[2019] AACR 19

(London Borough of Enfield v NH and another (SEN)
[2019] UKUT 1(AAC))

Judge Ward **HS/1936/2018**
2 January 2019

Tribunal practice and procedure – lack of consistency between order contemplating the possibility of justifying non-compliance or providing for automatic barring - delegation of judicial functions to staff – whether an order in the name of a judge but issued by a clerk without judicial consideration purporting to bar a party from further participation in proceedings has any effect – whether it is a ground for deciding that a school is unsuitable that it could not offer an immediate placement

The parents of E, a child aged 7, wanted her to go to school A, an independent special school substantially more expensive than school B, a maintained special school, which the local authority (LA) considered more appropriate. E's parents appealed to the First-tier Tribunal (F-tT). On 3 April 2018, the F-tT issued case directions in the name of the Deputy Chamber President, as to which there was no evidence who actually issued them, requiring amongst other things, the LA to provide final hearing bundles by 12 noon on 25 May 2018. The directions indicated that "[i]f the LA does not comply with the direction and fails without reasonable explanation to deliver the tribunal hearing bundles by the 25 May 2018 then the further participation of the LA in the appeal shall be automatically BARRED pursuant to Rule 8(2) of the Tribunal Procedure Rules." The LA filed and served the bundle at 10:54 on 29 May 2018 and gave explanation for the delay. At 11:29 on 29 May 2018 an order issued in the name of the Deputy Chamber President but not in fact approved by her or any other judge or an authorised registrar under the relevant Practice Statement barred the LA from participation in the appeal but allowed the LA to apply for reinstatement by writing by 12 noon on 1 June 2018. No application was made before the deadline, but LA's representative attended the F-tT hearing on 15 June 2018 and applied for reinstatement. The F-tT refused the application. The F-tT went on to consider the case and found the school B was not suitable as no immediate placement was available. The F-tT allowed the parents' appeal. The LA appealed to the Upper Tribunal.

Held, allowing the appeal, that:

1. agreeing with *SL v SSWP and KL-D* [2014] UKUT 0128 (AAC), the tribunal's power to give a direction in terms that lead to the automatic barring of a respondent is subject to the overriding objective and one factor that the tribunal has to take into account is that it should ensure, so far as practicable, that the parties are able to participate fully in the proceedings. There are also practical considerations, for example, the extent of non-compliance. Exercising a power to bar a party from proceedings requires careful thought and the existence of the reinstatement procedure does not mean that "anything goes" (paragraphs 11 and 12);
2. the order in this case was not truly an automatic barring because of the "reasonable explanation" get out or it did not become one until the explanation had been considered and rejected. The LA was entitled to have its explanation for delay given judicial consideration. In the absence of such, the barring order of 29 May 2018 was invalid (paragraphs 10, 13 to 16);
3. if contrary to the above the barring order was valid, the F-tT's exercise of its discretion was in error of law because of its failure to consider the limited extent of default to the part of the LA and prejudice to the parents, ensure parties' participation and the need for proper argument of the significant issues at stake (paragraphs 18 to 22);
4. the F-tT erred in law by concluding that School B was unsuitable. There is no rule of law that a placement must be immediately available at the date of hearing or at the date of decision. (paragraph 23 to 24);

The judge set aside the decision of the F-tT and remitted the appeal for rehearing before a differently constituted tribunal.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision: The local authority's appeal is allowed. The decision of the First-tier Tribunal (F-tT) sitting in London on 15 June 2018 under reference EH308/18/00004 involved the making of an error of law and is set aside. There was no valid order barring the local authority from defending. The case is referred to the First-tier Tribunal (HESC Chamber) for rehearing before a differently constituted tribunal. I direct that the file be placed before a salaried judge in the F-tT (SEND) jurisdiction for case management directions to be given.

No order is made on the application for anonymity.

REASONS FOR DECISION

1. This case concerns the education of E, aged 7. Her parents wanted her to go to school A, an independent special school substantially more expensive than school B, a maintained special school, which the local authority considered appropriate.

2. The F-tT held a hearing on 15 June 2018. The local authority had, as it would have appeared to the F-tT, been barred from taking part and the F-tT refused its application for reinstatement. By a decision dated 2 July 2018 the F-tT found for the parents and ordered that school A be named.

3. The F-tT rejected ordering school B on the basis that it did not accept year 2 pupils (as E then was) and so "could not meet E's immediate needs". Looking at matters as at the date of the hearing, it noted that E had been out of school for several weeks, and that school A could offer a place immediately (indeed could have done so as of 4 June).

4. The local authority appears to have been under the wholly mistaken impression that by the mere fact of applying for permission to appeal it was entitled not to comply with the F-tT's order. It should not have advised E's parents to that effect at all, *a fortiori* not at a time when an application for the effect of the F-tT's order to be suspended had already been refused. A renewed application for such an order was also subsequently refused and in September 2018 E began to attend school A.

5. Meanwhile, following an oral hearing of the local authority's application on 29 August, I gave permission to appeal. The authority's grounds, put shortly, were that:

> a. the decision to refuse to reinstate was unjustified, and disproportionate and resulted in substantive and procedural unfairness. No reasonable tribunal could have adopted such a course. As will become apparent, my investigation of the grounds led to a further sub-issue becoming apparent, of some importance to the F-tT's practice;
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> b. the decision to reject school B as unsuitable on the ground that it could not offer a place at the time of the F-tT's hearing failed to take into account relevant considerations (e.g. that there would be only a few (in fact, four) days of term left anyway by the time the F-tT issued its decision) and/or was perverse;

c. it failed to heed the cost difference (approx £46,500 p.a.) between school A and school B.

6. Both parties have indicated that they are content for me to decide the appeal on the papers and I consider that the submissions I have received permit me to do so fairly. Mr Greatorex for the local authority asked for an opportunity to make submissions on the 2011 Practice Statement (see [9]); E's mother asked me to refer the question of the authority for the making of the F-tT's order of 29 May 2018 a second time to the Deputy Chamber President, though for what purpose is unclear. In neither case do I regard such a step as necessary to achieve fairness or proportionate in the light of the submissions I have received and in the light of the conclusions I proceed to reach in this decision.

<u>Ground (a): refusal to reinstate</u>

7. It is convenient to set out the chronology here,

28/03/18	E's parents appeal against the LA's proposal to name her current school, C, in her EHC Plan; their preference is for A, a special school.
03/04/18	F-tT sends LA Case Directions in standard form, issued in the name of the Deputy Chamber President, as to which there is no evidence who actually issued them. In briefest outline these required: (a) the LA's response (for which a proforma was provided) to be filed by 15/05/18; (b) the LA's attendance form to be filed and served by 15/05/18; (c) further evidence to be filed and served by 18/05/18 at latest; and (d) the LA to provide final hearing bundles by 12 noon on 25/05/18. The Directions indicated that : *"[i]f the LA does not comply with the direction and fails without reasonable explanation to deliver the tribunal hearing bundles as required by the **25/05/2018** 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 in the appeal 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.* *If the LA has been barred pursuant to Rule 8(2) then the LA may apply for their participation to be reinstated by making an application in writing within 3 working days of the date on which the Tribunal sent notification of the barring to that party if the Tribunal bundle has also been provided within that time."* (capitals and emboldening in the original). Hearing date set for 15/06/18.
15/05/18	LA files response in the form of a 9 line email saying that both school B and [school D, another school then under consideration by E's parents]

	have a place available. E's mother had asked if either could accommodate E during the Summer Term rather than in September and the LA was investigating. The LA would provide an update "imminently" and hoped the matter could be resolved without Court intervention.
16/05/18	The LA files (one day late) its attendance form.
18/05/18	LA informed that E signed off school by her GP
24/05/18	LA informs E's mother that they propose home tuition until the end of 2017/18 and are minded to issue an amended plan shortly naming School B
25/05/18 (Friday)	The deadline passes without the LA providing a bundle
28/05/18	Bank Holiday Monday
29/05/18	At 1054 the LA files and serves a bundle. The email apologises for the slight delay, explaining that "our paralegal prepared the bundle and incorrectly noted the date/time for when the bundle required to be sent"; E's mother responds by email pointing out 4 items missing from it (expanded to 8 on 04/06/18) At 1129 an order is issued in the name of the Deputy Chamber President in the following terms: ***"It is ordered that:*** *1. The LA is barred from further participation in the appeal and shall not attend the final hearing of the appeal, pursuant to Rule 8(2) of the Tribunal Procedure Rules 2008, having failed to comply with the Tribunal's order made on the 03/04/2018 which stated that the failure to comply would lead to automatic barring of the LA from further participation in the appeal.* *2. The LA may apply to be reinstated pursuant to Rule 8(6) and (7) of the Tribunal Procedure Rules 2008 by making an application in writing to the Tribunal and sending a copy to the parents by* ***12 noon on 01/06/2018*** *explaining the reason for the request.* ***This application will only be considered if the bundle has arrived within this time limit."*** **(Emboldening in original).** The order is issued by one email, to E's mother and to the email address provided by the LA for correspondence.
01/06/18	The deadline passes without an application having been made for reinstatement.
11/06/18 (Monday)	The LA's solicitor emails the F-tT explaining that "we" have not received the barring order but had received a document (unidentified) which referred to it; explaining the circumstances of the default; enclosing an updated bundle (including those items sent on 8 June - which appear to be what is in the bundle as "late evidence"); apologising for the inconvenience and applying for reinstatement

15/06/18 (Friday)	Mr Chothi, the LA's representative, attends the F-tT and applies for reinstatement. He provides no evidence of the claimed non-receipt of the barring order. He has no witnesses to call, if permitted to do so. The F-tT concludes that there was no merit in its application for reinstatement, thus the LA remained barred, and the F-tT went on to consider the substance of the case.

8. Rule 4 provides:

> "(1) Staff appointed under section 40(1) of the 2007 Act (tribunal staff and services) may, with the approval of the Senior President of Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal.
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> (2) The approval referred to at paragraph (1) may apply generally to the carrying out of specified functions by members of staff of a specified description in specified circumstances.
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> (3) Within 14 days after the date on which the Tribunal sends notice of a decision made by a member of staff under paragraph (1) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge."

9. The Senior President's approval for this purpose was recorded in the Practice Statement in force at the relevant time: "Delegation of Functions to Legally Qualified Staff on or after 22 June 2011- Health Education and Social Care Chamber of the First-tier Tribunal (SEND, Care Standards and Primary Health Lists)."[1]

> "1. The Senior President of Tribunals hereby approves that a legally qualified member of staff appointed under section 40(1) of the Tribunals, Courts and Enforcement Act 2007 may carry out the following functions of the [HESC] Chamber of the [F-tT] under the Tribunal Procedure ([F-tT]) ([HESC Chamber]) Rules 2008 where that legally qualified member of staff, who for the purposes of exercising those functions shall be known as a registrar, has been authorised by the Chamber President or a Deputy Chamber President of the [HESC Chamber] to exercise those functions in respect of SEND, Care Standards or Primary Health List cases -
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> a. Exercising any case management powers under rule 5 except suspending a decision under rule 5(3)(l);
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> c. Striking out under rule 8(2), or (4) and reinstating proceedings under rule 8(6);
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> 2. In accordance with rule 4(3) of the Tribunal Procedure ([F-tT]) ([HESC Chamber]) Rules 2008, within 14 days after the date that the Tribunal sends notice of a decision made by a Registrar pursuant to an approval under paragraph 1 to a party, that party may apply in writing to the Tribunal for the decision to be considered afresh by a judge."

[1] The 2011 Practice Statement has since been replaced by a Practice Statement dated 5 June 2018.

10. I do not know the process of authorisation by which the directions of 3 April 2018 were issued and say no more about that aspect[2]. However, 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. At the time, that decision could only be taken by a judge, or by a person authorised under the 2011 Practice Statement and, in the latter case, subject to the right for the decision to be considered afresh by a judge. Indeed, the 2011 Practice Statement appears to envisage that even the implementation of a striking-out under rule 8(2) fell within the delegation to a Registrar, subject to those safeguards.

11. In *SL v SSWP and KL-D* [2014] UKUT 0128 (AAC), Upper Tribunal Judge Jacobs observed:

> "12. The First-tier Tribunal has power to issue a direction in terms that lead to the automatic barring of a respondent: rule 8(1).
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> 13. The tribunal's power to give a direction in those terms is subject to the overriding objective. It is under a duty to seek to deal with cases fairly and justly when exercising this power: rule 2(1) and (3)(a). And one factor that the tribunal has to take into account is that it should 'ensure, so far as is practicable, that the parties are able to participate fully in the proceedings': rule 2(2)(c). So, exercising a power to bar a party from proceedings can only be exercised after taking account of the overriding objective under which participation is to be encouraged. This is not to say that it is impossible to bar a respondent, just that it requires careful thought.
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> …
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> 15. There are also practical considerations to take into account before operating rule 8(1). One example is non-compliance. Directions in child support cases typically require a parent to provide a variety of financial information. The form of direction in this case had the effect of barring the respondent from participating, regardless of the extent to which he failed to comply. I understand why tribunals prefer not to use their powers under rule 8(3) and (4), as they can lead to further delay. I also accept that the tribunal has power to reinstate a party's case and can do so if the failure to comply was not substantial or significant. But it is surely preferable for a tribunal to exercise its power to use rule 8(1) only after taking account of these potential difficulties."

12. While the context is a different one, I respectfully agree with Judge Jacobs' remarks and consider them equally applicable in the context of special educational needs cases, as the respective rules are in materially similar form. Indeed, I would go further if Judge Jacobs was intending to suggest that it was merely "preferable" to take into account the potential difficulties before relying on rule 8(1) (the equivalent in the Social Entitlement Chamber of rule 8(2) in the HESC Chamber). E's mother submits that *SL* is in error in suggesting that automatic debarring requires careful thought by virtue of the operation of the overriding objective, which is fully met by the availability of the reinstatement procedure. I disagree. A tribunal is required to seek to give effect to the overriding objective when it exercises any

[2] It is, in any event, now the subject of express provision in the 2018 Practice Statement

power under its Rules: rule 2(3)(a). It cannot be right that the existence of the reinstatement power means that "anything goes" with regard to whether the conditions for anything so draconian as a barring order have been met. Even where they have been met, the reinstatement procedure provides an opportunity for relief to be obtained. Where those conditions have not been met, the submission cuts out one of the levels of protection available to a party.

13. The order in this case either was not truly an automatic barring at all (because of the "reasonable explanation" get-out) or it did not become one until the explanation had been considered and rejected. Whichever of those it was, it is necessary to examine the consideration the case in fact received. I caused an enquiry to be made to the Deputy Chamber President, for whose response I am grateful. She wrote:

> "It has been confirmed to me that in accordance with the standard operating procedure in relation to automatic barring orders, on the 29 May 2018, a member of the Notice of Hearing team sought and obtained permission from the Team Leader to issue an order confirming the automatic barring of the Local Authority. The Local Authority had failed to submit to the Tribunal a full hearing bundle prepared in accordance with the bundle guidance by the deadline imposed on the registration directions issued on the 3 April 2018, which was set at noon on the 25 May 2018.
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> The order issued on the 29 May 2018 was therefore confirmation of the automatic barring order made following failure to comply with the Tribunal's direction pursuant to rule 8(2) of the Tribunal Procedure Rules 2008(as amended).
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> It was not an order issued following judicial consideration of the email from the LA explaining the reason for the late submission of a partial bundle but confirmation of their automatic barring because of their non-compliance with the Tribunal's directions."

14. It is clear that no consideration was given to the Order of 29 May 2018 either by a judge or by a Registrar under the 2011 Practice Statement. The authority was entitled to have the explanation it had put forward in its email of 29 May considered by a person authorised to do it and that did not happen. I note that the possibility of a reasonable explanation is not mentioned on the face of the Order. Whether the original order is to be viewed as not an automatic barring order at all or whether it became one but only once a duly authorised person had considered the explanation offered, the conditions for its applicability were not met. While the existence of the reinstatement procedure would have provided an opportunity, had the true facts been visible to the F-tT hearing the case, to have corrected the error, for the reasons given above it does not excuse a failure to meet the conditions for the barring order to become operative in the first place.

15. E's mother seeks to justify the F-tT's barring decision by reference to the local authority's "repeated non-compliance with [F-tT] orders and rules." While the local authority's conduct of the F-tT proceedings may indeed have been unsatisfactory, they were barred not for their conduct of those proceedings generally, but for a specific reason and it is by reference to that reason that the legal adequacy or otherwise of the F-tT's decision falls to be judged.

16. I am acutely aware of the very considerable pressures on the HESC Chamber of the F-tT at a time when its caseload has increased significantly and regret having to reach the conclusion that the order of 29 May was unauthorised. The Chamber has greater flexibility under the 2018 Practice Statement but, at a time when there is a move towards greater delegation of functions to a variety of tribunal staff, it is nonetheless important to ensure that the decision-taking processes are consistent with the limits of delegated authority.

17. That of itself is sufficient to resolve this case in favour of the local authority but, lest I be wrong in the above analysis, I deal briefly with the other points in the case.

18. If, contrary to my view, the 29 May Order was valid, I accept that the F-tT was entitled to consider the matter on the basis that it had been served on the authority by email on 29 May. It was conceded that it was sent to their nominated email address. No evidence of non-receipt at that email address was provided to the F-tT and easily could have been if available.

19. I am not assisted by E's mother's reliance on dicta of Elias J (as he then was) in *H v Gloucestershire CC and Bowden* [2000] ELR 357, where the context was very different – a complaint that the judge below had allowed an authority's representative to interrupt the parent's witness to an excessive degree. However, I do accept that the F-tT is entitled to a generous ambit of discretion in matters of case management. Nonetheless, in evaluating the extent of the local authority's default in relation to serving the bundle, it failed to take into account the limited extent of the default, either in time terms (less than one working day) or qualitatively (the bundle when served was less deficient than it might have been because of the lack of a substantive response from the local authority). It failed to identify any prejudice to the respondents or to the administration of justice that had arisen through the slightly late initial provision of a bundle – albeit incomplete - on 29 May and the provision of a supplementary bundle of 11 June. Considering whether there has been, or would be, prejudice to a party is a routine and generally summary part of many case management decisions: I reject E's mother's submission that to require there to be such consideration would make the system unworkable. That E's parents were deprived of four days they would otherwise have been able to spend in preparing the case is a somewhat notional prejudice: this was not about the disclosure of new documents, previously unseen by them.

20. Further, the overriding objective of the F-tT's rules (which the F-tT asserted it had considered) is to "deal with cases fairly and justly", which includes "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings" and it is not evident why it was not practicable to permit the local authority to participate further in the proceedings, notwithstanding the shortcomings in how it had handled the case, which it had subsequently sought to rectify.

21. The F-tT further failed adequately to take into account the need for the significant issues at stake to be properly argued, both for E and her parents in terms of her school attendance and in terms of the potentially significant cost to the local authority. While I accept that the F-tT did note the lack of any witnesses for the local authority, that lack need not have precluded the local authority from making relevant submissions on such matters as the cost of provision or the impact of the short period remaining in the Summer term. I appreciate that the parents disagree with the material provided by the local authority on costs, but that simply serves to illustrate that it is not possible to say what course the case would have taken if the local authority had not been barred.

22. Mr Greatorex seeks to characterise the F-tT's refusal to reinstate as disproportionate and/or one which no reasonable tribunal properly directing itself could reach. In giving permission to appeal I accepted that view as arguable, but he does not need it in order to succeed, as the F-tT's exercise of its discretion was in error of law for the reasons articulated in [19] to [21].

Ground (b): Rejection of school B as unsuitable

23. I also consider that the F-tT erred in law by concluding that School B was unsuitable. It appears to have had two reasons for that view (see paragraphs 29 and 30 of its decision). It observed that "[School B] do not accept Year 2 pupils and as such the Tribunal concluded that [School B] cannot meet E's immediate needs". Further, it rejected the local authority's proposals for tutoring until E could start at School B in September 2018 as lacking in detail. While the inadequacy of interim arrangements and the non-availability of a place could, in certain circumstances, be valid considerations in deciding whether a proposed placement was suitable, the F-tT appears to have overlooked the material consideration of timing in the context of the school year. It held its hearing on 15 June and issued its decision on 2 July. After that, the local authority would have 14 days to comply: Special Educational Needs and Disability Regulations 2014, regulation 44(2)(f), thus taking us to 16 July. The Summer Term is unlikely to have ended any later than the third week in July, thus there were only a few days of Summer Term left. There is no rule of law of which I am aware that a placement must be immediately available at the date of hearing, or at the date of decision. Indeed, a three judge panel rejected a challenge to an F-tT's decision where there was, at best, a substantial likelihood that a school place at the relevant school would become available at the start of the next school term and where the delay might have been as long as nine months: see *Hampshire CC v JP* [2010] AACR 15 at [21]. The number of school days which would elapse before a place at School B became available was minimal. Similarly, even if there were shortcomings or uncertainties in the local authority's tutoring proposals, the number of days liable to be affected by them was minimal. The fact that E had not been accessing education for a number of weeks before the tribunal hearing, having been signed off school by her GP, was regrettable, but a proper concern for that did not exonerate the F-tT from the need to address the situation – including as to timing – that was before it.

24. Time for compliance could not start to run until the F-tT had promulgated its decision: see the authorities reviewed at *Jacobs, "Tribunal Practice and Procedure", 4th edition*, at 14.258. Until promulgation it was free to change its decision and I do not agree that the date of the hearing was the trigger. Cases such as *Gloucestershire CC v EH (SEN)* [2017] UKUT 0085(AAC) and *DH and GH v Staffordshire CC* [2018] UKUT 49 (AAC) are about whether an appeal is to be considered at the date of the decision under appeal or at the date of hearing and are this examining a different choice of date. Further support for this view is to be found in the power to review a decision in r.48(2), which relates to a change in circumstances "since the decision was made" (not since the date of the hearing.) Nor do I accept that the local authority was doing anything wrong by failing to arrange with immediate effect following the F-tT's decision for E to start at school A: their responsibilities in that regard are set out in the Regulations (where the timescale is in any event a short one).

Ground (c): failure to address cost differential

25. I am not in a position to form a view as to whether School B would be likely to be considered suitable. Contrary to the skeleton argument on behalf of the parents in the F-tT, I do not think School B itself had any doubt as to its ability to meet E's needs: the "may" in the head teacher's letter is a reflection of the doubt caused by the lack of a place at the time he was writing. However, I cannot tell what material School B had been sent or whether teachers there had met E (it seems unlikely from the letter); the short OFSTED report is about matters of governance and largely matters of concern to older students than E. There was a dearth of written evidence concerning the school and no oral evidence was on offer (even if the authority had not been barred). The reason why the parents' appeal to the F-tT and the tribunal's decision were light on reasons why the school was unsuitable was because the authority did not put forward much of an evidenced case that it was suitable which required to be rebutted. The authority's case in my view is not assisted by the fact that the parents had originally sought a placement at the school before changing their minds: that is consistent with a reason having emerged why it was not suitable. Nonetheless, while the unsatisfactory evidential basis for School B might have told against it, the local authority, but for the barring, would have been entitled to have its suitability considered (without the flaw identified as ground (b)) and, if it was found suitable, the comparison of cost and benefits made.

26. E's mother has done no more than pursue her case, correctly and effectively, for the education she believes E needs. The local authority failed to pursue its case in the F-tT as it should have done. But what I have to decide upon is the F-tT's response to one particular aspect of that and I do consider it was flawed for the reasons I have given.

27. A certain amount of E's mother's submissions touch upon wider issues concerning the local authority's conduct in relation to E's education. Those are not the matter before me and I say no more about them.

28. An application was made that the name of E and her parents be anonymised in any report of the appeal. The application is not reasoned and in fact this decision says very little about E at all. In the usual way, the vast majority of decisions of this Chamber are written in an anonymised form, as this one has been, without a formal order for anonymity being made.