

**IN THE UPPER TRIBUNAL**

**Appeal No: HS/1071/2019**

**ADMINISTRATIVE APPEALS CHAMBER**

**Before: Upper Tribunal Judge Wright**

## **ORDER**

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

## **DECISION**

**The Upper Tribunal allows the appeal of the appellant parents.**

**The decision of the First-tier Tribunal made on 14 February 2019 under the reference EH344/18/00035 involved an error on a material point of law and is set aside.**

**The Upper Tribunal is not in a position to re-decide the appeal. It therefore refers the appeal to be decided afresh by a completely differently constituted First-tier Tribunal and in accordance with the Directions set out below.**

**This decision is made under section 12(1), 12 (2)(a) and 12(2)(b)(i) of the Tribunals Courts and Enforcement Act 2007**

## **DIRECTIONS**

**Subject to any later Directions by a Judge of the First-tier Tribunal, the Upper Tribunal directs as follows:**

- (1) The new hearing will be at an oral hearing.
- (2) If either party has any further evidence that they wish to put before the tribunal, this should be sent to the First-tier

Tribunal's office within one month of the date this decision is issued.

- (3) The new First-tier Tribunal should have regard to the points made below.

## **REASONS FOR DECISION**

1. This appeal concerns a young girl who is the daughter of the appellant parents. The girl was 11 years old at the date of the First-tier Tribunal's decision on 14 February 2019 ("the tribunal").
2. The appeal before the tribunal was made under section 51(2)(a) of the Children and Families Act 2014 against the decision of the respondent local authority ("Wirral") not to secure an Education and Health Care needs assessment for the daughter of the appellants. I need say no more about the daughter's difficulties related to her learning in education given the grounds on which the appeal succeeds, save to indicate that it was accepted that she had special educational needs but the issue was whether those needs could be met within the resources normally available in a mainstream school.
3. Section 51(2)(a) of the Children and Families Act 2014 needs to be read with the relevant parts of section 36 of the same Act, which together provide as follows:

**51(1)** A child's parent or a young person may appeal to the First-tier Tribunal against the matters set out in subsection (2), subject to section 55 (mediation).

(2) The matters are—

(a) a decision of a local authority not to secure an EHC needs assessment for the child or young person....

**36(1)** A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.

(2) An "EHC needs assessment" is an assessment of the educational, health care and social care needs of a child or young person.

(3) When a request is made to a local authority under subsection (1)....., the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.....

(5) Where the local authority determines that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan it must notify the child's parent or the young person—

(a) of the reasons for that determination, and

(b) that accordingly it has decided not to secure an EHC needs assessment for the child or young person.

(6) Subsection (7) applies where—

(a) no EHC plan is maintained for the child or young person,

(b) the child or young person has not been assessed under this section or section 71 during the previous six months, and

(c) the local authority determines that it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(7) The authority must notify the child's parent or the young person—

(a) that it is considering securing an EHC needs assessment for the child or young person, and

(b) that the parent or young person has the right to—

(i) express views to the authority (orally or in writing), and

(ii) submit evidence to the authority.

(8) The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.”

The tribunal found that the appellants' daughter met section 36(8)(a) but not section 36(8)(b).

4. Two important aspects of the tribunal's reasoned decision need to be emphasised.
5. First, the tribunal noted as a “Preliminary” point the following.

“The parties in the notice of appeal and response, agreed to the appeal being considered on the papers without an oral hearing.

The Tribunal concluded pursuant to Rule 19 of the Tribunal Procedure Rules 2008 (as amended) that the case was suitable for consideration on the papers and consented to conclude the appeal without an oral hearing.”

6. Second, under its heading of “Evidence” the tribunal referred to and said the following about evidence from B A Bourne, who is an educational psychologist.

“The report of B A Bourne, Educational Psychologist dated 10 December 2015 [page 63] is therefore over three years. This report concluded that [the daughter’s] overall performance was indicative of specific literacy difficulties (i.e. dyslexia at moderate levels), and also highly indicative of specific number difficulties (i.e. dyscalculia).”

The was the only reference the tribunal made to evidence from Mr Bourne.

7. In their application for permission to appeal made to the First-tier Tribunal the appellants relied on a further, eight page report from Mr Bourne, dated 14 July 2017. In refusing permission to appeal the First-tier Tribunal said of this later report from Mr Bourne:

“It appears the more up to date EP report dated 14 July 2017 was not considered by the Tribunal. I have considered the report and I am satisfied that it would have made no arguable material difference to the outcome.”

8. Having investigated matters in relation to this 14 July 2017 report with both the appellants and the First-tier Tribunal’s records, I gave permission to appeal to the appellants on 5 September 2019 for the following reasons.

“I give permission to appeal as I consider it is arguable with a realistic prospect of success that the First-tier Tribunal’s decision was erroneous in law in failing to have regard to potentially relevant evidence that was before the First-tier Tribunal which the appellant parents had provided and on which they were relying in their appeal to that tribunal. That evidence includes the report of BA Bourne of 14 July 2017.

The directions of 10 July 2019 refer to the report of BA Bourne (an educational psychologist) dated 14 July 2017. The parents have now supplied a (further) copy of that report and other documents, all of which it appears from the covering email they submitted to First-tier Tribunal on the appeal on 28 January 2019. That was some two weeks before the First-tier Tribunal heard the appeal on 11 February 2019, without a hearing, and then made its decision three days later on 14 February 2019. There is no reference to this report in the written

record of the First-tier Tribunal's decision. The decision does refer (at paragraph 8) to an earlier report of BA Bourne, dated 10 December 2015, but (correctly) identifies it as being three years old. If the age of that report made it of less evidential relevance to the First-tier Tribunal's decision on 14 February 2019 (as would seem to have been the case for the First-tier Tribunal), the nearly two years later report of BA Bourne was arguably material evidence the tribunal ought to have taken into but did not.....

The above about the 14 July 2017 report having been before the First-tier Tribunal at the time of its decision has been confirmed by information provided by the First-tier Tribunal to the Upper Tribunal. On the 17 July 2019 the First-tier Tribunal advised the Upper Tribunal that its records show that 'late evidence' was received by the First-tier Tribunal on 30 January 2019 and sent to the panel that heard the appeal on 31 January 2019. That late evidence amounts to 140 pages and includes the BA Bourne report of 14 July 2017, as well as a different earlier report from the same educational psychologist dated 21 October 2016 and other evidence.....This evidence accords with evidence found, unnumbered at the back of the First-tier Tribunal's appeal bundle file.

There is nothing in the First-tier Tribunal's written decision to indicate that it had regard to this late evidence or its admission before that tribunal, though it did state (paragraph 14) that it had carefully considered **all** the written evidence submitted to the Tribunal. It is unclear if this means the 140 pages of 'late evidence' referred to above. If it does then (a) no consideration was given by the First-tier Tribunal to admitting this late evidence in its decision, and (b) it may be thought at least unusual that in its consideration of the evidence of BA Bourne, the only report it referred to was the one dated 10 December 2015 and the tribunal's reliance on it being three years old may suggest the tribunal was not aware that there had been later (that is, less old) reports from BA Bourne. These points may suggest the First-tier Tribunal did not have regard to the 140 pages of late evidence. Even if it did, however, there is no consideration of that evidence in the tribunal's decision.

The failure of the First-tier Tribunal to have regard to potentially relevant evidence on which a party before it was seeking to rely arguably amounts to an error of law.

I note that when refusing permission to appeal Judge Plimmer took the view that the 14 July 2017 report of BA Bourne would have made no material difference to the First-tier Tribunal's decision. I do not consider myself able to take such a view at the permission stage and without the benefit of argument on the point. Judge Plimmer gives no reasons why she considered the 2017 report would make no material difference to whether an EHC needs assessment ought to have been secured for Sophie. She also did not have the benefit of the view of the specialist First-tier Tribunal member when forming her view, which would not have been the case had the 2017 report been considered by the First-tier Tribunal at the time of making its decision. Moreover, Judge Plimmer's view appears not to have taken into account the 2016 report of BA Bourne and the continuity it may have provided between

the 2015 and 2017 reports, and the 2016 report also only appears in the 140 pages of 'late evidence'.

I also give permission to appeal as I consider it arguable that the First-tier Tribunal's consideration of whether to decide the appeal without a hearing may have been inadequate.

Firstly, the tribunal refers to wrong rule: it is not rule 19 but rule 23 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 which apply. Secondly, and perhaps because of the first error, the First-tier Tribunal arguably proceeded on a misunderstanding as to what tests it had to apply under rule 23. Rule 23(1) involves neither consideration of whether an appeal is 'suitable' for consideration on the papers nor does it depend on the 'consent' of the Tribunal. Rule 23 provides as follows.

"23.—(1) Subject to paragraphs (2) and (3), the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—  
(a) each party has consented to the matter being decided without a hearing; and  
(b) the Tribunal considers that it is able to decide the matter without the hearing.  
(2) This rule does not apply to a decision under Part 5.  
(3) The Tribunal may dispose of proceedings without a hearing under rule 8 (striking out a party's case)."

Neither rule 23(2) nor rule 23(3) was in play in this case.

The importance of the obligation to hold an oral hearing ('must hold a hearing') in all appeals where the appeal is to be decided on its merits unless the exceptions in rule 23(1)(a) and (b) apply, calls for careful, deliberate and accurate consideration of the rule 23(1) tests, and it is arguable the First-tier Tribunal in this appeal failed to meet this standard.

A separate or related point may arise as to whether section 4 on page five of the First-tier Tribunal's Notice of Appeal form (see page 13 of the First-tier Tribunal's appeal bundle) unlawfully constrains or 'contracts out' the First-tier Tribunal from properly applying the test under rule 23(1) or inverts that test.

First, can consent be presumed if a party does nothing or does not tick the box in section 4? It may be arguable that the terms of rule 23(1)(a) of "has consented to" requires a positive giving of consent by the parties to there being no hearing rather than an absence of a lack of consent. Unlike other First-tier Tribunal procedure rules, rule 23 does not include an alternative of "or has not objected" to the appeal being decided without a hearing, which may support the argument that a positive giving of consent is required. The Upper Tribunal's decisions in *IB v ICO and Dorset Police* [2013] UKUT 582 (AAC) and *SB v SSWP (ESA)* [2012] UKUT 249 (AAC) may be of relevance on this issue.

Second, and in the alternative, ‘automatically’ deciding all refusal to secure an EHC needs assessment appeals without a hearing, even if the parties’ consent to such a course can be presumed, may arguably fetter the First-tier Tribunal’s discretion as it seemingly leaves out entirely the relevant considerations under rule 23(1)(b).

Third, and further in the alternative, it is arguable that a party need only state that they wish for an oral hearing to take place for the requirement to hold an oral hearing under rule 23(1) to arise, at which stage the exceptions to that requirement simply fall away as they are legally irrelevant. If this is correct then it was and is arguably unlawful for the First-tier Tribunal to impose a requirement on, or even make a request of, a party to give reasons why they want an oral hearing, as section 4 in the Notice of Appeal form does.

If any or all the above arguments about section 4 in the Notice of Appeal form are correct, it is arguable that the First-tier Tribunal proceeded on a flawed basis in its consideration of whether to hold an oral hearing of the appeal.

9. Wirral’s response to the appeal and the above grounds was pithy, to say the least. It limited itself to saying that an oral hearing was not necessary and that it had “no objections to this matter being remitted to the First Tier Tribunal for an Oral rehearing by a new panel”, as well as (unnecessarily) saying that each party should bear its own costs on the Upper Tribunal appeal (no request for costs had been made by the appellants).
10. The appellant parents in their reply of 30 December 2019 did not address any of the grounds on which I had given permission to appeal either, understandably given neither of them is a lawyer or has a lawyer to call on for advice. They spoke of wanting the best education for their daughter and set out their concern about having to deal with the costs of any appeal. They attached to their email reply an email letter from their daughter in which she told me about her struggles in school.
11. Despite the lack of legal argument put before me, I am satisfied that the tribunal erred in law in both of the respects I identified when giving permission to appeal and that its decision should be set aside as a result.

*The additional reports of BA Bourne*

12. It is now clear that the tribunal had **three** reports from Mr Bourne before it when it came to its decision. These reports spanned the period from 10 December 2015, through 21 October 2016, to 14 July 2017. There is nothing to indicate either that the tribunal refused to admit the later two of these reports or what it made of the last two of these reports if it had admitted them. The distinct impression I am left with is that the tribunal simply missed them out altogether and that they probably did not read them or were even aware of them. However, these were reports on which the appellant parents were relying and they were entitled to know what tribunal made of them. Moreover, in the absence of any argument from Wirral to the contrary, I am not prepared to conclude that the two further and later reports of Mr Bourne would have made no material difference to the tribunal's decision that no EHC needs assessment even needed to be secured. The continuity in Mr Bourne's reports from later 2015 to the middle of 2017 at least may have made some difference to whether the lower threshold "may" test in section 36(8)(b) of the Children and Families Act 2014 was met.

*Whether an oral hearing was not required*

13. In addition, or in the alternative, I am separately satisfied that the tribunal gave no proper consideration to whether it could properly absolve itself of the duty to hold an oral hearing of the appeal before it.
14. Firstly, rule 19 of the tribunal's procedure rules simply had no relevance to this issue. Rule 19 is concerned with certain cases where leave is required to bring the appeal proceedings before the First-tier Tribunal in the first place. It had no application to this appeal as there is nothing to suggest that this appeal was one where such leave was required. (If it was such a case then the tribunal would have erred in law by entertaining the appeal absent the grant of leave that was necessary precondition of the appeal being brought.)



15. The tribunals failure to acquaint itself with the correct rule in its procedure rules gave rise to its second, albeit related, error. This was its casting the relevant considerations in terms of whether the appeal was “suitable” to be decided without a hearing and whether the tribunal consented to it being so decided. Neither consideration finds any expression in the correct rule: rule 23. That rule, which I set out in my reason for giving permission to appeal (and is set out in paragraph eight above), continues to require that an oral hearing of any and all appeals under section 51 of the Children and Families Act 2014 must be held *unless* both the conditions found in rule 21(1)(a) and (b) exempting that requirement are satisfied. Neither of those conditions involves the consent of the First-tier Tribunal or whether that tribunal considers the appeal is ‘suitable’ for decision without an oral hearing. If one of the parties does not consent to their appeal being decided without an oral hearing then an oral hearing of the appeal **must** be held. Where considerations of suitability might be relevant in such a case is where the appeal on the papers appears to have no reasonable prospect of success, but that falls for consideration to be made under rule 8(4)(c) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (the “HESC Rules”).
16. The approach of the tribunal to whether an oral hearing of the appeal before it was not required was therefore fundamentally flawed and meant the decision to which it came, without an oral hearing, was in error of law and cannot stand.
17. It is unclear how, if at all, the approach the appellants were directed to take in the appeal form affected the tribunal’s consideration as to whether an oral hearing was not required. I am mindful on this point that I am not considering a judicial review of the legality of instructions given on that appeal form and, moreover, I have not had any legal argument on whether those instructions are lawful. However, those instructions did form an important part (and arguably the sole important part) of the basis on which the appellants were asked by the

First-tier Tribunal to address their views in respect of an oral hearing being held, and on any analysis the terms of rule 23 of the HESC Rules allows for (if not requires) such views to be sought.

18. The relevant part of the First-tier Tribunal’s appeal form in this appeal read as follows.

**“Section 4: Deciding your appeal**

The Tribunal will try to fast track the appeal to ensure a quicker decision. All appeals against a refusal to secure an EHC needs assessment decision will automatically be decided following consideration of the written evidence by the Tribunal without an oral hearing. Unless you notify otherwise, your consent will be presumed. If you wish to have an oral hearing, you will need to notify the Tribunal.

I do not agree to a paper hearing and wish to attend an oral hearing. Please explain the reasons below for a Judge to consider.”

19. The above would appear to come from a standard appeal form provided by the First-tier Tribunal specifically for ‘refusal to secure an EHC assessment’ appeals, on the front page of which the following is said:

“Special Educational Needs and Disability Tribunal

# Application for appeal

Refusal to secure an EHC Needs Assessment

## **Child or Young Person**

You should use this form to appeal against a decision made your Local Authority (LA) not to secure an EHC needs assessment of a child or a Young Person. A child is aged 0 – 16 years. A Young Person is anyone aged 16 years or over who is over statutory school age but under the age of 25 years.

All appeals against an LA’s refusal to secure an EHC needs assessment will be decided by the Tribunal following consideration of the written evidence without an oral hearing. Unless you tell us otherwise, your consent will be presumed. If you wish to have an oral hearing of the appeal you must tell us and this will then be arranged.”

20. In addition, paragraph four of case management directions made by the Deputy Chamber President of the chamber of the First-tier Tribunal on this appeal stated the following.

**“Every appeal against a refusal to secure an EHC assessment is automatically listed for a paper hearing as a proportionate and efficient means of concluding the appeal.**

If the circumstances of your case are exceptional, and you believe that an oral hearing is necessary, then once the LA response has been submitted, you can ask a Tribunal Judge to consider whether it is a proportionate means of dealing with the issues in the appeal by submitting a request for change form to the other party and to the Tribunal.

An oral hearing may be conducted by telephone, Skype or other electronic means of communication.”

These directions were said to have been issued under rule 5 of the HESC Rule. On their face these case management directions were made, and could only have been made after the appellants had completed the appeal form referred to in paragraphs 18 and 19 above.

21. Rules 5 and 7 of the HESC Rules provide, so far as is relevant as follows.

“5.—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment containing a time limit;

(b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case;

(c) permit or require a party to amend a document;

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;

(e) deal with an issue in the proceedings as a preliminary issue;

(f) hold a hearing to consider any matter, including a case management issue;

(g) decide the form of any hearing;

(h) adjourn or postpone a hearing;

(i) require a party to produce a bundle for a hearing;

(j) stay proceedings;

(k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—  
(i) because of a change of circumstances since the proceedings were started, the Tribunal no longer has jurisdiction in relation to the proceedings; or  
(ii) the Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;  
(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal of an application for permission to appeal against, and any appeal or review of, that decision.

7.—(1) An irregularity resulting from a failure to comply with any provision of these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.  
(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as the Tribunal considers just, which may include—  
(a) waiving the requirement;  
(b) requiring the failure to be remedied;  
(c) exercising its power under rule 8 (striking out a party's case);  
(d) exercising its power under paragraph (3); or  
(e) except in mental health cases, restricting a party's participation in the proceedings....”

22. I am not aware of any statutory or other provision in place at the relevant time on this appeal that ousted or modified the starting requirement under rule 23 of the HESC Rules that an oral hearing of an appeal must be held. Further, I would need to be persuaded by argument (if such argument can be made) that the general case management powers in rule 5 of the HESC Rules enabled any judge of the First-tier Tribunal to disapply, indeed arguably invert (and so subvert), the requirement in rule 23 such that the appellant has to ‘contract in’ to having an oral hearing (by asking for one and giving reasons why a hearing is needed) rather than ‘contract out’ of having an oral hearing (as rule 23 provides). Moreover, the provisions in rule 5(f)-(h) are predicated on there being a ‘hearing’, which means an ‘oral hearing’ under rule 1(3) of the HESC Rules, and so cannot authorise no hearing taking place.
23. Rule 7 of the HESC Rules provides the express authority for the First-tier Tribunal to waive a requirement under the HESC Rules. However, this power of waiver only applies where there has been a failure to comply with a requirement, and I find it difficult to conceive of how

such a waiver could apply (even though rule 7 has never been invoked as a relevant power in respect of the cutting down of the appeal right by the First-tier Tribunal in respect of ‘refusal to secure an EHC assessment’ appeals) in circumstances where the parties are simply at the stage of expressing the views which are needed in order to determine whether the rule 23 oral hearing requirement may not apply.

24. I would add that I can find nothing in the enabling provisions of the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”) – section 22 and schedule 5 to the TCEA - that founds consideration of whether an oral hearing is required other than in what is set out in rule 23 of the HESC Rules. Paragraph 7(a) of schedule 5 to the TCEA allows for the “Tribunal Procedure Rules” to “make provision for dealing with matters without a hearing”. That, however: (i) may arguably imply a starting point of there being a hearing on appeals, with paragraph 7(a) then enabling provision for that not be so, and (ii) in any event, directs attention to what the relevant tribunal procedure rules say about dealing with matters without a hearing, which here is rule 23 of the HESC Rules.
25. Given the above, I can identify no legal basis under which the First-tier Tribunal could (or can) modify that which is set out in rule 23 of the HESC Rules. Further, I do not consider that the appeal form or the Deputy Chamber President’s directions are lawful expressions of the legal requirement found in rule 23. Both convert the plain starting duty under rule 23 to hold an oral hearing into a mere power perhaps to hold one, with that power moreover only being exercisable if such a hearing is requested by the appellant **and**<sup>1</sup> the First-tier Tribunal considers that a hearing should be granted. Nor I am persuaded that the appellants could lawfully be presumed to have consented to the appeal being decided without a hearing simply, in effect, by their not

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<sup>1</sup> It is to be noted that, confusingly (and unhelpfully), the appeal form instructions and that which is set out in the Deputy Chamber President’s directions contradict one another. The appeal form indicates that if an oral hearing is requested “this will then be arranged”. However, the directions then add an additional hurdle of persuading the First-tier Tribunal, and it seems only where there are exceptional circumstances, that a hearing is needed.

saying anything at all (i.e. being silent) on this subject, as the appeal form contends. It seems to me that the language in rule 23 of “each party has consented” requires a positive act of giving consent. As I said in *IB v ICO and Dorset Police* [2013] UKUT 582 (at paragraphs [27] and [28]):

“27....the tribunal could only have acted as it did – to decide the appeal on the papers – if, first, it was satisfied that each party had consented to the appeal being decided without a hearing and, if so, second, that it could properly determine the appeal without a hearing.

28. There was in my judgment no sufficient evidence before the tribunal to show that Dorset Police had in fact consented to the appeal being decided without a hearing. Again, given the importance of this exception to the general rule that a hearing must be held, and given the wording of rule 32(1)(a) of the TPR, there must in my judgment be evidence of consent positively having been given. An absence of an objection will not suffice. If it did then the rule could have said so: contrast here the wording of rule 27 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008.”

(Rule 32 of the tribunal procedure rules in play in *IB* is identical to the terms of rule 23 of the HESC Rules.)

26. Important considerations may no doubt have been (and remain) in play in addressing how the First-tier Tribunal was (and is) best to use its resources to address appeals made to it under section 51 of the CFA. However, the First-tier Tribunal is entirely a creature of statute and it can only lawfully do, or not do, that which the law as set out in the relevant statutes and delegated legislation made under it allows it to do. For the reasons I have given above, in my judgment, and albeit bearing in mind the unargued state of the appeal before me, the way in which the First-tier Tribunal sought to mediate and qualify the consideration of right to an oral hearing provided for in rule 23 of the HESC Rules was wrong in law.
27. The tribunal’s decision of 14 February 2019 must therefore be set aside for the reasons given above. The Upper Tribunal is not able to re-decide the first instance appeal. The appeal will therefore have to be re-decided by a completely newly constituted First-tier Tribunal (Social

Entitlement Chamber), at a hearing. I have directed a hearing because the appellants have indicated they wish to have such a hearing and rule 23 of the HESC Rules therefore requires that such a hearing must be held. I note the concerns the appellants have about costs but I can see nothing from what is before me to suggest that they would be liable for Wirral's costs on the appeal I am remitting to the First-tier Tribunal.

28. The success of the appellants on this appeal to the Upper Tribunal on error of **law** says nothing one way or the other about whether the appeal will succeed on the **facts** before the First-tier Tribunal, as that will be for that tribunal to assess in accordance with the law and once it has properly considered all the relevant evidence.

**Signed (on the original) Stewart Wright  
Judge of the Upper Tribunal**

**Dated 15<sup>th</sup> January 2020**