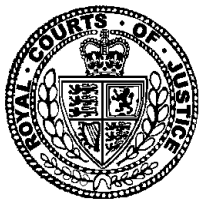

Neutral Citation Number: [2026] EWCA Civ 20

Case No: CA-2024-001676

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
UPPER TRIBUNAL JUDGE MARK WEST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2026

Before:

LORD JUSTICE BEAN
LADY JUSTICE KING
and
LORD JUSTICE STUART-SMITH

- -

Between :

HAMPSHIRE COUNTY COUNCIL	**Appellant**
- and -	
GC AND ANOTHER	**Respondent**

- -
- -

Alexander Line and **Monique Bouffé** (instructed by **Hampshire County Council**) for the **Appellant**
Tom Gillie and **Roisin Swords-Kieley** (instructed by **Clifford Chance LLP**) for the **Respondents**

Hearing date: 11 December 2025

- -

Judgment Approved by the court

Lord Justice Bean:

1. This case concerns a decision of Hampshire County Council to cease to maintain an Education, Health and Care Plan ("EHCP") for a disabled child when the family temporarily relocated to Dubai due to the father's service in the Royal Navy. Three issues are raised:

    a. First, the 'jurisdiction question': What is the jurisdiction of the First-tier Tribunal under s.51 of the Children and Families Act 2014 ("the 2014 Act")? In particular, may the Tribunal uphold an appeal on the basis of a procedural error (or multiple procedural errors) made by a local authority?.

    b. Second, the 'residence question': What is the meaning of the phrase "in the authority's area" in s.24 of the 2014 Act, and are local authorities responsible for children with special educational needs who are temporarily absent from their area? In particular, for the purpose of Part 3 of the 2014 Act, is the test for determining whether a child is in a local authority's area one of ordinary/habitual residence, or physical presence?

    c. Third, the 'implementation question': Are there circumstances in which a local authority may maintain an EHCP for a child without securing the provision set out in the plan, and how can a local authority give effect to that duty in such circumstances?

Factual and procedural background

2. This case concerns the provision of an EHCP for a boy, T. T was born on 15 June 2015. He has a diagnosis of Autistic Spectrum Disorder and Global Development Delay. T attended Primary School in Hampshire from September 2019, and his first EHCP was issued on 14 October 2019. The identity of T and his parents, the Respondents to this appeal, is protected by an anonymity order which remains in force.

3. T's father, GC, is a Chief Petty Officer in the Royal Navy. GC was born in Hampshire and has been employed by the Royal Navy since February 2006. He has gone on three deployments (the most recent being to Bahrain in 2018) without his family; and has been on six-month deployments on ships at various times as well. During all these times he has retained a residential address in Hampshire (first at his parents' house, then at his own property).

4. In August 2021 the Royal Navy deployed GC to a British military installation in Dubai. The move was initially to be for three years but was later reduced to two. The family, including T, moved to Dubai. T's needs were to be supported by provision facilitated by the Ministry of Defence. It was understood by all that the family would return to their home in Hampshire at the end of the deployment (which they did). One of the Council's case workers emailed the Respondents to say that T's EHCP would be "paused" until the family returned.

5. The family retained ownership of their house in Fareham, Hampshire during this period but secured a tenancy contract for it for a term of 12 months**.**

6. On 19 November 2021 the Appellant notified the Respondents that T's EHCP would cease from "this date". No consultation had occurred. It is common ground that this constituted a breach of s.45(5)(c) of the 2014 Act and reg 31(1) of the Special Educational Needs and Disability Regulations 2014 ("the SEND Regulations"). Additionally, the Appellant also failed to notify the Respondents of their right to appeal against the decision to cease to maintain the EHCP, a further breach of the SEND Regulations.

7. On 19 January 2022 GC received a further letter from the Appellant confirming that "the local authority has now ceased to maintain [T's EHCP]".

8. The Council had decided that it was not necessary to maintain the EHCP while T was not resident in the local authority's area; and that his needs would have to be reassessed if he returned. They had, however, stated that they were committed to expediting the EHCP reassessment process upon T's return.

9. The Respondents appealed the decision pursuant to s.51(2)(f) of the 2014 Act. This had the effect of requiring the Council to stay its decision to cease to maintain until the appeal was finally determined. The Council took the position that the parents had no standing to bring an appeal to the Tribunal and sought to have the appeal struck out. This was refused by order of Tribunal Judge Brownlee on 22 September 2022.

10. A First-tier Tribunal ("FTT") hearing took place remotely on 20 March 2023 when the family were still in Dubai, but due to return at the end of July 2023. The Appellant conceded that it had not performed a consultation before ceasing to maintain T's EHCP and asserted that s.42(2) of the 2014 Act could not be complied with while T was abroad.

11. At the outset of the hearing of 20 March 2023 the Council conceded that the letters sent to the parents did not comply with regulations 29 and 31 of the SEND Regulations; and that the local authority were required to maintain the plan until the appeal against the decision to cease to maintain it had been determined.

12. In its decision handed down on 30 March 2023 the FTT (Tribunal Judge Wenham and Specialist Members Markwell and Wood) stated:

> **"[24].** The LA conceded in the hearing on 20 March 2023 that they have not correctly followed that procedure. We find, that having made that concession, the LA should also have conceded the appeal, because it is mandatory that they comply with reg.31 and they have not. Having failed to comply with the mandatory requirements of reg. 31, the LA cannot cease to maintain T's EHCP, even at the conclusion of this appeal.
>
> **[25].** We need go no further in deciding the merits of the appeal in these circumstances. […]
>
> **[26].** For the LA to cease to maintain [T]'s EHCP, in circumstances where he is expected to return to the UK, would be to put him at a significant disadvantage to children or young people who simply move between local authorities within the

> UK. In order for the LA to act consistently with 10.55 of the Code of Practice, we find that they should not cease to maintain T's EHCP, but instead should implement a "freezing" or "pausing" of his EHCP. It is self-evident that the LA cannot comply with its duty to secure the provision in Section F of T's EHCP whilst he attends school in Dubai, but to require [him] to commence the process of applying for an EHCP afresh on the family's return to the UK, may well result in T being without the provision he requires for a considerable portion of that academic year. A process where all parties are agreed that the EHCP is frozen for a period of time is a proportionate response to mitigate the disadvantage T would otherwise suffer as a Service child.
>
> **[27].** The LA has made an offer that they will commit to providing T with the funding previously in place under his EHCP until a new EHCP process could be completed. However, this would place T at significant disadvantage, due to the fact that [his father], as Service Personnel, may yet be posted to a different LA in the UK, and T would have to start the EHCP application process in that new LA with no guarantee of funding in the meantime. If, however, the LA "freezes" T's EHCP, then it would be transferred to the new LA pursuant to Reg. 15.
>
> **[28].** Therefore, we have concluded that Hampshire County Council may not cease to maintain T's EHCP."

13. On 26 July 2023 the FTT (Tribunal Judge Ozen) granted permission to appeal.

14. Meanwhile GC's deployment had ended early, and the family had returned to the UK on 16 July 2023. The Navy paid for rental accommodation in the Appellant's area while the family waited to reclaim their house from the tenants.

15. In September 2023 a fresh EHCP was issued for T at his new mainstream junior school. Nevertheless, when the appeal came before Upper Tribunal Judge West ("the Judge") both sides agreed that he should hear the appeal because the issues involved were likely to be of general importance in other cases concerning service personnel with families, and to local authorities with duties towards the children of such families**.**

16. At the request of the Judge, Mr Line, who acted for the Council then as he has before us, stated that the Council were aware of 6180 service children in the county, of whom 309 had an EHCP. Mr Line confirmed that, at that time, there were no service families living abroad with an EHCP maintained by the local authority, and that in the past when service families had moved abroad the Council had ceased to maintain the EHCP.

17. The judge was severely critical of Hampshire's procedural failings. He said that he was satisfied that the Council had committed "egregious and manifest breaches" of reg 31 of the SEND Regulations by not consulting with T's parents as required by reg 31(1)(b); nor with the head teacher of T's primary school; and by not notifying T's parents or

head teacher of their right to appeal against the decision (nor the time limits for doing so; nor information concerning mediation; nor other matters required by regulation 31(3)). At [159] the Judge wrote, "It is difficult to conceive of a more obvious and blatant case of a failure to comply with the requirements of regulation 31."

18. The Judge accepted the parents' submissions about the mandatory nature of the obligations and the consequences of a failure to comply. He held:

> **"[162].** It follows that a decision to cease to maintain an EHCP under s.45(1) of the 2014 will be invalid if it is taken in breach of the mandatory requirements of regulation 31 of the 2014 [Act]. I leave open for another case the question whether, in circumstances where the parents have participated in a significant consultation process and have been provided with substantially all of the requisite information and have therefore suffered no prejudice, minor infringements of regulation 31 might not invalidate the subsequent s.45(1) decision, but that is plainly not this case."

19. The Judge rejected the local authority's argument that the Tribunal had no jurisdiction to determine whether or not there had been a breach of regulation 31.

20. At [199] the Judge held:

> **"[199].** I am satisfied that the provision in s.24 of the 2014 Act which stipulates that, when a local authority is responsible for a child "in the authority's area" who has been identified by the authority as someone who has, or may have, special educational needs, that includes a person who is ordinarily or habitually resident in that area, but is temporarily absent by virtue of [his] parent's overseas deployment as a part of the armed forces of the Crown. It follows that if a child or young person is ordinarily or habitually resident "in the authority's area", notwithstanding such temporary absence elsewhere, the local authority remains responsible for the child or young person and may not therefore cease to maintain the child's EHCP on the basis that it cannot comply with s.45(1)(a) and demonstrate that it "is no longer responsible" for the child or young person. In summary, s.24 of the 2014 Act imports an ordinary or habitual residence test, as Mr Gillie contended, rather than a presence test, as Mr Line contended."

21. The Judge also considered the speeches of Lady Hale DPSC and Lord Hughes JSC in *A v A (Children: Habitual Residence)* [2013] UKSC 60; [2014] AC 1. At [224] the Judge said:

> **"[224].** As a general rule, a child will share the habitual residence of his parents with whom he lives and there is no reason why that general rule should not apply in the present case. In particular, I note what Lord Hughes said …… namely that, in order to distinguish habitual residence from

> mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence, although the law does not lay down any minimum duration. However, before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."

22. The Judge held, applying this, that although at the relevant time T and his family were physically present in Dubai, the other relevant factors to be taken into account indicated that their ordinary or habitual residence was in Hampshire, and that their presence in Dubai was temporary and of a circumscribed duration.

> **"[226]** […]The duration, conditions and reasons for the stay in Dubai and for the family's move there on service deployment all demonstrate that he remained ordinarily or habitually resident in Hampshire, and thus within the Council's area. […]".

23. The Judge also rejected the submission that the FTT had approached its task as if it were subjecting the Council's decision to review as opposed to a *de novo* appeal. At [229] the Judge found that the FTT had been:

> "deciding an appeal which had been brought before it as the appropriate statutory tribunal pursuant to s.51 of the 2014 Act against one of the matters listed in subsection (2), namely (f) a decision by a local authority to cease to maintain an EHCP for a child or young person."

24. The argument that the FTT had relied on procedural irregularity as the basis of upholding the appeal did not mean that it was illegitimately performing a quasi-judicial review outside the scope of its jurisdiction. It simply meant that the Council's defence had failed on a preliminary point, and thus there was no need to continue to examine the substantive merits [231].

25. The Judge also rejected at [241] a submission that the Tribunal's decision should be struck down for perversity.

26. The Judge accepted the submissions of the parents that T would be placed at a disadvantage compared to children who moved between local authorities in the UK. The Judge identified a risk that T would be without provision for a considerable portion of the academic year if he had been required to reapply for an EHCP upon the family's return to the UK. The fact that the Council had provided assurances about equivalent funding pending a fresh assessment did not wholly ameliorate the disadvantage as the father might be posted to a different area of the UK and T would then have to start the EHCP application process in the new area.

27. At [244] the Judge acknowledged that the words 'freezing' or 'pausing' used by the FTT do not appear in the 2014 Act or subordinate regulations, but nevertheless he upheld the FTT's decision. The Judge was satisfied that a local authority was permitted under the 2014 Act to maintain an EHCP in the circumstances of the case without breaching its statutory duty:

> "[245] Mr Line raised the spectre of the local authority being placed in breach of statutory duty by the Tribunal's decision, but it seems to me that the reality is that no action would, or could sensibly, be taken by a child's parents against the local authority in circumstances such as these if it simply maintained the status quo pending the family's return to the UK at the end of the deployment and that the problem which Mr Line sought to raise was in reality something of a chimera."

28. The Judge reasoned that the provisions of s.45(1) bestowed a discretion on the local authority to cease to maintain an EHCP rather than an obligation [246]; and by virtue of s.42(5) the Council was not obliged to "secure the specified special educational provision" in the EHCP if "the child's parent has made suitable alternative arrangements". While it was for the Council to satisfy itself that suitable alternative provision had been made, in the present case Hampshire had not done so by virtue of their breach of reg.31 of the SEND Regulations in failing to consult the parents.

29. On 9 October 2024 Andrews LJ granted permission to appeal on condition that the Appellant (Hampshire) agreed that whatever the outcome in this court it would not seek costs from the Respondents in respect of proceedings in this court or the tribunals below, and would not seek repayment from them of any costs that it had been ordered to pay. In a letter dated 18 October 2024 the solicitors for the Appellant confirmed that Hampshire agreed to these conditions.

The legal framework

The Children and Families Act 2014

30. The material provisions of the 2014 Act are as follows:

> **s.22 Identifying children and young people with special educational needs and disabilities**
>
> A local authority in England must exercise its functions with a view to securing that it identifies—
>
> (a) all the children and young people in its area who have or may have special educational needs, and
>
> (b) all the children and young people in its area who have a disability.
>
> **s.24 When a local authority is responsible for a child or young person**
>
> (1) A local authority in England is responsible for a child or young person if he or she is in the authority's area and has been—

(a) identified by the authority as someone who has or may have special educational needs, or

(b) brought to the authority's attention by any person as someone who has or may have special educational needs.

(2) This section applies for the purposes of this Part.

s.42 Duty to secure special educational provision and health care provision in accordance with EHC Plan

(1) This section applies where a local authority maintains an EHC plan for a child or young person.

(2) The local authority must secure the specified special educational provision for the child or young person. …

(5) Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.

(6) "Specified", in relation to an EHC plan, means specified in the plan.

s.45 Ceasing to maintain an EHC plan

(1) A local authority may cease to maintain an EHC plan for a child or young person only if

(a) The authority is no longer responsible for the child or young person, or

(b) the authority determines that it is no longer necessary for the plan to be maintained […]

(4) A local authority may not cease to maintain an EHC plan for a child or young person until –

(a) after the end of the period allowed for bringing an appeal under s.51 against its decision to cease to maintain the plan, where no such appeal is brought before the end of that period;

(b) after the appeal has been finally determined, where such an appeal is brought before the end of that period.

(5) Regulations may make provision about ceasing to maintain an EHC plan, in particular about- […]

(a) other circumstances in which it is no longer necessary for an EHC plan to be maintained

(b) circumstances in which a local authority may not determine that it is no longer necessary for an EHC plan to be maintained;

(c) the procedure to be followed by a local authority when determining whether to cease to maintain an EHC plan.

s.83 Interpretation of Part 3

(6) A reference in this Part to a child or young person who is "in the area" of a local authority in England does not include a child or young person who is wholly or mainly resident in the area of a local authority in Wales or who would be wholly or mainly resident in the area of a local authority in Wales were it not for provision secured for the child or young person under Part 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018".

The Special Educational Needs and Disability Regulations 2014

31. Reg.31 provides that:

(1) Where a local authority is considering ceasing to maintain a child or young person's EHC plan it must—

a) inform the child's parent or the young person that it is considering ceasing to maintain the child or young person's EHC plan; and

b) consult the child's parent or the young person;

c) consult the head teacher, principal or equivalent person at the educational institution that is named in the EHC plan.

(2) Where, following that consultation the local authority determines to cease to maintain the child or young person's EHC plan, it must notify the child's parent or the young person, the institution named in the child or young person's EHC plan and the responsible commissioning body of that decision.

(3) When notifying the child's parent or the young person of its decision to cease to maintain the EHC plan, it must also notify them of—

a) their right to appeal that decision;

b) the time limits for doing so;

c) the information concerning mediation, set out in regulation 32; and

d) the availability of— (i) disagreement resolution services; and (ii) advice and information about matters relating to the special educational needs of children and young people.

The SEND Code of Practice

32. The SEND Code of Practice provides:

Maintaining special educational provision in EHC plans

Section 42 of the Children and Families Act 2014

9.133 Where the child's parent or the young person makes alternative arrangements, the local authority must satisfy itself that those arrangements are suitable before it is relieved of its duty to secure the provision. It can conclude that those arrangements are suitable only if there is a realistic possibility of them being funded for a reasonable period of time. If it is satisfied, the authority need not name its nominated school or college in the EHC plan and may specify only the type of provision. This is to avoid the school or other institution having to keep a place free that the child's parent or the young person has no intention of taking up.

> **10. Children and young people in specific circumstances**
>
> **Children of Service Personnel**
>
> 10.53 The Children's Education Advisory Service (CEAS) within the Ministry of Defence provides advice and guidance to Service parents, educational establishments and local authorities on educational issues relating to Service children, including issues relating to SEN. Service Children's Education (SCE) provides mainstream education for Service children in some overseas locations. As the education, health and social care resources available overseas are different from the UK, MoD services complete an MoD Assessment of Supportability Overseas (MASO) for all Service children with complex needs before an overseas posting is agreed. Personal Budgets agreed in the UK cannot be transferred to SCE locations overseas.
>
> 10.54 Children whose parent(s) are Service personnel may face difficulties that are unique to the nature of their serving parent's employment. These needs may arise from:
>
> • service induced mobility: Service personnel may relocate more often than the rest of the population and, sometimes, at short notice. Such transitions should be well managed to avoid Service children with SEN experiencing delays in having their needs assessed and met
>
> • the deployment of serving parents to operational arenas, while not constituting SEN in itself, may result in a Service child experiencing anxiety, dips in educational performance and/or emotional difficulties. Children may also be affected similarly by siblings' deployment
>
> **Action to take in respect of Service children with SEN**
>
> 10.55 In having regard to this Code of Practice and in meeting the aspirations of the Armed Forces Covenant, which attempts to eliminate or mitigate some of the potential disadvantages faced by Service families, all those with statutory responsibilities towards Service children with SEN should ensure that the impact of their policies, administrative processes and patterns of provision do not disadvantage such children because of their Service-related lifestyle.

The Armed Forces Act 2006

33. The Armed Forces Act 2006 provides:

> **343AA Due regard to principles: England**
>
> (1) In exercising in relation to England a relevant function, a person or body specified in subsection (3) must have due regard to—
>
> (a) the unique obligations of, and sacrifices made by, the armed forces,
>
> (b) the principle that it is desirable to remove disadvantages arising for service people from membership, or former membership, of the armed forces, and

> (c) the principle that special provision for service people may be justified by the effects on such people of membership, or former membership, of the armed forces.
>
> (2) In this section "relevant function", in relation to a person or body specified in subsection (3), means— […]
>
> (c) a relevant education function […]
>
> (3) The specified persons and bodies are—
>
> (a) a local authority in England; …
>
> (5) In this section "relevant education function" means a function under or by virtue of any of the following—
>
> (a) the Education Act 1996;
>
> (b) Part 3 of the School Standards and Framework Act 1998 (school admissions);
>
> (c) section 175 of the Education Act 2002 (duties of local authorities and governing bodies in relation to welfare of children);
>
> (d) any provision of Part 3 of the Children and Families Act 2014, so far as it deals with special educational provision. […]
>
> (7) In this section "health care provision" and "special educational provision" are to be interpreted as if this section were in Part 3 of the Children and Families Act 2014 (see section 21 of that Act).

34. It should be noted that s.343AA did not come into force until 22 November 2022, some months after the FTT decision. The Council had, however, in June 2011 signed the Armed Forces Covenant whose obligations were not materially different from the later statute. On its website the Council stated:

> The County Council's approach is based on the following principles:
>
> • No disadvantage - this ensures members of the armed forces community experience no disadvantage as a result of their service in the armed forces
>
> • Smooth transition - this ensures appropriate actions are taken to support the transition from military to civilian life
>
> • Work with partners to reduce duplication. Make efficient use of all available resources to deliver the best possible outcomes for members of the armed forces community The ambition is that the County Council's support for the armed forces is embedded into mainstream services, based on evidenced need. The Armed Forces Covenant is based upon two key principles:
>
> • The Armed Forces community should not face disadvantage compared to other citizens in the provision of public and commercial services
>
> • Special consideration is appropriate in some cases, especially for those who have given most such as the injured and the bereaved.

Grounds of appeal to this court

35. Andrews LJ granted permission to appeal on three grounds:

    a. **Ground 1 (the jurisdiction question)**: The Upper Tribunal erred, in particular at [160]-[163], by concluding that a procedural defect occurring before the registration of an appeal, or the decision which was subject to that appeal (in this case a failure to consult), could constitute the basis for upholding the appeal by the Tribunal.

    b. **Ground 2 (the residence question)**: The Upper Tribunal erred in particular, at [206] and [228], by concluding that the test for determining if a child or young person is in the area of a local authority is one of ordinary / habitual residence.

    c. **Ground 3 (the implementation question)**: The Upper Tribunal erred, in particular at [244]-[250], in its approach to s.42(2) of the CFA 2014 by concluding that a local authority must maintain an EHCP in cases where the child or young person is absent from its area.

Submissions

Ground 1: the jurisdiction question

36. The Appellant Council submitted that the Upper Tribunal had made an error of law and extended the jurisdiction of the Tribunal beyond its statutory remit**.** The Council did not deny that it failed to consult with the parents and headteacher in accordance with reg.31**.** Mr Line submitted, however, that there are situations where mandatory procedural obligations are imposed on local authorities but are not always completed, in practice, before an appealable decision is made.

37. The Appellant cited Lord Steyn in *R v Soneji* [2006] 1 AC 340 at [14] in support of this: "A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply". At [23] Lord Steyn stated that: "……the question [is] whether Parliament can be fairly taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction."

38. The Appellant submitted in its skeleton argument that the failure to consult happened before the decision to cease to maintain. If the parents wished to invalidate the Appellant's decision because of a failure to consult, the correct route would have been to pursue a quashing order from the High Court through a judicial review claim**.**

39. The Appellant argued before us that the Tribunal's jurisdiction on appeal is in relation only to the decision to cease to maintain, not the process leading to such a decision. The Tribunal has a *de novo* inquisitorial jurisdiction and engages with the merits of the case at the time of the hearing. The nature of the Tribunal's jurisdiction is further illustrated by its powers in a cease to maintain context. The Tribunal may order a local authority to continue to maintain an EHCP in its existing form, or an amended form, but has no power to determine a complaint regarding a procedural breach**.** Such a system puts a parent or young person at no disadvantage.

Respondents' submissions

40. The Respondents argued that the jurisdiction of the Tribunal is defined by reference to the subject matter, not by reference to a legal regime. Further, the ordinary meaning of the phrase "against the matters" in s.51(2) is wide enough to include the question of whether a decision is invalid because a local authority has failed to comply with the mandatory regulations governing that decision. There is nothing in the language of s.51(1) or s.51(2) that confines the Tribunal's jurisdiction in the manner that the Appellant submits.

41. The Respondents submitted that reg.31 creates a duty on the local authority to consult parents, children and teachers in the course of its decision, and that the regulation is integral to the local authority's exercise of its power.

42. Mr Gillie submitted that there is a public benefit for each of two reasons in the Tribunal having the power to decide that a s.51(2) decision is invalid where a local authority has not complied with mandatory regulations governing the decision. First, the Tribunal should uphold the rule of law in this specialist area over which it has been given primary jurisdiction. Second, it avoids the duplicated costs, delay and confusion created by requiring proceedings in the High Court alongside those in the Tribunal**.**

43. The Respondents cite, by way of analogy, the House of Lords decision in *Chief Adjudication Officer and another v Foster* [1993] AC 754. The House considered the jurisdiction of the Social Security Commissioner in an appeal against the social security appeal tribunal on the ground that the latter had been erroneous in point of law by determining the *vires* of regulations promulgated by the Secretary of State. The House of Lords found that the Commissioner's jurisdiction to determine a statutory appeal on the basis of an error of law extended to determining a challenge to the *vires* of a provision in secondary legislation**.** The Respondents argue that if a tribunal may set aside a decision because it is based on *ultra vires* regulations, there is no good reason why the FTT may not set aside a decision because the procedure required by the relevant regulations has not been followed.

44. The Respondents argue that: "the practical effect of what the Appellant is now advocating is that local authorities can treat the mandatory nature of Reg 31 (and others) as a dead letter, because it does not matter whether the local authority complies with them or not, given the general appeal jurisdiction. That cannot be right, or what Parliament intended.". They cite the speech of Lord Browne-Wilkinson in *R v East Sussex CC ex p. Tandy* [1998] A.C. 714 at 749:

> "Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgement the courts should be slow to downgrade such duties into what are, in effect, mere discretions over which the court would have very little real control."

Ground 2: the residence question

Appellant's submissions

45. The Appellant submits that the Upper Tribunal erred in concluding that an ordinary / habitual residence test applied to deciding whether a child or young person is in a local authority's area. Mr Line points out that there is no reference to an ordinary / habitual residence test in ss.24 or 45 of the 2014 Act. Section 24 uses the term *"in the authority's area"* instead, which creates a physical presence test.

46. Furthermore, even on an ordinary residence test, T was not present within the Appellant's area and did not practically benefit from his EHCP whilst abroad for two years.

47. The Appellant also criticises the Upper Tribunal's reasoning at [201]-[202] where it relied on s.83(6) of the CFA 2014 – where the material aspect of the provision was only appliable to Wales. It gives no insight into how s.24 should be generally interpreted.

48. The Appellant notes that regulation 15 of the SEND Regulations, which concerns the transfer of EHCPs from one Local Authority area in England to another, does not use the language of ordinary / habitual residence. It is possible to be ordinarily resident in more than one place, but the 2014 Act clearly envisages that only one local authority ought to be responsible for an EHCP; hence the process for transfer and the physical presence approach.

49. With regard to the Armed Forces Act 2006, the Appellant accepts that these obligations apply to Hampshire (either via the operation of the 2006 Act or via the Armed Forces Covenant). The Appellant submits, however, that the Upper Tribunal was wrong to reason that their obligations to Service families with SEN children can only be met by the local authority's maintenance of an EHCP throughout long periods of absence.

Respondents' submissions

50. The Respondents submit that the Appellant's physical presence construction would have significant detrimental consequences at odds with the purpose of the legislation. It would particularly impact children who are looked after by local authorities, and the children of Service families.

51. The physical presence construction, in the submission of the Respondents, would also create confusion in circumstances of temporary absence (for school holidays, temporary residential placements, or moving between separated parents). By contrast, the factors that go to the question of ordinary / habitual residence are well established (see *A v A and another (Children: Habitual Residence) (Reunited International Child Abduction Centre and others intervening)* [2013] UKSC 60; [2014] A.C. 1 at [54]).

52. Furthermore, guidance produced by the Department for Education has since 2009 consistently applied a test of ordinary residence. This guidance is not binding, but the Respondents submit that it is persuasive.

53. The Respondents note that s.83(6) of the 2014 Act states that:

> "(6) a reference in this Part to a child or young person who is "in the area" of a local authority in England does not include a child or young person who is wholly or mainly resident in the area of a local authority in Wales […]"

54. This suggests that the concept of temporary absence is possible within the 2014 Act. A child may be mainly resident in Wales but sometimes resident in an English local authority, but the responsibility of the Welsh local authority. For the purposes of the equivalent statute in Wales a child may be 'in the area of the authority' despite being temporarily absent in England. The Respondents submit that it would be surprising if the reverse were not true as well.

Ground 3 – the implementation question

Appellant's submissions

55. The Appellant submits that the Upper Tribunal erred, in particular at [244]-[250] in its approach to s.42(2) of the 2014 Act by concluding that a local authority must maintain an EHCP in cases where the child or young person is absent from its area. S.42(2) creates an absolute and non-delegable duty, where a local authority maintains an EHCP, to secure the special educational provision specified within it.

56. At [244] the Upper Tribunal held that: "*what the tribunal was saying was that, in the circumstances of T's case, the Council could maintain the EHCP, but that it was not obliged to take steps to secure the provision specified within it."* The Appellant argues that if the Appellant was not able to secure provision because T was abroad for a significant period in Dubai, the Appellant acted lawfully in ceasing to maintain the EHCP by applying s.45 of the CFA 2014.

57. The Appellant argues that the Upper Tribunal's judgment creates difficulties for local authorities. It leaves uncertain whether a local authority must facilitate special education provision abroad; how annual review obligations can be performed effectively; whether school or college places need to be kept open during lengthy periods of absence at a cost to the local authority and to the detriment of other pupils. Furthermore, such concerns are not unique to Service families, but to any families where one parent faces secondment abroad in the course of their employment.

Respondents' submissions

58. The Respondents submit that it does not follow from the fact that the s.42(2) duty is absolute and non-delegable that a local authority has no choice but to cease to maintain an EHCP if a person is temporarily absent from its area. There are two mechanisms within the statute which permit a local authority to maintain an EHCP in circumstances where a person is temporarily absent. S.42(5) disapplies the authority's s.42(2) duty where a parent (or young person) has made suitable alternative arrangements. The Respondents submit that this is the case here. Alternatively, s.44(3) gives a local authority the power to secure a reassessment of a child's needs if it thinks it necessary. If a child were moving to a place where it would be impossible for the authority to secure the EHCP provision, then it could reassess the child's needs accordingly.

59. The Respondents highlight that not being able to secure provision for an EHCP is not a ground for ceasing to maintain it. The only lawful grounds for ceasing to maintain an EHCP are found in s 45(1) of the 2014 Act and regs 29 and 30 of the 2014 Regulations.

Discussion

Ground 1 – the jurisdiction question

60. Hampshire did not argue before us, as they appear to have done before the Upper Tribunal, that T's parents had to bring proceedings for judicial review in the Administrative Court to quash the Council's decision to cease to maintain their son's EHCP before appealing to the FTT. I agree with the Judge that no such requirement exists and Mr Line was in my view correct not to pursue the point in oral argument in this court. A requirement that a challenge based on reg. 31 could only be brought and determined in the High Court would entail precisely the duplication of proceedings which Lord Bridge deprecated in *Foster*. It would be impractical, disproportionate and time-consuming for a parent or young person to have to bring High Court proceedings in parallel to or even before embarking on an appeal to the FTT. Parliament established the FTT in order to give appellants ready access to a specialist tribunal in a field where, in the words of Collins-Rice J in *R(Kumar) v Hillingdon LBC* [2021] PTSR 686 at [31], "there is a fundamental and frightening inequality of power".,

61. The gap between the parties on the jurisdiction question is not as wide as it at first appeared to be. Mr Line contends:

> "The decision to cease to maintain the EHCP stood notwithstanding the error of process and was subject only to the outcome of the s.51 statutory appeal."

That submission is correct as far as it goes, so long as one bears in mind that the powers of the FTT on a statutory appeal are very wide.

62. For his part, Mr Gillie does not contend that the serious procedural deficiencies criticised by the tribunals below resulted in automatic invalidity of the decision. The Respondents' skeleton argument states:-

> "The correct delineation is between a breach of a regulation governing a decision [listed] in s.51(2) CFA 2014, over which the tribunal's jurisdiction extends; and a free-standing breach that is not directly relevant to a matter s.51(2), over which it does not. Thus, the section does not preclude a Tribunal form determining that a local authority's decision is invalid because the authority has breached mandatory regulations governing the decision to cease to maintain. This does not mean that such a breach will inevitably lead to the setting aside of a decision. That is a matter for the tribunal under Reg. 43of the 2014 Regulations on the facts of each case."

This is in my view an entirely accurate statement of the FTT's jurisdiction in a case of this kind. (It makes it unnecessary in this case to consider the numerous authorities on automatic invalidity.)

63. I would accordingly amend the Judge's statement of the law in paragraph 162 of his judgment to read as follows:

> "A decision to cease to maintain an EHCP under s.45(1) of the 2014 Act will be *liable to be held invalid and set aside by the*

> *FTT* if it is taken in breach of the mandatory requirements of Reg. 31 of the 2014 Regulations." [emphasis added]

64. Consultation with the child or young person, the child's parents and the child's school is of fundamental importance to the fair and proper operation of the system. Nevertheless, as the Judge pointed out, there may be cases where there has been significant consultation and the breach of reg. 31 is not material. Plainly this case, where there was a total lack of consultation, is not one of them. The breaches were, as the Judge held, "wholesale and egregious". The procedural error cannot be separated from the decision to cease to maintain the EHCP. Each was integral to or intertwined with the other.

65. The answer to the jurisdiction question is therefore "yes". But in the present case this is only the prelude to the critical issue of whether, while T and his parents were temporarily in Dubai, he was nevertheless "in the area" of the local authority. If he was, then (subject to ground 3) the local authority were in breach of their duty to him. If, however, on a proper interpretation of s.24 he was not "in the area" of the Council, then the procedural issues are academic.

Ground 2 - the residence question

66. Section 51 of the 2014 Act provides, so far as material, that:

> "(1) A local authority in England is responsible for a child or young person if he or she is in the authority's area and has been —
>
> (a)identified by the authority as someone who has or may have special educational needs, or
>
> (b)brought to the authority's attention by any person as someone who has or may have special educational needs.
>
> (2) This section applies for the purposes of this Part."

67. Section 24(1) makes a local authority responsible for a child with special educational needs who is in the authority's area. The Council first suggests that whether T was in Hampshire's area for s.24 purposes was a question of fact for decision by the local authority, again only challengeable by judicial review.

68. In the present case, the determination of whether he was in the authority's area is a question of mixed fact and law. The Appellant Council argues that on a proper interpretation of s.24(1) the essential criterion is physical presence in Hampshire. Physical presence on a given date is a simple concept, but as a test for legal responsibility of an authority under s.24(1) it does not withstand scrutiny.

69. Many obvious examples spring to mind. The family may take a short holiday or pay a visit to relatives, whether elsewhere in this jurisdiction or abroad. The father might be deployed abroad for a fixed term of three months - in effect for one school term – and the mother and children might accompany him. Or the child concerned may have parents who are divorced or separated, one living in the local authority's area and one

in a neighbouring county, and the child moves regularly between the two in accordance with arrangements agreed between the parents or ordered by a court.

70. In the case of looked-after children these issues may be particularly acute. Mr Gillie gave the following example:-

> "A child with SEN is looked after by a local authority (A) who is the child's corporate parent. There is a shortage of available care placements in Local Authority A's area. The local authority has to place the child in several different placements over the course of a six month period, all outside Local Authority A's area. The child is placed in Local Authority [B then C, then D]. At the end of that six month period a longer-term foster placement becomes available in local authority A and the child moves back to Local Authority A's area. In this scenario the child is deemed ordinarily resident in Local Authority A, who has responsibility to look after the child."

71. In his valiant submissions on this issue Mr Line conceded that a simple test of physical presence or absence on a particular date is inadequate. He accepted that there must be a *de minimis* exception for very short holidays and the like. He argued that where to draw the line was a matter of discretion with the decision challengeable only by judicial review.

72. Given the inadequacies of the physical presence test, the obvious alternative is to use the test of "ordinary or habitual residence", as it was described in the judgment of the Upper Tribunal. Mr Line is right to point out that the two terms are not quite interchangeable, but I do not think it is necessary in this case to explore the distinctions between them. Ordinary residence, the more usual term in the law relating to children, is sufficient for present purposes.

73. As Lord Carnwath JSC said in *R* (*Cornwall Council) v Secretary of State for Health* [2015] UKSC 46; [2016] AC 137, the ordinary residence test has proved resilient. The Supreme Court held in that case that the policy of the Children Act 1989 and the National Assistance Act 1948 was to leave the ordinary residence of a person provided with accommodation by a local authority unaffected by the location of the particular placement, in order to prevent authorities from exporting their responsibilities. In the context of children or vulnerable adults to whom a local authority has statutory duties it was common ground in the *Cornwall* case that the subject could be ordinarily resident in the area of only one local authority. Otherwise the test would not be an effective tool for allocating responsibility for services or their cost.

74. The applicability and utility of the ordinary residence test in SEN cases is confirmed by the guidance provided by the Department for Education and its predecessors over many years. As long ago as 2009 the Department set out in its *Guidance on Looked After Children with Special Educational Needs placed out-of-authority* that:

> "The term 'in their area' is not defined in the legislation. In line with established practice, the Department construes this phrase to mean 'ordinarily resident in their area'. This means that an

> SEN assessment must be carried out by the authority where the child is ordinarily resident."

The 2015 statutory guidance promulgated under the CFA 2014, the *Special educational needs and disability code of practice: 0 to 25 years*, also continues to adopt a test of ordinary residence. Neither of these guidance documents is binding on the court, but Mr Line did not persuade me that they were legally erroneous or that the test was too difficult to apply in practice, at least in the great majority of cases.

75. Use of the ordinary residence test is also in my view consistent with public policy and in particular with the Armed Forces Covenant to which Hampshire has subscribed for some years. On the Appellant's construction, Hampshire might cease to maintain the EHCP whenever T accompanies his father abroad on deployment. Upon T's return to this country there would be no SEN provision in place and the process to obtain a new EHCP would have to begin from scratch. Assurances that the case would be expedited do not take the matter much further and might prove impossible to enforce. Far better that on T's return to the UK, with the EHCP still in place, he can continue to have SEN support without any gaps and without the family having to grapple with a new assessment process.

76. I accept also that the Respondents' case is supported by the wording of s.83(6) of the 2014 Act which states that references to a child "in the area" of a local authority in England do not include a child or young person who is wholly or mainly resident in the area of a local authority in Wales. The inclusion of "or mainly" is significant. If a child is mainly resident in Wales but sometimes resident in England, s.83(6) states that he will be the responsibility of the Welsh local authority. He will therefore be "in the area of the authority" in Wales for the purposes of the equivalent of s.24 set out in the Additional Learning Needs and Education Tribunal (Wales) Act 2018, despite being temporarily absent in England from time to time. It would be surprising and inconsistent, as Mr Gillie submits, if in the opposite scenario the statutory scheme had the result that a child mainly resident in England but sometimes resident in Wales was not in the English local authority's area for the purposes of s.24 of the 2014 Act. However, this point is hardly central to the Respondents' case.

77. I agree with UTJ West that the important features of the present case are that:

> a) the deployment of T's father to Dubai was for a strictly limited period (set at 3 years though in the event he and the family returned after 2 years) and the intention was clearly that they would then return to Hampshire;
>
> b) the parents retained ownership of their home in Fareham, Hampshire, although they rented it out;
>
> c) the Royal Navy paid for an annual return flight for GC and his family from Dubai to England to help them maintain contact with relatives in England.

On these facts the UT was right to hold that T remained ordinarily resident in Hampshire.

78. Not every move of a family abroad will have a factual background pointing to a child's ordinary residence remaining in an English local authority. If a family relinquish

ownership or the tenancy of their home in England and move abroad together because one of the parents has obtained a permanent job abroad, it may be very difficult to argue successfully that the child remains ordinarily resident in England for s.24 purposes. Less straightforward may be a situation where the family move for what is intended to be a trial period. As time then passes, it will be increasingly difficult to argue that the child remains ordinarily resident in the area. Such cases will have to be considered on the facts as and when they arise.

Ground 3: The implementation question

79. This can be dealt with briefly. The statutory scheme contains two mechanisms by which a local authority may maintain an EHCP even if the provision specified within it cannot, or need not, be implemented. Section 45(5) of the 2014 Act allows a local authority to maintain an EHCP without implementing its contents where parents arrange alternative provision which the local authority considers suitable. A local authority also has a power to reassess what provision is necessary in an EHCP under s.44(3) of the 2014 Act. Where a child is temporarily abroad such that current EHC provision cannot be implemented, there is nothing to stop a local authority from amending the contents of an EHCP to reflect a change in what is necessary for the child; but that does not justify ceasing to maintain the EHCP. Here, suitable alternative provision was found by the Respondents, facilitated by the Ministry of Defence. The Council, because of their failure to consult as they should have done, were unaware of this. But if they had made proper enquiries they could quite properly have decided to maintain the EHCP without implementing its contents as s.45(5) permits: or, in the apt words of the FTT, effectively to "freeze" or "pause" the provision of education themselves.

Conclusion

80. I would dismiss this appeal. By agreement between the parties there will be no order as to costs.

Lady Justice King

81. I agree.

Lord Justice Stuart-Smith

82. I also agree.