IN THE UPPER TRIBUNAL **Case No** HS/1585/2018
ADMINISTRATIVE APPEALS CHAMBER

Before UPPER TRIBUNAL JUDGE WARD

Attendances:

For the Appellant:	Mr Tom Tabori, instructed by SEN Tribunal Team Manager, Essex County Council
For the Respondent:	Mr Sean Bowers, SEN Action

Decision: The appeal is allowed to the following extent. The decision dated 5 April 2018 of the First-tier Tribunal sitting at Royal Courts of Justice under reference EH881/17/00139 involved the making of an error of law. The discretion of the Upper Tribunal under s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 is exercised against setting the First-tier Tribunal's decision aside.

REASONS FOR DECISION

1. This case has served to examine some areas of the law and practice relating to special educational needs which rarely come before the Upper Tribunal. They include what action the First-tier Tribunal ("FtT") should take where it has made an order to which it is common ground between the parties that effect cannot be given; the procedural consequences which follow if an EHC Plan is issued after the FtT's decision which, even for good reasons, does not reflect the FtT's order; and the role of an order for suspension of the effect of the FtT's decision made by the Upper Tribunal under rule 5(3)(m) of its Rules (which I shall refer to hereafter as a "stay" for brevity). The case also involves the exercise by the Upper Tribunal of its discretion under s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

2. The case concerns J, a boy in his mid-teens. He has diagnoses of autistic spectrum disorder ("ASD"), global developmental delay and epilepsy. He has complex communication and behavioural difficulties as a result of these conditions and can display challenging behaviour at times. He had been attending C School and college, a day special school for pupils with severe special educational needs and additional needs and the local authority proposed that those arrangement should continue. His parents considered he required a waking day curriculum and a residential placement at B School, a maintained residential special school for pupils with ASD and severe learning difficulties, situated in a different area. The local authority accepted B could meet J's special educational needs but considered that placing him there would be incompatible with the efficient use of resources.

3. The FtT sat on 13 March 2018 and by a decision dated 5 April 2018 noted that J had been offered a place at B from September 2018 and (without any stipulation as to effective date) named B. By reg 44(2) of the Special

Educational Needs and Disability Regulations 2014/1530 ("the 2014 Regulations"), the local authority was obliged to re-issue the plan within 5 weeks (the FtT having required it to amend the special educational provision specified as well as the school named).

4. On 20 April a local authority officer emailed the FtT explaining that, as the FtT had noted, B did not have any boarding places available until September 2018, but that the decision had not indicated whether the placement at B was to start immediately or only from September. The email asked if the matter could be placed before the judge "as a matter of urgency for clarification and amended, if necessary." The evidence suggests that the FtT sent a reply refusing to clarify its decision, although it is not in evidence what form that "refusal" took. In subsequent correspondence between the representatives, J's parents suggested that C be named until July 2018 and B from September 2018 and the local authority agreed. The local authority issued a Plan to that effect dated 18 May and on 29 May wrote to the parents, saying:

> "Further to your recent contact with regards to inaccuracies with the EHCP following the SEND tribunal order and correspondence from Mr Sean Bowers your Advocate, I now enclose the final Plan including the changes to page 19 and using the agreed wording for Section I."

5. On 15 June 2018 the local authority, having been refused permission to appeal by the FtT against the decision of 5 April, applied to the Upper Tribunal for permission to appeal and a stay. The application made no reference to the matters in [4] above. In support of the application for a stay, it submitted:

> "63. The effect of the decision regarding Section I changes [J's] placement from his current school, [C] School and College. [J] attends this school as a day pupil and has done so since 2009. The effect of the order will be to change J's school placement to [B] School, a residential school from September 2018. This will be a significant change for him as he will have to get used to a new environment after 9 years in the same school and become accustomed to staying away from home for longer periods than he has before. If, following this appeal, a different decision was reached regarding his school placement this would be a further change and disruption for J.
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> 64. In line with Carmarthenshire CC v M and JW [2011] AACR 17, a solid ground exists in the need to act at all times in the best interests of the child. The LA's view is that it is in [J's] best interests to remain at [C] School until his placement is finally decided. This would be with the increased therapy provision ordered by the Tribunal, something which was put in place immediately after the decision. J would remain at a school he is familiar with and this would avoid any unnecessary disruption for him if it is ultimately decided that he does not require a residential school placement.
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> 65. The LA therefore requests that the Upper Tribunal suspends the decision regarding Section I of the appeal [i.e. of the EHC Plan] and

> that [J] remains at [C] School and College until the outcome of this appeal."

6. On 2 July 2018 (issued 3 July) Upper Tribunal Judge Wikeley refused permission to appeal on the papers, but ordered a stay for long enough for the local authority to exercise their right to apply to renew their application at an oral hearing and, if they did so, until further order. He suggested that if they did so, the parties might wish to agree to a rolled-up hearing. On 17 July the local authority sought a hearing. The parents did not agree to a rolled-up hearing and on 13 August 2018 I gave directions confirming that the stay remained in force and setting the oral hearing for 31 August, which was attended by both parties' representatives.

7. Following that hearing, I gave permission to appeal on limited grounds. In the light of the way the case has gone, their detail is of secondary importance but in short was whether the FtT had made sufficient findings to support the view that a waking day curriculum was required, whether that conclusion was consistent with the FtT's handling of the remainder of the working document and whether it had given adequate reasons for its treatment of certain expert evidence. I indicated that in the light of the strong emphasis in the evidence on J's need for continuity and consistency, the stay would be maintained.

8. On behalf of the parents, Mr Bowers filed a submission dated 23 October which accepted that the FtT had erred in law in the respects I had identified but submitted that the Upper Tribunal should not set the FtT's decision aside because the local authority (a) had arranged and was funding J's placement at B School and (b) had issued another EHC Plan on 18 May 2018 which was different from that ordered by the FtT, with the consequence that the decision of Upper Tribunal Judge Wright in *Essex CC v DH (SEN)* [2016] UKUT 0463 should be followed. The local authority in reply rejected the argument based on *DH*, invited the Upper Tribunal to remake the decision so as to name C and sought an oral hearing, particularly if the Upper Tribunal was minded to agree to the parents' submission on disposal.

9. Those submissions came as a surprise to the Upper Tribunal. Neither the issue of an EHC Plan in May 2018 nor the placing of J at B had been mentioned in the case papers prior to Mr Bowers' submission, nor in the reasonably lengthy permission hearing on 31 August. I discharged the stay and directed an expedited hearing of the appeal.

10. This is a convenient point at which to summarise the remainder of events during the Summer of 2018, so far as they have now become evident to me. It appears that on 29 May the local authority had signed and returned the offer letter for J's place at B to that school. At an unknown date, but before 16 July 2018, J was taken "off timetable" at C. Home to school transport in respect of B was approved on 13 August 2018. J had been seen by SLT and OT services at C School and in August the relevant therapists signed a discharge report from those services. The same was done by the paediatric physiotherapist on 6 September 2018. I have been shown no evidence going to whether or when the stay was communicated within the local authority or to

its external partners who had been providing services to J, but in submissions on behalf of the local authority it is said that the stay was not communicated to all relevant local authority officers until 29 August 2018 and not at all to the health services. In short, the local authority has never sought to take advantage, on a practical level, of the stay which it had obtained; indeed, by placing J at B and not seeking to unscramble that arrangement when permitted to do so by Judge Wikeley's order for a stay, it had created exactly the potential for change which its application for a stay asserted would be so harmful to J.

11. I take the various issues in turn.

Could the FtT have cleared up the confusion over the lack of an operative date in the FtT's order regarding when placement at B should commence?

12. Had it done so, it would have simplified matters for the parties and avoided the need for the consideration given below to the effect of the EHC plan issued in May 2018. I have not made enquiry of the FtT so do not know how it apparently came about that it refused to act upon the local authority's email of 20 April 2018, or in what sense it "refused". It does seem to me, though, that ample powers exist to deal with practical glitches of this sort. In effect, the tribunal by not making more detailed provision about the commencement date of the placement and what was to happen meanwhile had ordered something which was incapable of being delivered, as the evidence before it had made clear. It seems to me that had the application been treated as being for permission to appeal, it could readily have been treated as an application first for review under rule 49 of the FtT's rules of procedure, and that it would have been a sufficiently obvious error of law for the decision to have been set aside and re-made under s.9 of the 2007 Act and the gap in the order plugged.

13. Some other cases might not need as much as that: things which can properly be categorised as "any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it" may be simply cured under r.44.

What was the effect on the FtT's order of the issue by the local authority, with the agreement of the parents, of the EHC Plan dated 18 May?

14. I begin by setting out relevant parts of the 2014 Regulations. Reg 19 creates certain duties on the local authority to consult and to consider certain maters when undertaking a review of an EHC Plan. Reg 20 (in the case of people attending a school or other institution) makes detailed provision requiring a review meeting to be held, who is to be invited to attend, identifies particular matters to be considered and requires a written report from the child's school, including recommendations as to amendments to be made to the plan. Reg 22 sets out procedural rules where a local authority is considering amending an EHC Plan following a review. Various obligations (including as to the naming of a school) are imposed in the same terms as

apply when the EHC Plan is first being prepared and the local authority is required to notify parents of their right of appeal.

15. The right of a child's parent or a young person under s.51(2) of the Children and Families Act 2014 ("the 2014 Act") to appeal to the FtT against (among other matters) the special educational needs and special educational provision specified in the plan and the school or other institution named in the plan, arises not only when an EHC plan is first finalised but "following an amendment or replacement of the plan": s.51(3)(b).

16. Returning to the 2014 Regulations, reg 28 provides that:

> "Amending an EHC plan without a review or reassessment
>
> If, at any time, a local authority proposes to amend an EHC plan, it shall proceed as if the proposed amendment were an amendment proposed after a review."

17. The *DH* case concerned a statement of special educational needs under the Education Act 1996. The judge held, among other things, that where there had been an annual review during the course of the proceedings, which had resulted in the statement being amended in a way sought by the parents, the appeal against the statement, as first made, no longer had anything to bite upon, as the parties' legal relationship was, following the annual review, governed by the amended statement, which the parents had no desire to appeal against as it had given them what they wanted. While the Upper Tribunal retained jurisdiction (because it was concerned with whether the decision of the FtT on the statement as originally made had involved the making of an error of law), it was therefore one in respect of which it was appropriate to exercise the judge's discretion under s.12(2)(a) of the 2007 Act against setting it aside.

18. So, says Mr Bowers, notwithstanding that *DH* was under the 1996 Act rather than the 2014 Act, when the EHC Plan was issued in May 2018 giving the parents what they wanted – the naming of B in Section I - that was just as much a new plan governing the relationship of the parties going forward as the plan as amended following the annual review in *DH* had been and, for the same reason, I should exercise my discretion as Judge Wright had exercised his in *DH*.

19. The argument is based on reg 28. The local authority was - with the agreement of the parents – "propos[ing] to amend an EHC plan", thus reg 28 required it to proceed "as if the proposed amendment were an amendment proposed after a review." That in turn triggered the application of reg 22(3) which prescribes when and to whom the local authority must send "the finalised EHC plan" where it has decided to amend the EHC plan following representations from the child's parent or the young person, and reg 22(5) which requires the local authority to notify them of their rights of appeal

20. Mr Tabori resists this argument on the basis that the issue of the EHC Plan on 18 May (a date which he, somewhat optimistically, seeks to characterise as "directly before the summer holiday") was merely a matter of "the practical administration and implementation of the FtT decision", given the refusal of the FtT to do anything itself about the problem its decision had created. As such, the situation should be distinguished from that in *DH*, which had concerned a periodic (i.e. annual) review (see *DH* at [27]). He does not accept that the amendment made in the May EHC Plan was effected under reg 28, because of the "complete absence of appealable change". If it had been, he characterises its effect as "mere procedural pathway", but one which does not mean that the present case, where amendment is merely to address a problem of a pre-existing determination, without new evidence, is to be equated with a review based on new evidence. He submits that to apply *DH* to the present case would have the effect of deterring local authorities from taking sensible practical steps to implement legal decisions, even (as here) in co-operation with parents) for fear of depriving themselves of statutory appeal rights. The chronology of the local authority's actions shows, he submits, that action was taken pursuant to the FtT decision and not to a "second EHCP".

21. He then further submits that a local authority may need time to decide upon the merits of an appeal and that even having obtained a stay may wish to take steps to help and support the child or young person concerned. Although expressed as a further reason why *DH* should not be applied, in my view this point is more appropriately considered with the remainder of the submissions about the need for, and consequences of, a stay, at [39] below.

22. In terms of how reg 28 should be construed, Mr Tabori submits that the regulation is aimed at substantive changes, of the level seen following an annual review. The regulation, he submits, protects parents against local authorities who go, as he puts it, off-piste[1]. He was not able to elaborate on what the requirement to act "as if following a review" meant. In any event, the parents had agreed to the change reflected in the May 2018 plan and did not need a right of appeal.

23. Mr Bowers submits that reg 28 has to be read "as is" and that it is inappropriate to read in the gloss that it only applies following a substantive event. He does not shrink from the consequence being that every minor change to an EHC Plan would generate rights of appeal, nor from the consequence that the various steps required by reg 22 would mean that each minor change would generate a need to comply with substantial procedural requirements. He accepts that a possible consequence of his interpretation would be that local authorities, rather than making changes mid-year, might store them up for the annual review: indeed, he submits that that is what typically happens. He submits that the interpretation for which he contends is

[1] Had it been decided at the time of the oral hearing in the present case, he might have referred to *R(S) v LB Camden* [2018] EWHC 3354 (Admin) at [26] and [71]-[81] as an illustration of the combined effects of reg 22 and reg 28 where the degree of amendments was greater. However, that case provides no authority for suggesting that it is only changes of a certain level or extent which are caught by those regulations and I have not seen fit to delay this decision to invite submissions upon it.

consistent with s.51(3) which, as noted, indicates that a right of appeal arises following an "amendment" of the plan. If parents have a right of appeal, it cannot be dependent on their having informed the local authority that they do not agree with the decision. Such an appeal should not inevitably be struck out – as the FtT hearing special educational needs cases does so down to the date of hearing, circumstances might have moved on by the time of a hearing and be properly justiciable.

24. Mr Tabori in reply points out that s.51(3) links back to s.51(2)(c) and to s.51(1) and thus that an amendment needs to fall within s.51(2) before s.51(3) can bite. The availability of strike-out in suitable cases is not a satisfactory means of addressing meaningless rights of appeal created by expanding *DH* inappropriately. As regards the reading of reg 28, "proposes to amend" (as used in that regulation) is different from "agrees to amend". In any event, the Upper Tribunal should not rely on a literal reading of the words but should d consider the operation and intention of the statute.

25. I should make clear that neither party has sought to cast doubt on the correctness of what is said in *DH*, nor to suggest that its reasoning cannot be transplanted from the context of the 1996 Act to the 2014 Act: the submission for the local authority is that the (agreed) making of the amendment by the May 2018 Plan was not sufficient to apply DH to the present situation.

26. I was not taken to the legislative history of reg 28, but it appears to be as follows. Its origin lies in the amendments introduced by the Special Educational Needs and Disability Act 2001 ("the 2001 Act"), s.10 and sch 1, to the Education Act 1996, sch 27. Para (2A) of that schedule provided:

> "(1) A [local authority] shall not amend a statement except–
> (a) in compliance with an order of the Tribunal,
> (b) as directed by the Secretary of State under section 442(4), or
> (c) in accordance with the procedure laid down in this Schedule.
>
> (2) If, following a re-assessment review, a [local authority] propose to amend a statement, they shall serve on the parent of the child concerned a copy of the proposed amended statement.
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> (3) Sub-paragraphs (3) and (4) of paragraph 2 apply to a copy of a proposed amended statement served under sub-paragraph (2) as they apply to a copy of a proposed statement served under paragraph 2(1).
>
> (4) If, following a periodic review, a [local authority] propose to amend a statement, they shall serve on the parent of the child concerned–
> (a) a copy of the existing statement, and
> (b) an amendment notice.
>
> (5) If, at any other time, a [local authority] propose to amend a statement, they shall proceed as if the proposed amendment were an amendment proposed after a periodic review.

> (6) An amendment notice is a notice in writing giving details of the amendments to the statement proposed by the authority.[...]"

27. A "periodic review" was defined by para 1 of the schedule to mean a review under s.328(5)(b) i.e. an annual review. It can be seen that the 2001 Act introduced a degree of control over the amendment and review of statements which had not previously existed. Sub-para 2A(5) is evidently the direct predecessor of reg 28. The only difference in the substantive language is the change from the requirement to proceed as if proposed following a periodic/annual review to doing so as if proposed following a review.[2] Para 19 of sch 1 of the 2001 Act also effected an amendment to s.326 of the 1996 Act extending the rights of parents to appeal following an amendment (the predecessor to what is now s.51 of the 2014 Act). It is clear that the priority of the legislator since 2001 has been to ensure that amendments outside the review process, while permitted, are subject to the procedural steps associated with the latter (including rights of appeal). There is no basis for reading in a threshold condition as to the extent of the amendments which must be involved before the legislation bites. The intention was not to secure that minor amendments, or those that were merely a matter of practical administration, could be made with minimal process and sparse paperwork. Mr Tabori's submission, based on a distinction between "proposes to amend" and "agrees to amend" goes nowhere. It is the local authority which controls the content of the Plan and is in a position to make amendments, irrespective of whether the catalyst for them was its own initiative or agreement. I regret I do not see how the point in the first sentence of [24] above avails him. The need to resort to an application to strike-out in probably a very small number of cases is, I accept, an inconvenience rather than an absurdity, and is but one factor in the interpretation of reg 28, one to which I attribute less weight than I do to the legislative history.

28. Further, I note that the Code of Practice (January 2015), provides:

> **"Amending an existing plan**
> *Relevant legislation: Sections 37 and 44 of the Children and Families Act 2014 and Regulations 22 and 28 of the SEND Regulations 2014*
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> 9.193 This section applies to amendments to an existing EHC plan following a review, or at any other time a local authority proposes to amend an EHC plan other than as part of a re-assessment. EHC plans are not expected to be amended on a very frequent basis. However, an EHC plan may need to be amended at other times where, for example, there are changes in health or social care provision resulting from minor or specific changes in the child or young person's circumstances, but where a full review or re-assessment is not necessary.
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> [Paras 9.194 to 9.197 summarise procedural steps]
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> 9.198 When sending the final amended EHC plan, the local authority **must** notify the child's parent or the young person of their right to appeal and the time limit for doing so, of the requirement for them to consider mediation should they wish to appeal, and

[2] Whilst acknowledging the limitation in the value of headings as an aid to construction (see Bennion, 7th edition, at p447),the heading to reg 28, not present in the predecessor text, provides a modest degree of further support for the interpretation reached below if such were needed.

> the availability of information, advice and support and disagreement resolution services."

It is clear that the Code anticipates that amendments will be infrequent but may on occasion be necessitated (with the concomitant procedural consequences) even by minor changes. It was consulted upon at the same time as what became the 2014 Regulations and, while it cannot determine their meaning, is of some persuasive authority.

29. It is unsurprising if, as was canvassed in argument, the effect of this reading is to encourage local authorities to store up amendments until the annual review: indeed, that appears from the extract from the Code of Practice to be what the authors of the Code may have anticipated would occur in many cases. As the legislation provides no warrant to differentiate according to the nature or extent of the amendment[3] needed to trigger reg 28 (and so reg 22), the argument that the evidence shows that the local authority was acting on the basis of the first plan (i.e. as ordered by the FtT), not the May 2018 Plan, falls away.

30. Construed in context, as Mr Tabori invites me to do, and in particular in the light of its legislative history, it is clear that Mr Bowers' reading of reg 28 is correct. In the light of that interpretation, the amendment effected by the May 2018 plan fell to be conducted as if proposed after a review and would, though the J's parents might have had no desire to exercise them and/or an appeal risked being struck out if they had, carry fresh appeal rights.

31. I appreciate that this view might not be felt by the local authority to be conducive to sensible administrative steps being taken. The answer to that is that Parliament has created a rights-based framework in relation to special educational needs and one that specifically extends to the amendment of (now) EHC plans, whether following a review or otherwise. As it is rights-based, the institutions established to adjudicate on those rights need to play their part. Whether that means being ready to correct the sort of error in the FtT's decision in this case which unfortunately went uncorrected, being ready to react by way of striking-out in appropriate cases where parents having agreed amendments then seek to challenge the resulting Plan or being ready to adjudicate swiftly on applications to it for a stay, the FtT needs to be a key player within the system. When all is working smoothly, the burdens on local authorities caused by the legislation, though not eliminated, will be mitigated. It is regrettable if the position apparently adopted by the FtT when a query was raised in relation to its decision created a difficulty for the local authority, but that does not justify adopting a distorted reading of reg.28.

<u>The discretion under s.12(2)(a); the stay and the local authority's actions</u>

32. The question for me is how to exercise the discretion which I have under section 12(2)(a) of the 2007 Act. As I consider that the reasoning in *DH* can

[3] Arguments that a change is de minimis must await cases in which they arise but a change in the school named for 2 months cannot be so categorised

be applied to the 2014 Act and is applicable to the amendment effected by the May 2018 EHC Plan, it is hard to resist the conclusion that the FtT's decision has been overtaken by events in practical terms and that there is no reason to set it aside.

33. Lest I be wrong in my conclusions about the applicability of *DH* and thus that there is room for a wider range of considerations to carry greater weight, while I note that the date (29 May) on which the local authority's acceptance letter was posted pre-dated the date when the stay was obtained, it has not been suggested that thereby the authority had concluded a contract which it could not unscramble once the stay was obtained on 2 July. If on the other hand it was free not to continue with a placement at B once the stay had been obtained, it either took a conscious choice to maintain J's placement there anyway or, as seems more likely from what has been said to me, there was an extended failure of communication over the Summer period and the existence of the stay was not passed on in a timely fashion to those inside and outside the authority who were in a position to take action upon it.

34. The local authority did – and still does – consider that C is appropriate for J and wants me to remake the decision to name it. However, even were I to conclude that C could make appropriate provision and that a placement at B would be incompatible with the efficient use of resources (I should not be taken as expressing a view on those issues), the fact would remain that, looking at a decision now, J has spent rather more than one term at B, something previously characterised by the local authority itself as a significant change for the reasons set out at [5] above, and that is now a part of the factual matrix against which appropriate educational provision for him falls to be decided.

35. It is precisely for that sort of reason that local authorities in this jurisdiction not infrequently do apply for a stay of the order of the FtT. They may seek to keep the child at the school s/he was previously attending; they may offer to put alternative provision in place. Either way, they will be seeking to avoid the child commencing on an educational path which may not be in the child's interests if it has to be changed back again in relatively short order and may not be in the local authority's interests if they to a greater or lesser extent are locked into bearing higher costs than they consider appropriate. The mechanism holds a balance between seeking to ensure that a local authority (and, indirectly, those who fund it through taxes and otherwise) can benefit from a successful appeal to the Upper Tribunal, but also that provision which is acceptable – at least on an interim basis - is put in place for the child.

36. The difficulty in this case arises because the local authority, having made a sensibly reasoned application for a stay and obtained one, acted inconsistently with the very rationale it had put forward.

37. I directed post-hearing submissions on the significance of applications for a stay in public law proceedings. I am grateful to Mr Tabori and Mr Bowers for their responses. It is common ground between them that the most relevant authority is *R(H) v Ashworth Hospital Authority* [2002] EWCA Civ

923. For the sake of other cases in which the same point may arise, I set out the relevant extract:

> "42. The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell LJ said that the phrase "stay of proceedings" must be given a wide interpretation so as apply to administrative decisions. In my view, it should also be given a wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies* would appear to deny jurisdiction even in case A. That would indeed be regrettable, and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review. As I have said, this extreme position is not contended for by Mr Pleming. Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision, but the decision itself. The Administrative Court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect. A good example is where a planning authority grants planning permission, and an objector seeks permission to apply for judicial review. It is not, I believe, controversial that, if the court grants permission, it may order a stay of the carrying into effect of the planning permission.
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> 43. In some and perhaps many contexts, the result desired by the court can be achieved by the grant of an injunction. This was, in effect, the point that was made by Lord Oliver in the passage that I have cited. But that would not be an appropriate remedy in a case concerning the detention of a patient pursuant to the Act. The judge recognised that, if there were no jurisdiction to grant a stay, there was a serious lacuna in the law, unless it could be overcome by a fresh admission to hospital. At paragraph 97 of his judgment, he said that there was power in the court under section 37 of the Supreme Court Act 1981 to grant an injunction prohibiting a patient from leaving hospital, and requiring him to agree to treatment. But, he added, he could not think of circumstances in which it would be proper to use this power. As he pointed out:
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> "The Court should not deprive a person of liberty by injunction or compel him to submit to treatment, except in the most exceptional cases. Moreover, an injunction cannot authorise a doctor to treat a patient: it can only require the patient to agree to treatment. If notwithstanding the injunction, the patient does not agree to the treatment in question, the only remedy is committal for contempt. Difficulties would also arise in specifying the treatment in question."
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> 44. For these and other reasons, the judge held that the solution to the problem did not lie in the jurisdiction to grant an injunction. It was common ground before us that the judge was right, and I agree. Where the patient has actually left the hospital, the arguments in favour of an injunction have even less attraction. It is unthinkable that the court would grant an injunction to order the patient to return to hospital and submit to the regime of the Act.
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> 45. I return, therefore, to the question whether the court has jurisdiction to grant a stay in cases B and C. As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.

> 46. I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be *suspended*. How can one say of a decision that has been fully implemented that it should *cease* to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history. Take a decision by a tribunal to discharge a patient. The order has effect for the purposes of being implemented, i.e. releasing him into the community. But it also has effect in a more general sense: it declares that at the time it was made, the tribunal was not satisfied that the criteria for the patient's continued detention were fulfilled. If the order is ultimately quashed, it will be treated as never having had any legal effect at all: see *R(Wirral Health Authority) v Finnegan and DE* [2001] EWCA Civ 1901. If that occurs, it will be treated as if it had never been made, and the patient will once again become subject to the Mental Health Act regime to which he was subject before the order was made. It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented as in cases B and C."

38. In paras 47 and 48 the Court goes on to point out that, it being a Mental Health Act case, the effect of a stay even once the order of the tribunal below had been implemented would be to render the patient subject to the constraints of that Act and to deprive him of his liberty, just after the specialist tribunal had said he should have it. For that reason, in mental health cases, the Court observed that the jurisdiction to grant a stay even after the decision had been fully implemented should be exercised sparingly and the substantive case decided with the greatest possible speed.

39. Whilst I accept in the light of the above case that it is possible to seek a stay of a decision or order which has been implemented, in order to preserve on an interim basis a legal position which might be achieved by a successful final appeal (or judicial review), that possibility appears to me to be an unlikely one in the context of special educational needs appeals. A local authority which succeeds on a eventual appeal will be vindicated as to the legal position by that eventual success; it will be a highly unusual case in which, despite the FtT's order having been implemented it needs to establish an interim position that it should be treated as vindicated as to the legal position. I do not accept Mr Tabori's submission that the main utility of a stay is that, having obtained one, the local authority's subsequent actions cannot prejudice the legal position. As in the case of mental health, there are jurisdiction-specific considerations, albeit different ones. The reality is that there is a child or young person needing to be educated while the appeal to the Upper Tribunal is pending and a stay is more concerned with the practicalities of how, given the decision of the FtT against which one party seeks to appeal, to achieve an appropriate position pending a decision on the appeal. The apparent strength of a party's legal position on the appeal may be one factor but is not determinative. If a local authority, as Mr Tabori suggests, may wish to help and support the child or young person, it only needs to seek a stay if the help and support proposed takes a form other than

that ordered by the FtT. If it is content to go along with the provision ordered by the FtT until such time as its appeal to the Upper Tribunal succeeds, then it does not (at any rate in the vast majority of cases) need a stay.

40. The situation in this case is in reality that the local authority did not seek a stay irrespective of whether the FtT order had been, or was to be implemented. The grounds for its application make plain that it sought one because it wished to retain the ability to keep J at C at any rate until it had lost in the Upper Tribunal (if such proved to be the case) and, in the event it were to win in the Upper Tribunal, the consequence of moving him twice would be inappropriate. Despite that, it has now moved him once and would like to move him again. In my view having acted in way which flies in the face of the basis on which the stay was obtained, the local authority has to take the position as it finds it i.e. with J attending B.

41. What the consequences are of J having spent some time at B is not a matter which the Upper Tribunal is well equipped to determine. I was told that his annual review is due this month. Even if I were to accept that it is the FtT's decision which continues to be operative, not the May 2018 EHC Plan, there would be nothing to be gained by setting it aside. The case would need to be remitted to the FtT where it would in all probability become subsumed within the annual review and its consequences, which will proceed/have proceeded on the basis of up-to-date evidence addressing the position with J having attended B for a while.

Conclusion

42. As indicated above, it is common ground, and I agree, that the decision of the FtT was in error of law for the reasons summarised at [7]. In all the circumstances of the case, including the circumstances the issue of the EHC Plan in May 2018, the local authority's failure to implement the stay it obtained and the proximity of the next annual review, I consider it appropriate to exercise my discretion against setting the decision of the First-tier Tribunal aside.

C.G.Ward
Judge of the Upper Tribunal
31 January 2019