter (page 239 FTT bundle) and the information before it about C's ability, aptitude and needs. The Tribunal found 'she displays sensory sensitivities and sensory avoidant behaviours and struggles with certain sounds and noises. A class size of 30 is bound to cause her sensory difficulties'.
>
> 39.Having found [School O] to be unsuitable for [C] under section 39(4)(a), the Respondent was not required to name [School O] in Section I (section 39(3)) and section 39(5) imposed a duty on the Respondent to name an appropriate school or type of school. It did so by naming mainstream provision at [School S].
>
> 40.In consequence of not naming the school of parental preference, section 33(2) imposed a qualified duty on the Respondent to name a mainstream school, which it did. However, I consider it arguable that in the face of parental preference for a named school, the Tribunal did not go on to determine the issue of incompatibility with reference to [School O] in particular.
>
> 41.The Respondent's position statement (p 201-202 FTT bundle asserted that [C's] attendance at [School O] would be incompatible with the provision of efficient education for others and the efficient use of resources. I consider it is arguable that the Tribunal failed to deal with the issue of incompatibility under section 33(4) and what 'reasonable steps' could be taken by [School O] to address incompatibility.
>
> 42.In reaching my decision to grant permission on this ground, I have taken into account that a school considered 'unsuitable' under section 39 may still be named under section 33 by the taking of reasonable steps to avoid incompatibility (*ME v LB Southwark*).
>
> 43.Further, I consider it arguable that the Tribunal omitted to consider the separate test to apply in the face of parental preference under section 9 EA explained in *IM v London Borough of Croydon*.
>
> 44.For these reasons I grant permission to appeal on ground 2.

The parties' submissions

39. As indicated above, the parties in this case were largely agreed on the relevant statutory framework and applicable legal principles in this case. They did, however, differ as to how the legal framework should have been applied by the First-tier Tribunal in this case.

40. Mr Chothi for the appellant argues that the First-tier Tribunal failed to consider section 9 of the EA 1996. He submits that, where a parent seeks placement at a particular mainstream school, section 9 mandates that 'real weight' should be given to that preference. He submits that the First-tier Tribunal should have found the appellant's preferred school to be appropriate and considered whether the additional cost of the preferred school was 'unreasonable' in the section 9 sense. He submits that the Tribunal should have applied section 33(4) CFA 2014 and should have considered what reasonable adjustments would have supported C's attendance at School O, and that the Tribunal made insufficient effort in that respect, wrongly assuming that C could not cope with a class of 30 although she had attended a mainstream nursery. He submits that the First-tier Tribunal should have taken account of the parents' preference for a 'mainstream experience'. Alternatively, he submits that if the Tribunal considered it did not have enough evidence about School O, it should have adjourned to enable that evidence to be obtained.

41. Mr Thomas for the local authority accepts that the First-tier Tribunal failed to refer to section 9 of the EA 1996. However, he submits that (as the Court of Appeal accepted in the case of *C v Buckinghamshire* [1999] ELR 179), it would have made no difference to the outcome because consideration of section 9 of the EA 1996 encompasses consideration of whether the parents' requested school is incompatible with the efficient education of the child so that a school that was 'unsuitable' when the section 39(4) test was applied would inevitably also be 'not appropriate' for naming under section 39(5), even if regard was had to the wishes of the parent as required by section 9. Alternatively, he submits that as section 9 is only a weak 'have regard' duty, the Tribunal had in substance complied with it by considering the section 39(4) test and the unsuitability of School O would inevitably have meant that the Tribunal would have decided to name School S in any event. He further submits that there was no error in relation to failure to apply section 33(4) because it did not apply in this case. The local authority was not relying on the exception in section 33(2)(b), it had complied with the duty under section 33(2) by naming School S as a mainstream school. He further submits that this was an experienced Tribunal panel who can reasonably be assumed to have had in mind when considering the appeal the obligation on all mainstream schools under section 66(2) CFA 2014 to use reasonable endeavours to secure special educational provision to meet a pupil's special educational needs, and the obligations under the Equality Act 2010 to make reasonable adjustments for, and not discriminate in relation to, disabled pupils.

Analysis and conclusions

42. I have no difficulty in concluding that the local authority is right that the 'reasonable steps' duty in section 33(4) was not relevant in this case. In the light of the legal framework that I have set out above, and in particular the Court of Appeal's decision in *MH,* Philip Mott QC's decision in *Medway* and Judge Ward's decision *KC v London Borough of Hammersmith and Fulham*, it is clear that the duty under section 33(2) to name a mainstream school unless that is incompatible with the wishes of the parent or the provision of efficient education for others is

complied with if the local authority names **a** mainstream school in the EHC Plan. It is not the function of section 33 to provide a further specific right for parents to request a particular mainstream school. The right to request a particular school is dealt with in section 39. Further, section 33(4) is not imposing a general obligation on a local authority/governing body/proprietor/principal to take reasonable steps to prevent incompatibility with the efficient education of others in relation to every mainstream school a parent might request. Section 33(4) (like Section 33(3)) only applies where the local authority is relying on the exception in section 33(2)(b) to resist parental preference for a specific mainstream school (or, in the case of section 33(3), to resist parental preference for mainstream schools in the local authority's area generally). In this case, the local authority was not relying on that exception. Section 33(4) did not apply.

43. I equally have no difficulty in concluding that the First-tier Tribunal erred in law in failing to address section 9 of the EA 1996 when considering whether it was 'appropriate' to name the local authority's preferred school under section 39(5). It is clear from the authorities above that section 9 applied and needed to be considered at that stage.

44. The issue that is more difficult is whether that failure was material in this case. I do not accept that the fact that section 9 is only a 'have regard' duty rather than a duty to achieve a particular result means that it will always be an immaterial error if a Tribunal fails to have regard to it. It is clear from the authorities, particularly those in relation to costs that I have mentioned above, that in many cases the application of section 9 will in practice result in a particular outcome (eg the naming of the cheaper placement when the relative costs are properly calculated in accordance with the guidance in the authorities). It seems to me that in those cases that is because there is no other rational reason for not complying with the general principle that a child should be educated in accordance with the wishes of their parent.

45. In this case, neither party before the Upper Tribunal has advanced their case on the basis that the relative costs of the two placements would have determined the outcome one way or the other, although there was some suggestion to that effect in Mr Thomas' submissions for the local authority. There was some evidence as to the costs of the two placements before the Tribunal, but the Tribunal did not consider that evidence because it did not need to for the purposes of section 39(4) having concluded that School O was not suitable. However, I note (for what it is worth) that the information provided as to the relative transport costs to the two placements is indicative that School O may be a significantly more expensive placement. If so, of course, application of Section 9 would result in School S being named regardless of the arguments that the parties have raised on this appeal.

46. The parties' focus in this appeal as regards the application of section 9 has been on the First-tier Tribunal's conclusion that School O was unsuitable. Mr Thomas says that the same factors would have led to School S being named if section 9 had been specifically addressed. Mr Chothi says that the Tribunal's decision on

suitability was flawed in ways that would have made a difference if section 9 had been considered.

47. One issue that is relevant to assessing whether or not the failure to have regard to section 9 is material in this case is whether or not the test in that section for whether a placement is 'compatible with the provision of efficient instruction and training' is the same thing in substance as the test in section 39(4)(a) of whether a placement is 'unsuitable for the age, ability, aptitude or special educational needs of the child or young person concerned'. The parties were equivocal in their answers to this question when I asked them at the hearing, so the point was not fully argued, but it seems to me that, as a matter of ordinary meaning, the concept of "efficient instruction and training" is different to suitability. It is, for example, quite possible as a matter of ordinary English to conceive of teaching being suitable but inefficient or efficient but unsuitable. I further observe that, in the light of the authorities discussed above (in particular Judge Mesher's decision in *NA v London Borough of Barnet*), 'incompatibility' is a strong test. It encompasses consideration of what can be done to avoid the incompatibility. In that respect, the test of 'incompatibility' can be regarded as carrying within it the need to consider similar matters to those that section 33(4) would have required the Tribunal to consider in this case, if it had applied, but with the difference being that, while section 33(4) is a duty to take reasonable steps to address incompatibility with the efficient education of others, section 9 would in addition require consideration of what steps could be taken to avoid incompatibility with the provision of efficient instruction and training for C herself. In contrast, I am not convinced that the test of whether a school is 'unsuitable' under section 39(4)(a) necessarily encompasses the same sort of consideration (although in the ordinary course the Tribunal will in deciding whether a school is suitable bear in mind the various statutory duties on the school and the local authority that I have referred to above to make appropriate provision for children with special educational needs).

48. It seems to me, therefore, that it is possible that if the Tribunal had considered section 9, it might have reached the conclusion that naming School O would not be incompatible with the provision of efficient instruction and training, so that (if the cost of both placements was equal) the Tribunal would have had to have regard to the general principle that C should be educated in accordance with her parents' wishes. However, the situation would then have been that the Tribunal would still have had before it a choice to make between two 'adequate' schools (to borrow the neutral term used in that situation by the Court of Appeal in *C v Buckinghamshire*). In those circumstances, the Tribunal would have been required to compare the two schools again and decide which school should be named in Section I, having regard to the wishes of the parent, but not being bound to comply with them because that is not the effect of section 9.

49. It is at that stage of the analysis that it seems to me it can be said with certainty that consideration of section 9 would not have led to a different result in this case. That is because the Tribunal's decision in substance contains all it needs to contain to constitute a proper application of section 9 to the question of which school it is 'appropriate' to name in Section I for the purposes of section 39(5):

a. First, it must be remembered that there is no ground of appeal (on which permission was granted) that challenges the Tribunal's conclusion on 'suitability' for the purposes of section 39(4)(a). As such, when applying section 9, the Tribunal would still need to take into account when considering whether it was 'appropriate' to name School O that it had found it to be unsuitable. As the authorities above indicate, normally an unsuitable school will not be 'appropriate'.

   (I add here that, although permission was not granted to challenge the Tribunal's decision on 'suitability', some of Mr Chothi's arguments did appear to be directed at that conclusion. In particular, he criticised the Tribunal's conclusion that a class size of 30 was unsuitable for C, pointing out that she had been in a mainstream nursery and would have full-time 1:1 support. For completeness, I record that these are not in my judgment good grounds of challenge to the Tribunal's decision. The evidence was that C's nursery provision consisted of a small group of 12-15 children supervised by 3 adults. It cannot be said that it was perverse in the light of that evidence for the Tribunal to conclude that a class size of 30 was unsuitable. Further, the Tribunal had plainly not left out of account in assessing the suitability of School O that C would have full-time 1:1 support because it mentions it again in [30].)

b. Secondly, the Tribunal did have regard to parental preference. In line with the guidance of Thorpe LJ in *C v Buckinghamshire* case set out above, the Tribunal considered the nature of that preference and the reasons for it. As it was entitled to do, it appears to have given somewhat less weight to that preference than it might otherwise have done for two reasons: (i) because the parental objection to School S was in part because the appellant regards it as not providing a 'mainstream experience', but as the Tribunal explained at [29], School S is a mainstream school and placement in the resource base will provide opportunities for interaction with mainstream peers; and (ii) because it did not consider that the appellant's concerns about C mimicking negative behaviours from other children with SEN needs was a particularly good reason for objection to School S. As the Tribunal put it in [30], *"it is not beyond possibility that she may pick up and mimic negative behaviours from children in a mainstream setting"*.

c. Thirdly, the Tribunal identified several respects in which School S provided educational advantages for C that she would not have at School O, including not only the issue of class size (which was relevant both to her learning style and need for small group work, but also to her sensory issues), but also the availability of onsite OT and SLT which the Tribunal considered would be beneficial for C.

50. Given its reasoning, it seems to me to be inevitable that if the Tribunal had considered section 9 it would still have arrived at the conclusion that School S was the 'appropriate' school to name in Section I. This case really is very much

on 'all fours' with the *C v Buckinghamshire* case in this respect. As Sedley LJ explained in that case at 188:

> I see no basis in the statute for requiring a tribunal which finds that two schools are adequate but that one is markedly more suitable than the other to the child's special needs to ignore the difference and abdicate its judgment in favour of the parents'. … There is all the difference in the world between the argument (rejected in *R v Cheshire County Council ex parte C* [1998] ELR 66) that a local education authority or a tribunal is bound to specify the best of the adequate schools irrespective of cost and the proposition that, where cost is equal, the authority or tribunal may choose the most appropriate of the adequate schools even if the parents favour a less appropriate one. The latter is what happened here; it happened after full consideration had been given to the parents' reasons for making a different choice; and it is in my view inconceivable that it could have made any difference had the tribunal added in the bare fact that the school which it judged more appropriate to N's needs was not the one favoured by the parents.

51. Finally, I need to deal with Mr Chothi's argument that the Tribunal should have adjourned to allow further evidence to be obtained from School O. I do not consider that the Tribunal erred in law in this case in proceeding on the basis of the evidence it had. The appellant was represented by an experienced advisor. She had not sought an adjournment because a witness from School O was not available, although it ought to have been obvious that the lack of a witness from the school would be disadvantageous to the appellant's case. Although a Tribunal may err in law if it fails to raise the question of an adjournment of its own motion in circumstances where a party has not had a reasonable opportunity to put their case, or where the Tribunal does not have before it sufficient evidence to determine whether any school is suitable, or to determine some other issue that is crucial to the fair and just determination of the appeal, this was not such a case. The appellant had had a reasonable opportunity to advance her case and the Tribunal had sufficient evidence before it both to determine that School S was suitable and to make a determination about the suitability of School O. It could have had more evidence about School O, and it might have been better if it did, but it was not an error of law to proceed on what it had.

Anonymity

52. At the hearing (which was held in public), the appellant, through Mr Chothi invited me to make an order anonymising the appellant and C. He said that the appellant was 'a very private person' and that he considered the Upper Tribunal should in any event act of its own motion to protect the identity of C, given her age, needs and vulnerability. Mr Thomas for the local authority agreed. Both parties also agreed that in order to achieve anonymity for C it would in practice be necessary to anonymise the appellant and the schools.

53. I remind myself that I must not direct anonymity merely because the parties agree. The open justice principle is important, and publication of parties' names is important to the effectiveness of that principle. However, these proceedings are concerned with the upbringing and education of a child whose age and needs are such that she can have no say in these proceedings. The case was heard in private before the First-tier Tribunal and the appellant (and C) could reasonably assume when they commenced these proceedings that their identities would not enter the public domain as a result. In this case, I consider that the appropriate balance between C's rights under Article 8 of the European Convention on Human Rights is struck by holding this hearing in public and publishing this judgment. The names of C and the appellant add very little to the public interest in open justice in this case. On the other hand, the impact on them of their identities being included in this judgment (which will remain accessible to the general public online indefinitely) could be significant. I therefore make an order under rule 14 of the Upper Tribunal Rules in the terms set out at the start of this decision.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 7 July 2025