

Neutral Citation Number: [2026] UKUT 426 (AAC)
Appeal No. UA-2026-001157-JR

RULE 14 ORDER: No one shall publish or reveal the name or address of C, who is the child involved in these proceedings, or any information likely to identify him, including the name of his parent (the respondent, DMS) and C's school. *Breach of this order may be a contempt of court, punishable by imprisonment, fine or other sanction.*

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

LONDON BOROUGH OF WANDSWORTH

Appellant

- v -

DMS

Respondent

Before: Upper Tribunal Judge Stout
Hearing date(s): 23 October 2026
Mode of hearing: By video

Representation:
Appellant: Tom Wilding (counsel)
Respondent: In person

On appeal from:
Tribunal: First-Tier Tribunal (Health, Education and Social Care Chamber) (Special Educational Needs and Disability)
Judge/Panel: Tribunal Judge M Johnson, Specialist Member R J Parsons
Tribunal Case No: EH212/25/00029
Tribunal Venue: By video
Hearing Date: 30 March 2026

SUMMARY OF DECISION
SPECIAL EDUCATIONAL NEEDS (85)
The First-tier Tribunal treated the local authority as having been automatically barred for failing to send the parent a paper copy of the bundle as well as an electronic copy. The Tribunal refused the local authority's application for reinstatement and excluded the local authority's representative from the hearing. The local authority sought

permission to apply for judicial review of the Tribunal's decision on the basis that it was a "nullity".

The Upper Tribunal holds:

(1) The appropriate route for challenging the First-tier Tribunal's decision was an appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007). Having regard to section 18(6) of the TCEA 2007 and the Lord Chancellor's direction under Part 1 of Schedule 2 to the Constitutional Reform Act 2005, judicial review in the Upper Tribunal was not therefore available. However, the Upper Tribunal has power under rule 7(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to waive the irregularities in the way in which the proceedings were commenced and to allow the application to proceed as an application for permission to appeal. It was appropriate to exercise that power in all the circumstances of this case.

(2) Where a case management direction provides that the local authority will be automatically barred if it fails "without reasonable explanation" to comply with the direction, it does not have the effect of automatically barring a local authority that fails to comply: a judicial determination must first be made as to whether the local authority had a reasonable explanation for the failure: *London Borough of Enfield v NH and anor (SEN)* [2019] UKUT 1 (AAC), [2019] AACR 19 applied. Automatic barring directions in this form under rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 are misleading and should be avoided in future. In standard case management directions, it is likely to be preferable to use the discretionary barring power in rule 8(4)(a).

(3) The First-tier Tribunal's direction in relation to the provision of a paper bundle had, with effect from 15 July 2025, been superseded by paragraph 53 of the *Practice Direction on Procedure for the Preparation of Bundles in the Special Educational Needs and Disability and Disability Discrimination in Schools jurisdictions of the Health, Education and Social Care Chamber*. Accordingly, a paper copy only needed to be supplied if it was "specifically and reasonably requested". No such request had been made, so the First-tier Tribunal had erred in treating the local authority as having failed to comply.

(4) The First-tier Tribunal's refusal to reinstate the local authority was also perverse. Barring and strike-out are measures of last resort. The discretion to make them, or to refuse to reinstate, needs to be exercised in accordance with the overriding objective, taking into account the nature and extent of the default and whether there is any prejudice to the other party or the fairness of the hearing that cannot appropriately be remedied by way of an order for costs or other case management direction. In this case, the fairness of the hearing had not been affected because the parent had the electronic bundle and had printed her own paper copy nearly seven months before the hearing. Any prejudice to the parent as a result of having to print her own copy could have been remedied by way of a costs order if the Tribunal considered that appropriate.

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 procedural irregularities in the commencement of these proceedings are waived under rule 7(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The application for permission to apply for judicial review is treated as an application for permission to appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal is removed as a respondent to these proceedings and DMS is added as respondent to the appeal.

Permission to appeal is granted.

The appeal is allowed. The decision of the First-tier Tribunal involved errors 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 new tribunal panel at an oral hearing.

REASONS FOR DECISION

Introduction

1. In these proceedings, the London Borough of Wandsworth (**the LA**) seeks to challenge, by way of an application for judicial review, a decision of the First-tier Tribunal dated 7 April 2026. The First-tier Tribunal's decision was made on an appeal brought by the respondent parent (**DMS**) under section 51(2)(e) of the Children and Families Act 2014 (**CFA 2014**) in respect of Sections B, F and I of her son's (**C's**) education, health and care plan (**EHC plan**).

2. By that decision, the First-tier Tribunal treated the LA as barred from participating in the proceedings, refused to lift the bar, excluded the LA's representative from the hearing and proceeded to make a decision in relation to the appeal in the absence of the LA.

3. By a notice sent to the parties on 9 September 2026, I indicated my provisional view that there were errors of law in the First-tier Tribunal's decision, but that judicial review was not the appropriate route to challenge that decision, and an application for permission to appeal ought first to have been made to the First-tier Tribunal. I listed the case for a "rolled-up" hearing to deal with the question of whether permission should be granted and, if so, the determination of the case on its merits.

4. The issues for determination at this hearing were accordingly:

    a. Whether permission to apply for judicial review should be granted;
    b. If not, whether the Upper Tribunal has power to convert the application to an appeal under section 11 of the Tribunals, Courts and Enforcement Act 2007 (**TCEA 2007**) and, if so, whether it should exercise that power;
    c. If permission to appeal is granted, to consider the substantive merits of the case and make a final determination in the matter.

5. After setting out the background to this matter, I take the issues in that order. In addition, it has become necessary to consider whether the appeal has become academic. The structure of this decision is therefore as follows:

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Factual background

6. The underlying appeal to the First-tier Tribunal is an appeal by DMS in relation to Sections B, F and I of her son's EHC plan. By the time of the hearing before the First-tier Tribunal on 30 March 2026, issues in relation to Section I had been resolved, and there was agreement in relation to much of Sections B and F, but there were some issues outstanding, most significantly in relation to C's diagnosis of dysarthria and whether speech and language therapy was reasonably required by way of provision to meet that need.

7. Upon registration of DMS's appeal to the First-tier Tribunal, the First-tier Tribunal issued standard directions on 12 May 2025 (**the Case Directions**). These listed the case for a final hearing on 30 March 2026 and included the following direction in relation to the bundle:

> **4. Issuing the Final Tribunal Bundle**
>
> **By 12 noon on the 1/09/2025 the LA must prepare and send an electronic copy of the final tribunal bundle to the Tribunal and parent(s), the young person or alternative person.**
>
> a. The final tribunal bundle contains all the written evidence which is to be considered in the appeal. It must contain the documents submitted by the parent(s), young person or alternative person and LA and any requests for changes and orders made by the Tribunal. It is to be prepared so that it complies with the latest Preparation of Bundles Guidance (which is attached).
>
> b. Any evidence not received by the Tribunal by the final evidence deadline must not be included in the tribunal bundle.

> c. The LA must also, by the deadline, deliver to the parent(s), young person or alternative person **a paper copy** of the tribunal bundle.
>
> d. If the LA does not comply with the direction and fail without reasonable explanation to provide the tribunal hearing bundles by this deadline, then the further participation of the LA in the appeal shall be automatically BARRED pursuant to rule 8(2) of the Tribunal Procedure Rules 2008 because they have failed to comply with a direction that stated that failure to comply would lead to their further participation being barred.
>
> If the LA is barred, then the appeal will proceed to a hearing at which the LA will not be represented or participate unless an application is made by them to be reinstated and exceptional reasons for failure to comply with the direction are accepted by the Tribunal.

8. The "latest Preparation of Bundles guidance" referred to in paragraph 4a was the *Practice Direction on Procedure for the Preparation of Bundles in the Special Educational Needs and Disability and Disability Discrimination in Schools jurisdictions of the Health, Education and Social Care Chamber* (**the Practice Direction**). That Practice Direction was made on 22 April 2025 (see page 123 of the Upper Tribunal Bundle), and came into force on 15 July 2025. As relevant to this appeal, it provided as follows (emphasis as in the original):

> **Overview**
> 1. This Practice Direction sets out certain ground rules for the preparation of hearing bundles. It is directed towards judicial office holders, professional advisers, representatives, local authority and responsible body staff, and other interested persons. …
>
> 8. Unless stated otherwise, any reference to "the Rules" in this document is a reference to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (as amended), and any reference to a numbered rule is to the rules so numbered in the Rules.
>
> 9. This Practice Direction supplements the Rules. In the event of a conflict between the Rules and this Practice Direction, the Rules take precedence.
>
> 10. Parties have the option to apply to the Tribunal, in accordance with rule 6, for further Directions if circumstances arise that suggest an exception should be made to this Practice Direction.
>
> **Commencement of the Practice Direction**
> 11. This Practice Direction shall have effect for bundles being used in any SEND or DD final hearings listed to take place after 15 July 2025. …
>
> 13. The Tribunal will expect this Practice Direction to be followed and will look to enforce the same. Parties may apply to the Tribunal if the other party has not complied.

> **Practice and Procedure: All appeals and claims**
> …
> 16. This Practice Direction will apply to all bundles being used in all final hearings listed to take place after 15 July 2025.
>
> 17. This Practice Direction applies whether a bundle is being issued for the first time or is being re-issued.
>
> 18. This Practice Direction applies whether the bundle is prepared in electronic or paper form.
>
> 19. A failure to comply with the deadline imposed for production of the hearing Bundle may lead to the automatic barring of the Local Authority (LA) or Responsible Body (RB) from further participation in the proceedings and may lead to the LA or RB response to the appeal being struck out. Reinstatement to the proceedings will be at a Judge's discretion. …
>
> **Format of the bundle**
> 26. Bundles must be produced electronically by the LA or RB in PDF format. …
>
> **Submitting the Tribunal Bundle**
> 50. By the Tribunal Bundle deadline, the LA must send the tribunal bundle electronically to HMCTS' Document Upload Centre (details of which can be obtained from the Tribunal).
>
> 51. The appellant must be copied into the email and receive the bundle at the same time. …
>
> 53. Paper bundles need only be supplied by the LA or RB to the appellant/claimant if one is specifically and reasonably requested. **The Tribunal's default position is electronic.**

9. At 11.51am on 1 September 2025, a Tribunal Officer for the LA sent an electronic version of the Hearing Bundle to the First-tier Tribunal, copying in DMS.

10. By email of 8 September 2025 at 00:57, DMS wrote to the First-tier Tribunal, copying in the LA, apologising for the late submission of her Case Review Form and stating "I have not received a paper bundle from the LA as yet. I understood it to be mandatory?"

11. On 9 September 2025 at 10:21, the LA's Tribunal Officer replied: "I would be happy to arrange for a paper copy of the hearing bundle to be delivered to your home address. We usually provide a paper copy only upon request, as most parents find the electronic version sufficient. Please let me know if you would still prefer a paper copy, and I will organise delivery as soon as possible."

12. DMS replied on 11 September 2025 at 18:24 by attaching a letter to the First-tier Tribunal, together with a copy of the First-tier Tribunal's Case Directions. The

letter had DMS's home address at the top. The letter stated that the LA had not provided a paper bundle, that according to the First-tier Tribunal's directions the LA was therefore barred from the appeal process and could not be represented.

13. Although DMS had made clear that a paper bundle had not been provided, I observed at the Upper Tribunal hearing that she had not specifically responded to the LA's question as to whether she required a paper copy in addition to the electronic version. At this hearing, DMS replied that she believed this was because she had around this time had a conversation with the LA's representative and told them that she had printed her own copy.

14. Neither the LA nor the First-tier Tribunal responded to DMS's letter of 11 September 2025.

15. Six months later, on 16 March 2026, with the final hearing now two weeks away, DMS wrote to the First-tier Tribunal, reiterating that the LA had not provided a copy of the paper bundle and again requested that the LA be barred from the final hearing. DMS did not copy the LA into her email.

16. On 19 March 2026, Tribunal Judge Poynter considered DMS's email and observed as follows:

> 5. The Parent's request has not been submitted via a SEND7 Request for Change form and I cannot see that the email has been copied to the LA. I am therefore mindful that … I do not have any information from the LA about whether or not they say that they have complied with the directions, although the correspondence that the Parent has attached to their request would suggest that a paper copy of the bundle has not been provided by the deadline set out in the Tribunal's directions.
>
> 6. Pursuant to the [Case Directions], if the LA has not provided a paper copy of the bundle to the Parent by 1/09/2025, then they are automatically barred from further participation in the appeal. It is not necessary for the Tribunal to make a further order barring the LA. It is open to the LA to make an application to be reinstated, as set out in the directions of 12/05/2025 and any such application would be considered by the Tribunal panel at the start of the final hearing on 30/03/2026.
>
> 7. No further order or directions required.

17. By email of 25 March 2026, DMS emailed the First-tier Tribunal again attaching a SEND 7 form "to officially strike out the LA on the basis that they have not complied with a court order". This email was also not copied to the LA.

The First-tier Tribunal's decision

18. There is some dispute between the parties as to what exactly happened at the hearing on 30 March 2026, but I do not need to resolve that for the purposes of this appeal, which can fairly be determined by reference to the First-tier Tribunal's written reasons. The First-tier Tribunal dealt with the barring issue in its decision

under the heading "Oral application by the LA representative for the lifting of the bar".

19. The First-tier Tribunal took the order of Judge Poynter as its starting point and proceeded on the basis that the LA had been automatically barred as a result of failing to provide a paper copy of the bundle by 12 noon on 1 September 2025.

20. The First-tier Tribunal records, at [14] of its decision, that the LA representative initially informed the tribunal that a paper copy had been sent after the deadline, but on that being challenged, and the LA representative making a phone call to check, this was corrected to admit that no paper copy had been sent.

21. At [16] the First-tier Tribunal records the LA's representative as explaining that:

> …the LA had not complied with the Case Directions because the Directions were superseded by the Senior President of the Tribunals Practice Direction on Procedure for the Preparation of Bundles in the Special Educational Needs and Disability and Disability Discrimination in Schools jurisdictions of the Health, Education and Social Care Chamber (hereafter referred to as 'the Practice Direction'). The LA rely on the part of the Practice Direction which says that electronic bundles are the default position and a paper bundle need only be supplied where it is specifically and reasonably requested.

22. At [17] the First-tier Tribunal set out its view that the Case Directions, having been made pursuant to the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (**the FtT Rules**), took precedence over the Practice Direction by virtue of paragraph 9 of the Practice Direction. The First-tier Tribunal further noted at [22] that the LA had not sought to vary the Case Directions or sought to clarify any uncertainty. The First-tier Tribunal stated at [21] that "Barring is automatic as a direct application of rule 8(2) of the [FtT Rules]". The First-tier Tribunal at [23] observed that the LA's application and explanation had been made at the latest possible stage and showed "no regard to the overriding objective" and "the fundamental need to comply with Case Directions". At [24], it recorded its finding that the failure to comply was "an intentional act". At [25], the First-tier Tribunal concluded that:

> 25. Having considered the oral submissions made by the LA representative … and taking into account the overriding objective, we were not satisfied that the explanation provided by the LA was sufficient to justify a failure to comply with Tribunal issued Case Directions. The panel found that the LA would remain barred from all further participation and the LA representative removed himself from the oral hearing at the request of the panel.

23. The LA representative, having left the hearing, then made a written application later that day for the lifting of the bar. The First-tier Tribunal dealt with this application in its final decision too. It did so by essentially repeating its reasons for rejecting what it regarded as the LA's oral application, adding in criticism of the LA's representative for initially wrongly saying that a paper bundle had been

provided, and pointing out that DMS had provided the LA with an address to which to send the bundle at the top of her letter of 11 September 2025. The First-tier Tribunal responded to the LA's expressed concern that it had not had notification of a barring order by stating at [36] that none was required because "The LA were barred the moment they failed to comply with the Case Directions and adequate notice of this is found in the Case Directions of 12 May 2025".

24. At [36] the First-tier Tribunal considered the LA's submission that the breach was "minimal" and had "not resulted in prejudice to the Appellant". The First-tier Tribunal noted that the appellant had been "put to unnecessary cost and inconvenience in printing her own bundle". The Tribunal went on to emphasise the importance of compliance with directions, which it stated were issued to ensure the fair, efficient and timely management of the appeal, and that it is not open to a party to opt not to comply with a direction on the basis that the breach will 'not really impact' the other side. The Tribunal reiterated that the LA had been aware of the breach since 9 September 2025 but had not rectified it or applied to lift the bar until the day of the hearing. The First-tier Tribunal concluded that the application to lift the bar should be dismissed and the LA remain barred.

25. The First-tier Tribunal went on to decide all outstanding issues between the parties in relation to Sections B and F of the EHC plan in favour of DMS, including directing the inclusion in Section F of speech and language therapy. The First-tier Tribunal's decision was sent to the parties on 7 April 2026.

26. On 10 April 2026, the LA applied to the Upper Tribunal for permission to apply for judicial review of the First-tier Tribunal's decision. The LA opted for that route rather than appealing because its case was that the First-tier Tribunal's decision was so procedurally irregular that it was a legal "nullity". DMS provided a full response to the application on 20 April 2026.

27. On 26 August 2026, the LA's application was registered by the Upper Tribunal and referred to me. On 31 August 2026 I made observations and directions listing this hearing as already set out in the Introduction above.

Whether permission to apply for judicial review should be granted

28. Both parties now agree that the answer to this question is "No". The Upper Tribunal's judicial review jurisdiction is set out in section 15(1) of the Tribunals, Courts and Enforcement Act 2007 (**TCEA 2007**). By section 15(2), the Upper Tribunal's judicial review jurisdiction may only be exercised: (a) if the conditions in section 18 are met; or (b) if the Upper Tribunal is authorised by the High Court to proceed even though not all of those conditions are met. There is no High Court authorisation in this case, so the conditions in section 18 need to be met. By section 18(2), the Upper Tribunal only has the function of deciding an application for permission to apply for judicial review if Conditions 1 to 4 are met. Condition 3 (set out in section 18(6)) is that "the application falls within a class specified for the purposes of this subsection in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005". The Lord Chancellor's direction under that provision specifies only the following relevant class of case:

> Any decision of the First-tier Tribunal made under Tribunal Procedure Rules or section 9 of the 2007 Act where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within paragraph (b), (c), or (f) of section 11(5) of the 2007 Act.

29. The LA's argument in its application as to why it had brought the application by way of judicial review rather than seeking permission to appeal the First-tier Tribunal's decision under section 11 of the TCEA 2007 was that the decision of the First-tier Tribunal was a "nullity" and therefore could not be the subject of an application for permission to appeal. The LA now accepts that argument was misconceived and that the grounds on which it sought judicial review of the First-tier Tribunal's decision are standard "point[s] of law arising from a decision made by the First-tier Tribunal other than an excluded decision" within section 11(1) of the TCEA 2007 and, as such, that there is a right of appeal against the decision to the Upper Tribunal under that Act.

30. It follows that the Upper Tribunal does not have the function of deciding the application under section 18(2), and if the application were to proceed as an application for judicial review, the Upper Tribunal would be required to transfer it to the High Court: see section 18(3).

Whether the Upper Tribunal has power to convert the application to an appeal under section 11 of the TCEA 2007 and, if so, whether it should exercise that power

31. Mr Wilding for the LA provided detailed submissions in his skeleton argument for this hearing dealing with the question of the Upper Tribunal's power to convert this application for judicial review to an application for permission to appeal. In the light of his submissions, DMS agreed that the Upper Tribunal has power to convert the application to an application for permission to appeal under section 11 of the TCEA 2007. I am satisfied that is correct too for the following reasons.

32. Section 11 of the TCEA 2007 provides that there is a right of appeal on any point of law arising from a decision made by the First-tier Tribunal (other than an excluded decision), subject only to the requirement that permission is granted by either the First-tier Tribunal or the Upper Tribunal. There is no requirement in the Act itself for an application for permission first to be made to the First-tier Tribunal. Nor is there any requirement as to the form or procedure that must be used for making an application.

33. Rules 21(3) and (4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (**UT Rules**) provide that an application for permission to appeal must be made in writing and must include the information set out in rule 21(4). There is no requirement to use a specific form, and the information included by the LA in its application for judicial review contained all the information required by rule 21(4). However, rule 21(2) provides that a person may apply to the Upper Tribunal for permission to appeal against the decision of another tribunal only if they have first made an application for permission to appeal to the tribunal that made the challenged decision, and that application has been refused or not admitted. The LA in this case made no such application, but I agree with Upper Tribunal Judge

Mark in *ZN, BB, JHS v London Borough of Redbridge (HB)* [2013] UKUT 0503 (AAC) (***Redbridge***) that the Upper Tribunal has power under rule 7(2) to waive any failure to comply with the Rules if it considers it just to do so. That discretion is to be exercised in accordance with the overriding objective in rule 2.

34. I therefore need to consider whether I should exercise that discretion in this case and, if so, whether I should grant permission to appeal. DMS submits that I should not because (in summary) the LA's use of the incorrect process has bypassed the usual step of applying to the First-tier Tribunal for permission to appeal, that the First-tier Tribunal would have refused permission, the LA's underlying case in relation to the appeal is hopeless, the LA breached numerous other orders and its decision to seek judicial review rather than appeal has resulted in delay, with the application now made for permission to appeal having been made outside the relevant time limit.

35. I have considered DMS's written and oral submissions with care, but in my judgment it is appropriate both to exercise my discretion to waive the procedural irregularities in the commencement of these proceedings and to grant permission. For the reasons I go on to deal with below, this is a meritorious appeal. The First-tier Tribunal's decision in this case was in clear error of law and the result has been a fundamental breach of natural justice because the LA was not permitted to participate in the hearing when it should have been.

36. The LA has provided a witness statement from Mr Potts, its SEND Tribunal and Mediation Manager, explaining that the First-tier Tribunal proceedings below, and the application for permission to apply for judicial review, were handled by a consultant who was working for the LA on an interim basis pending the appointment of Mr Potts and a permanent team. That does not justify or excuse any failures by the consultant, or make the LA any less responsible for them, but I accept Mr Potts' account as an honest explanation of why the application came to be made in a way that the LA now accepts was incorrect.

37. It is possible that the error made by the First-tier Tribunal in this case would have been recognised and rectified if the LA had made an application for permission to the First-tier Tribunal as it should have done (since permission applications in the First-tier Tribunal are commonly dealt with by a judge other than the judge who chaired the panel that made the decision). The LA's erroneous decision to seek judicial review rather than make an application for permission to appeal may therefore have caused delay. However, it has caused no more delay than would have been the case if the First-tier Tribunal had refused permission to appeal and the LA had to renew its application to the Upper Tribunal. Indeed, this matter has probably reached a final hearing in the Upper Tribunal more quickly than it would have done if that had been what happened because: (a) the LA filed its application for judicial review very promptly, well within the normal appeal time limits; (b) the application did not have to wait to be dealt with by a First-tier Tribunal judge; and (c) the procedural irregularity led to me listing the case for a "rolled-up" hearing, thus cutting out another step in the usual processes.

38. Either way, though, DMS has suffered no material procedural prejudice as a result of the route adopted by the LA. Because this is a meritorious appeal, if it

had taken the correct procedural route, it was always likely to succeed. In the event, by dealing with the case on a "rolled-up" basis as I have done, the overall delay for the parties has been minimised. DMS received notice of the LA's challenge, provided a full response and has had the opportunity to address both the procedural question and the merits. Any delay attributable to the LA's mistake does not outweigh the strong merits of the appeal or the significance of the First-tier Tribunal's error.

39. I therefore waive the procedural irregularities under rule 7(2). I convert the application for permission to apply for judicial review to an application for permission to appeal under section 11 of the TCEA 2007. I remove the First-tier Tribunal as a respondent to these proceedings, and make DMS (who was an "interested party" in the judicial review) the respondent to the appeal. I grant permission to appeal.

The substantive merits

Preliminary observations about the inappropriateness of the automatic barring direction made in this case

40. It is unfortunate that the First-tier Tribunal is, or was in May 2025, still issuing standard directions in the form used in this case. In *London Borough of Enfield v NH and anor (SEN)* [2019] UKUT 1 (AAC), [2019] AACR 19 (***Enfield***) at [10], Upper Tribunal Judge Ward expressed the view that automatic barring directions in this form were ambiguous and unworkable. I would go so far as to add that they are misleading. In this case, the wording led both DMS and the First-tier Tribunal to proceed on a mistaken understanding of its effect. The wording should now be revised to avoid unnecessary expenditure of tribunal resources and costs to the parties. Upper Tribunal Judge Ward explained the problem as follows:

> 10. … I am firmly of the view that by stating that non-compliance with the order will lead to automatic barring, while simultaneously leaving open the possibility that the party who would otherwise be in default can escape being in default if there is a reasonable explanation for their failure, is creating an unworkable ambiguity on the face of the order. If a party might have a reasonable explanation, then a decision is needed as to whether a reasonable explanation has been given or not.

41. In other words, although paragraph 4 of the Case Directions professed to be an automatic barring direction, it was not, because its effect was that the party would not be barred if they had a "reasonable explanation" for the default. As Judge Ward went on to explain, determination of that issue requires a judicial decision to be made, so the barring direction cannot take effect automatically as intended.

42. Judge Ward also drew attention to the decision of Upper Tribunal Judge Jacobs in *SL v SSWP and KL-D* [2014] UKUT 0128 (AAC) (***SL***) in which Judge Jacobs suggests that it will generally be preferable for tribunals to deal with procedural defaults by using the discretionary strike-out powers under what is rule 8(4) of the FtT Rules, rather than making provision for automatic strike-outs or barring under

rule 8(2). Judge Ward expressed agreement with Judge Jacobs, and I add my voice to theirs.

43. Another respect in which the automatic barring provision in these Case Directions could be said to be misleading is because, as a general rule, an automatic barring direction should only be made where the judge is satisfied in principle that if there is failure to comply with the direction, striking out of the whole of the party's case would be an appropriate response to that failure. That is a point that follows from first principles, but it is also in line with the guidance that the Employment Appeal Tribunal has given to Employment Tribunals as regards the use of the equivalent power in the Employment Tribunal procedure rules to make "unless orders". As HHJ Tayler put it in *Ms A Mohammed v Guy's and St Thomas' NHS Foundation Trust* [2023] EAT 16 at [22]:

> An unless order is not just a case management order. Before making an unless order an employment judge must consider with great care what the consequence of non-compliance will be. If an order will result in the entire claim being struck out if there is any material non-compliance the judge must be satisfied that the strike out of the entire claim, that will be the automatic consequence of material non-compliance, is a proportionate response to any material breach of the order, no matter how minor. An unless order is, in effect, a contingent decision to strike out the claim if there is any material non-compliance. The whole point of an unless order is that the dismissal of the claim is automatic without any further consideration of proportionality or the interests of justice.

(See also HHJ Tayler's more detailed guidance in *Minnoch and Others v InterserveFM Ltd and Others* [2023] EAT 35 at [33].)

44. It is undoubtedly important in appeals under section 51 of the CFA 2014 that the LA should prepare the hearing bundle in good time before the final hearing so that both parties and the Tribunal panel are able to be well prepared for the hearing, and the Tribunal is able to review the readiness of the case for hearing. However, where the deadline falls nearly seven months before the hearing, failure to comply precisely on time will not ordinarily, without more, justify barring. The Tribunal must consider the nature and duration of the default and its actual or likely effect on the preparation and fairness of the proceedings. A short delay when the hearing is that far off is unlikely to imperil the fairness of the proceedings. That is particularly so in appeals under section 51 where the First-tier Tribunal is required to consider the child or young person's needs and the position as at the date of the hearing. In many cases much of the relevant documentation will only be created in the six months leading up to the final hearing, so that a bundle produced that early may be largely overtaken by what is treated as "late evidence" under the Practice Direction.

45. As such, the making of an automatic barring direction in these Case Directions was in my judgment misleading in that it implied, and was effectively taken by the First-tier Tribunal in this case as meaning, that failure to comply with the direction even in a minor respect (a day late, say) would, in and of itself, jeopardise the fairness of the proceedings. Patently, however, that was not the case. I can see

that the intention of the Case Directions was for the bundle to have been prepared in time for a Case Review in the fortnight after the bundle was due. There was therefore a purpose to getting the bundle in so early. A process of early case review in this way is sensible. However, it appears from the sequence of events in this case that there was no effective Case Review at that time as DMS's application of 11 September 2025 went unanswered. That is no criticism of the First-tier Tribunal, whose resources are overstretched, but it does point to the need to consider carefully the timing of case management directions to which a draconian automatic barring power is attached.

46. It is apparent from paragraph 19 of the Practice Direction that the Senior President of Tribunals considers that the making of automatic barring orders for failure to comply with bundle deadlines in special educational needs and disability may be appropriate, no doubt in response to a persistent problem of default by local authorities in this jurisdiction. Procedural rigour is important, but care needs to be taken in the operation of such a practice for the reasons I have identified. In particular: (i) the words "without reasonable explanation" must not be included in the direction as including those words means that the barring is not automatic and the direction is ineffective and confusing; and, (ii) timing needs to be considered, with the bundle deadline being closer to the hearing if it is to be made the subject of an automatic barring order.

47. As Judges Ward and Jacobs observed in *Enfield* and *SL*, it may be preferable to rely on the power in rule 8(4)(a) to bar if, when a case is reviewed by a judge prior to hearing, it is found that the LA has not complied with a bundle direction that included the required warning that failure to comply may result in the case being struck out. That power can in principle be exercised without giving the LA an opportunity to make representations (see rule 8(5)), although it will still be necessary for the judge to consider whether it is fair and in accordance with the overriding objective to bar without giving the LA an opportunity to make representations. It will make it more likely to be fair to bar without seeking representations from the LA if the original directions include a specific warning that that might happen.

48. Reliance on rule 8(4)(a) also has the advantage over reliance on the automatic barring power in rule 8(2) in that it will be clear the LA is barred, and from what date, because there will be a judicial determination making that direction. That, in turn, will make it clear from what date the 28-day time limit in rule 8(7) starts to run for the LA to apply for reinstatement. Adopting that approach will also mean that a judge is able to consider the relevant principles (set out below) before barring the LA, and may thereby reduce the number of applications for reinstatement that may have to be dealt with.

49. I further observe that it would help to avoid what happened in this case if the standard directions specifically incorporated the requirements of rule 8(7) for a written application for reinstatement to be sent within 28 days of notice of the barring.

The principles to be applied where a decision about barring or reinstatement is to be taken

50. This appeal is not directed at the making of the barring direction in the first place, but at the First-tier Tribunal's decision of 7 April 2026. However, it follows from what I have said above that the first error that the First-tier tribunal made was in proceeding on the assumption that what purported to be an automatic barring direction actually had that effect when, for the reasons set out above, it did not. That would not, however, have been a material error if the First-tier Tribunal had nonetheless gone on to consider and exercise the discretion that it had as to the consequences of what it regarded as the LA's breach of the Case Directions in accordance with the correct legal principles. Those principles are in substance the same regardless of whether the discretion is being exercised:

    a. Where the LA has been automatically barred, on an application under rules 8(6) and 8(7) to be reinstated;

    b. As was the position in this case, where the LA has not been automatically barred, but the automatic barring direction included the words "without reasonable explanation" and the First-tier Tribunal therefore needs to decide whether the LA had a reasonable explanation for the failure to comply with the Case Directions in order to determine whether the LA has been automatically barred and then, if so, whether it should nonetheless reinstate the LA on application under rule 8(6); or

    c. When deciding whether or not to bar the LA under rule 8(4)(a) on the basis that it has failed to comply with a direction which stated that failure to comply could lead to the striking out of the proceedings or part of them (see my preliminary observations above regarding the use of this power).

51. The principles to be applied are well established. In line with the guidance given by the Supreme Court in *BPP Holdings Ltd v Revenue and Customs Commissioners* [2017] UKSC 55, [2017] 1 WLR 2945 (***BPP Holdings***) at [22]-[26], the principles are similar, but not identical, to those that apply in the courts when considering applications for relief from sanctions. In the courts, the principles are those laid down in *Denton v T H White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926 (***Denton***) in which the Court of Appeal (at [24]) held that the court should: (i) identify and assess the seriousness of the failure to comply; (ii) consider why the default occurred; and (iii) evaluate all the circumstances of the case to enable the court to deal justly with the application.

52. In *Denton* the Court of Appeal (at [32]) held that particular consideration needed to be given to the matters specifically identified in Civil Procedure Rule 3.9(1)(a) and (b), i.e. the need for litigation to be conducted efficiently and the need to enforce compliance with rules, practice directions and orders. Those two factors are important in the Tribunal context too. However, as I held in *MT v Governing Body of A School* [2026] UKUT 42 (AAC) (***MT***) at [31]-[32], in agreement with Martyn Rodger KC, Deputy Chamber President of the Lands Chamber of the Upper Tribunal in *Deane v LB of Newham* [2024] UKUT 300 (LC) (***Deane***) at [50]-[55], in the Tribunal context, it is the overriding objective in rule 2

that principally needs to be considered. That, of course, provides (at sub-section (1)) that the overriding objective of the FtT Rules is to enable the Tribunal to deal with cases fairly and justly. The First-tier Tribunal must seek to give effect to that objective when interpreting any rule or practice direction or when exercising discretion under the Rules (sub-section (3)) and the parties must help the First-tier Tribunal to further the overriding objective and co-operate with each other and the Tribunal (sub-section (4)). As particularly relevant in this context, by sub-section (2), dealing with a case fairly and justly includes: (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; and (e) avoiding delay, so far as compatible with proper consideration of the issues.

53. Consistent with those general principles, Upper Tribunal Judge Ward in *Enfield* emphasised the need to consider the extent of the default both in terms of timing and nature, and whether there was any and, if so, what prejudice to the other party. I would add that the nature and extent of both the default and the prejudice to the other party have to be assessed by reference to their impact on the fairness of the proceedings. Barring, like striking out the whole of a party's case, is among the most draconian steps the First-tier Tribunal can take. It departs from the fundamental principle that both parties should be heard and must therefore be treated as a measure of last resort. If a fair hearing remains possible on the listed date, without postponement or adjournment, that will ordinarily be a powerful consideration against barring or strike-out.

54. That is not to say that there will not be cases where the non-compliance is such that there cannot be a fair hearing, for example where a bundle is produced so late that the other party has insufficient time to familiarise themselves with it before the hearing and the hearing cannot fairly be conducted by reference only to the documents with which the party is familiar. Likewise, barring may be appropriate where late production of a bundle means that steps that would otherwise have been taken in relation to the case before the final hearing by the Tribunal or the other party cannot be taken (such as making directions for, or obtaining, further evidence). There may also be cases where a party's non-compliance reasonably leads to such a loss of confidence in their conduct of the case that it impacts the fairness of the hearing, such as where a party is dishonest or fails to produce relevant documents in circumstances that lead the Tribunal to conclude that there are likely to be other significant documents that have not been disclosed.

55. Even in such cases, though, it will generally be relevant to consider whether the prejudice could be remedied in other ways, such as by drawing adverse inferences against the defaulting party in relation to the issue to which the possibly missing documents or evidence are relevant. Where prejudice to the other party sounds in time or costs, consideration should be given to whether that is more appropriately addressed by way of an order for costs under rule 10 rather than by way of a barring direction.

56. If the First-tier Tribunal has properly directed itself as to the law, and taken into account all relevant and no irrelevant factors, then I agree with Upper Tribunal Judge Ward in *Enfield* at [19] that the Upper Tribunal on appeal will afford the First-tier Tribunal a generous ambit of discretion in what is a case management decision. It will not substitute its judgment for that of the First-tier Tribunal, or lightly regard the Tribunal's exercise of discretion as perverse.

How the First-tier Tribunal erred in law in this case

57. As already noted above at paragraphs 41-43 and 50, the First-tier Tribunal's first error in this case was in regarding the LA as having been barred automatically as a result of not sending a paper copy of the bundle on 1 September 2025 as required by the Case Directions. That error would not, though, have been material if the First-tier Tribunal had gone on to consider and exercise the discretion that it had as to the consequences of what it regarded as non-compliance in accordance with the correct legal principles. However, in this case, I am satisfied that the First-tier Tribunal made a number of further errors of law in barring the LA, and that its decision reaches the high threshold of being perverse.

58. First, in my judgment the First-tier Tribunal erred in law in concluding that there had been any non-compliance by the LA. This is because its analysis of the relationship between the Practice Direction and the Case Directions was wrong. The Practice Direction was made on 22 April 2025 (see page 123 of the Upper Tribunal Bundle) and came into force on 15 July 2025. The First-tier Tribunal was right to note that the Practice Direction provides at paragraph 9 that, in the event of a conflict between the FtT Rules and the Practice Direction, the FtT Rules take precedence. The conflict in this case, however, was not between the FtT Rules and the Practice Direction but between the Practice Direction and case management directions made by the First-tier Tribunal. Directions are not the same thing as the FtT Rules, notwithstanding that they are made under them. The Practice Direction does not state that in the event of a conflict between the Practice Direction and a tribunal case management direction, the case management direction shall prevail.

59. It is, of course, open to the First-tier Tribunal to make directions that depart from the terms of the Practice Direction and, if they do, the directions must be followed. Paragraph 10 of the Practice Direction explicitly envisages the parties being permitted to apply for an exception to be made to the Practice Direction. In this case, the Case Directions were made on 12 May 2025, between the date the Practice Direction was made and the date that it came into force. The Case Directions refer to the new Practice Direction at paragraph 4a and require the electronic bundle to be produced in conformity with it. Given the reference to the new Practice Direction in the Case Directions, I acknowledge that it is arguable that the direction in relation to the paper bundle at paragraph 4c is a direction specifically departing from the Practice Direction, as the First-tier Tribunal in this case effectively regarded it. However, in my judgment, that is not the correct interpretation. Neither party had specifically requested a departure from the Practice Direction, and the Case Directions did not state that the direction at paragraph 4c was intended as a specific departure from the Practice Direction. The Practice Direction provides at paragraphs 11 and 16 that it will apply to "all

bundles being used in all final hearings listed to take place after 15 July 2025". As a matter of construction, therefore, it seems to me that the effect of the Practice Direction was that, from 15 July 2025, it superseded case management directions made previously in cases listed for final hearing after that date. If paragraph 4c of the Case Directions was to take effect as a specific departure from that Practice Direction, once it came into force, in my judgment it needed to say so explicitly. Instead, the natural and ordinary interpretation of the relationship between the Case Directions and the Practice Direction is in my judgment that the Practice Direction superseded the Case Directions. The LA's approach in this case was therefore correct.

60. It follows that the direction regarding the paper bundle in this case was replaced after 15 July 2025 by paragraph 53 of the Practice Direction. A paper copy accordingly needed only to be supplied if "specifically and reasonably requested". DMS in this case made no specific and reasonable request. She asked the LA why no paper bundle had been provided as she believed it to be mandatory, but she did not reply to the LA's specific question as to whether she would like a copy sent to her home address. Instead, she printed her own bundle, and wrote a letter to the First-tier Tribunal seeking confirmation that the LA had been barred for failure to comply. That letter did have her address at the top of it, but it did not answer the LA's question. Rule 2(4) requires the parties to co-operate with each other and the tribunal, but DMS cannot really be criticised for the approach she took because it is the approach encouraged by the terms of the Case Directions - see my observations above at paragraphs 41-51 about the misleading nature of the automatic barring direction in this case. If I am right about the relationship between these Case Directions and the Practice Direction, it would follow that the LA without question had a "reasonable explanation" for not complying with the order for a paper bundle and the LA was therefore not at any point automatically barred.

61. However, even if I am wrong in my analysis as to the effect of the Practice Direction, it is nonetheless the case that the First-tier Tribunal erred in law in regarding the LA's argument about its effect as a factor to weigh in the balance against the LA. That is, first, because even if (contrary to my own conclusion) the LA's argument was wrong in law, it is nonetheless apparent from the LA's emails in September 2025 that it genuinely believed the approach in the Practice Direction applied and that belief was not unreasonable in the circumstances, given the terms of the Practice Direction. Secondly, because the fact that the Practice Direction provides for the default to be electronic bundles unless a paper copy is specifically and reasonably requested should have led the First-tier Tribunal to recognise the very minor nature of both the LA's supposed default and the prejudice to DMS in this case.

62. Moreover, when the First-tier Tribunal moved on to considering whether it should exercise its discretion to reinstate the LA, it made further errors as follows. The cumulative effect of these errors is that the First-tier Tribunal's decision was perverse. In my judgment, the only appropriate decision in this case was that the LA should have been permitted to participate in the hearing.

63. *First,* the First-tier Tribunal failed to recognise the last-resort nature of the power it was exercising. It did not explicitly direct itself to approach the exercise of discretion in that way and it is clear from its reasons that it did not take that approach in substance either.

64. *Secondly*, although the First-tier Tribunal was entitled to give weight to procedural rigour and the importance of compliance with Tribunal directions, the First-tier Tribunal wrongly elevated that above all other considerations in this case. At [38] of its decision, it stated that "compliance with all Directions is a fundamental requirement within these proceedings". It went on: "The Tribunal must apply the procedural rules consistently, and non-compliance, whether deliberate or inadvertent, risks causing unfairness, disrupting the established timetable, and undermining the orderly preparation of the case". Despite implicitly recognising that non-compliance merely "risks causing unfairness", and does not necessarily do so, the First-tier Tribunal failed to go on to consider whether it had caused unfairness in this case.

65. *Thirdly*, the First-tier Tribunal failed to consider whether, despite the default, it was possible to have a fair hearing on the listed date. The only reasonable conclusion in the circumstances of this case is that it was possible to have a fair hearing. DMS had received the electronic bundle on 1 September 2025 – seven months before the final hearing – and had printed her own paper copy of the bundle. It is not clear whether the First-tier Tribunal realised how long before the hearing DMS had printed her own paper copy (seven months prior if her recollection at the Upper Tribunal hearing was correct), but if it did not, it should have made enquiries as that was a factor relevant to the exercise of its discretion. Had the Tribunal made those enquiries, it might also have become apparent to it that there was a possible explanation for why the LA mistakenly considered a paper bundle had been sent, i.e. because DMS, in a conversation with an LA officer around 11 September 2025, told them that she had already printed her own bundle.

66. *Fourthly*, the First-tier Tribunal failed to consider the nature and extent of the prejudice to DMS. The prejudice to DMS as a result of having to print her own copy of a 401-page bundle was limited. If the First-tier Tribunal considered it appropriate, any prejudice could have been remedied by way of a costs order, and the First-tier Tribunal erred in failing to consider this option. However, even without a costs order, the prejudice was so limited that it was in my judgment perverse to regard it as justifying the draconian step of barring the LA.

67. *Finally*, a further reason why the First-tier Tribunal's decision was perverse was because, in my judgment, the tribunal placed unreasonable weight on the LA's failure to make a written application to have the bar lifted in advance of the hearing. Although rule 8(7) provides that an application to lift a bar should be made in writing within 28 days of notice of the barring being sent to the party, this rule was not reproduced in the Case Directions. It seems to me that the requirement for an application to be in writing was implicit in those directions, but they are not as clear as they should have been in this respect, and the time limit was not referred to. In any event, as no notification of barring was sent to the LA in September 2025, it was unreasonable to expect the LA to have made an

application to lift the bar at that stage. The First-tier Tribunal's view that notice of automatic barring had been given when the Case Directions were made is flawed because the direction included the "without reasonable explanation" provision and so was not automatic.

68. The requirement for an application to be made in writing was also not expressly included in Judge Poynter's order of 19 March 2026, although again it seems to me to be implicit that an application should be made in writing in order for there to be an application to be considered at the start of the final hearing as mentioned in her order. However, again, her order was not as clear as it might have been, and in my judgment the LA's failure to put an application in writing in the circumstances does not bear the weight that the First-tier Tribunal in this case gave to it.

69. For all these reasons, the decision to bar the LA, or to refuse to lift the bar, involved errors of law. The cumulative effect of those errors was that the decision fell outside the range of decisions lawfully open to the First-tier Tribunal. In the particular circumstances, the only lawful conclusion was that the LA should be permitted to participate in the hearing.

Materiality of the errors of law / whether the appeal is academic

70. DMS argues that there were numerous other defaults by the LA that she submits would have justified the LA being barred. However, this is an appeal against the First-tier Tribunal's decision and it did not consider that any other defaults by the LA should lead to it being barred. Nor did DMS raise any other alleged defaults in her applications of 11 September 2025 or 16 March 2026. Most of the matters on which DMS now relies I have dealt with above as they relate to the LA's failure to send a paper bundle and the shortcomings in its response to DMS's applications and Judge Poynter's order. In addition, DMS complains about failures by the LA in notifying the Tribunal that it wished Ms Donaldson to give evidence, and failure to provide a written witness statement for her. However, these failures were dealt with by the First-tier Tribunal excluding Ms Donaldson as a witness. That was an appropriate case management direction which properly addressed the prejudice to DMS of the LA's failures in that respect. It is not arguable that it should have led to the LA being barred. DMS's complaints about the LA's "unilateral amendments" to the working document do not take matters any further, because that sort of issue could be addressed at the hearing, and the final content of the EHC plan was a matter for the First-tier Tribunal to determine.

71. I have also considered what DMS says about the merits of the parties' respective positions on the principal issue of substance that was determined by the First-tier Tribunal, namely C's dysarthria and the speech and language therapy required to meet that need. There is some force in DMS's submission that the outcome in this case may well have been the same even if the LA had been allowed to participate in the hearing. However, given the fundamental breach of natural justice in this case in denying the LA the opportunity to be heard at first instance, I do not consider it would be appropriate for me to proceed on the basis that the LA's participation would have made no substantive difference. The LA was

entitled to be heard by the First-tier Tribunal and I am satisfied that, if it had been, there is a reasonable prospect that the outcome would have been different, even if the difference was only as to the detail of what was included in Sections B and F.

72. The annual review of C's EHC plan is not due until around March 2027, and it appears from a letter from the speech and language therapist of 12 July 2026 that there have been issues with the implementation of the speech and language therapy that may have some bearing on whether it is the correct provision for C. In those circumstances, I am satisfied that this appeal has not become academic.

Disposal

73. For the reasons set out above, I conclude that the decision of the First-tier Tribunal involved material errors of law. I set that decision aside and remit the case to the First-tier Tribunal for re-hearing before a different Tribunal panel. As always, however, the parties are encouraged if possible to reach agreement. If they are able to do so, they should notify the First-tier Tribunal as soon as possible.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 28 October 2026