



Neutral Citation Number: [2021] EWCA Civ 358

Case No: C1/2020/1469

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HHJ Allan Gore QC
CO/1307/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2021

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE HADDON-CAVE
and
LADY JUSTICE ELISABETH LAING

Between :

The Queen on the application of

Appellants

L (by her litigation friend N)
M (by her litigation friend O)
P (by his litigation friend Q)

- and -

Devon County Council

Respondent

Mr Broach and Ms Irving (instructed by Watkins Solicitors) for the Appellant
Mr Anderson (instructed by the County Solicitor) for the Respondent

Hearing dates : 23 February 2021

Approved Judgment

Lady Justice Elisabeth Laing DBE :

Introduction

1. These applications for judicial review raised what HHJ Allan Gore QC, sitting as a Judge of the High Court ('the Judge') described as a 'short point' of statutory construction about the timetable for producing amended education health and care plans ('EHC plans'). On 15 May 2020 Eady J gave permission to apply for judicial review on the papers. She rejected an argument that permission should be refused because the claims were academic. Having heard full argument at the hearing on the construction point, the Judge nevertheless declined to decide it, on the grounds that the claims were academic. The question at the heart of this appeal is whether he was right to do so.
2. On this appeal, the parties are represented as they were below. The Appellants ('the As') were represented by Mr Broach and Ms Irving, and the respondent local authority ('R') by Mr Anderson. We thank counsel for their written and oral submissions.
3. The grounds of appeal raised three issues.
 - i. The As accept that, in principle, it was open to the Judge to revisit the question of whether or not the claims were academic (and its implications), despite Eady J's view, at the permission stage, that the claims were not academic. The As submit that, on the facts of this case, however, the Judge should not have reconsidered that question and its implications.
 - ii. If the Judge was entitled to reconsider the question and its implications, the next issue is whether the Judge was wrong to consider that the claims were academic.
 - iii. The last issue is whether, if the Judge was right to decide that the claims were academic, he erred in principle in refusing to exercise his discretion to decide them.

The legal framework

4. Section 37(1) of the Children and Families Act 2014 ('the Act') makes provision for EHC plans 'Where, in the light of an EHC assessment, it is necessary for special educational provision to be made for a child...in accordance with an EHC plan...'. Section 37(2) of the Act explains what must be specified in an EHC plan. Section 37(4) enables regulations to be made 'about the preparation, content, maintenance, amendment and disclosure of EHC plans'. When a local authority maintains an EHC plan for a child, it must secure for the child the educational provision which is specified in the EHC plan (section 42(2)).
5. Section 44(1) requires a local authority annually to review a plan which it maintains. Section 44(2) provides for when a local authority must re-assess a child's needs. When a local authority reviews an EHC plan or re-assesses a child's needs, it must consult the child's parents (section 44(6)). Section 44(7) enables regulations to make provision about reviews and re-assessments. Section 44(8) and (9) make further provision about such regulations.
6. Section 51 of the Act confers a right of appeal to the First-tier Tribunal ('the FTT', known in this context as 'SENDIST') on the parent of a child against the matters

specified in section 51(2). That right may be exercised after an amendment to an EHC plan (section 51(3)(b)).

7. Section 77(1) obliges the Secretary of State to issue a code of practice giving guidance about the exercise of their relevant functions to local authorities, among others. Local authorities, among others, must 'have regard to' the code when exercising those functions (section 77(4)).
8. The regulations made under sections 37(4) and 44(7) of the Act are the Special Educational Needs and Disability Regulations (2014 SI No 1530) ('the Regulations'). Regulation 18 describes the circumstances in which a local authority is obliged to review an EHC plan. These include where a child is within 12 months of a transfer from one phase of education to another. In such a case, the local authority must review and amend the EHC plan by a specific date, which, in the case of children under 16, is 15 February in the calendar year of the transfer.
9. When a local authority reviews the EHC plan of a child who goes to school, they must ensure that there is a review meeting, to which the child's parents, among others, must be invited (regulation 20(1)). The local authority must ask the head teacher of the school to prepare a report setting out his or her recommendations for any amendments to the EHC plan and referring to any difference between those and the recommendations of others attending the meeting (regulation 20(8)). That report must be sent out 'within two weeks of the review meeting' (regulation 20(9)). The local authority must then decide whether it wants to amend the EHC plan, and must notify the parent 'within four weeks of the review meeting' (regulation 20(10)).
10. Regulation 22 is headed 'Amending an EHC plan following a review'. A local authority which is 'considering amending an EHC plan' must comply with the obligations listed in regulation 22(1). Where a local authority is 'considering amending an EHC plan' it must send the child's parent a copy of the EHC plan with 'a notice specifying the proposed amendments...' (regulation 22(2)(a)) and give them at least 15 days in which to make representations on the draft plan (regulation 22(2)(c)). Where a local authority 'decides to amend the EHC plan' after representations from the child's parent, it must send 'the finalised' EHC plan to the child's parent 'as soon as practicable, and in any event, within 8 weeks of' the date when the local authority sent a copy of the EHC plan in accordance with regulation 22(2)(a) (regulation 22(3)).

The background to the claims

11. In L's case, there was a review meeting on 2 December 2019. On 5 February 2020, L's solicitors sent a pre-action protocol letter. They asked for a notice under regulation 22(2)(a), and the proposed amendments. On 6 February, R gave the regulation 22(2)(a) notice. On 10 February 2020, R said it would provide the proposed amendments by 2 March 2020. R said that its only obligation was to issue the final amended EHC plan within eight weeks of the regulation 22(2)(a) notice. On 2 March 2020, L's solicitors sent a further pre-action protocol letter, asking for the proposed amendments. R sent those on 3 March 2020. On 12 March, L's solicitors asked R to issue the final EHC plan by 16 March 2020. On 17 March, R replied that it had eight weeks from 6 February to issue the final EHC plan. On 19 March, L's solicitors sent a pre-action protocol letter, asking for the final EHC plan to be issued. R replied on 20 March that it was trying to issue the final EHC plan within 8 weeks of

6 February. The claim was issued on 5 April 2020. R issued the final amended EHC plan on 17 April 2020. L appealed against it on 15 May 2020.

12. The sequence of events in M's case is similar. There was a review meeting on 29 October 2019. On 23 January 2020, M's solicitors asked for the amended EHC plan to be provided within 14 days. On 6 February, R issued a regulation 22(2)(a) notice. On 10 February, R said that it would provide the proposed amendments by 2 March, asserting that its only obligation was to issue the final amended plan within 8 weeks of the regulation 22(2)(a) notice. On 3 February, R issued the proposed amendments. On 23 March 2020, M's solicitors asked for the final EHC plan to be issued by 27 March. On 27 March, R said that it was trying to issue the final EHC plan within 8 weeks of the regulation 22(2)(a) notice. The claim was issued on 5 April. R issued the final EHC plan on 15 April 2020. M appealed against it on 1 May 2020.
13. P's case is somewhat different. The review meeting was on 11 October 2019. On 15 February 2020, R issued a final amended EHC plan by mistake. P challenged that on 12 March, because R had not consulted (contrary to the obligation imposed by section 44(6) of the Act). That letter was followed by a pre-action protocol letter on 26 March 2020. R issued a regulation 22(2)(a) notice on 2 April 2020. On 3 April, R apologised for the delay. It said that it would try to issue the amended EHC plan 'in accordance with regulation 22(3)' within eight weeks of the regulation 22(2)(a) notice. On 8 April 2010, P's solicitors applied for Ps' case to be joined with the claims of L and M. R issued the proposed amendments on 17 April, and the final amended EHC plan on 14 May 2020.

The nature of the claims

14. The claim form challenged 'decisions communicated in pre-action correspondence on 20 and 27 March 2020 to the effect that amended EHC plans for two L and M would not be issued until 28 April 2020'. As is apparent from my summary of the facts, R had sent those two letters in response to pre-action protocol letters from the solicitors who were acting for L and M. The relief sought in the claim form was declarations, quashing orders, particularly of the decisions of 20 and 27 March 2020, and a mandatory order requiring R to issue and send final EHC plans no more than two working days from the date of the order.
15. The grounds of claim made clear that, as well as those decisions, L and M were challenging both the overall delay in the issue of their EHC plans, and the components of that delay. One component of the delay flowed from R's contention that it was permitted to wait for eight weeks after the date when it notified L and M that it intended to amend the EHC plans before serving the amended EHC plan. Another component of that delay, which had been challenged in earlier pre-action protocol letters (to which R had replied), was the time which R had between serving the regulation 22(2)(a) notices and serving the proposed amendments. L and M contended that the proposed amendments should have been served at the same time as the regulation 22(2)(a) notices.
16. At the date when the claim was issued, R had served the proposed amendments on L and M, but had not yet served the amended EHC plans. By the time that R lodged its acknowledgement of service (27 April 2020), it had served the amended EHC plans. R argued in its summary grounds of defence that permission should be refused because the claims were now academic.

The grant of permission to apply for judicial review

17. Eady J was not persuaded, for the reasons given in the As' Reply, that the claims had become academic. She said that 'there will be ongoing reviews of the [As' EHC plans] and the issues raised by this claim remain live between the parties'. She identified 'the real dispute' in paragraph 2 of her reasons (R's process for formulating amended EHC plans and the timetable for that), which depended on the relevant regulations. She considered that both points which the L and M made about the timetable were arguable.

The substantive hearing

18. The substantive hearing took place by telephone. R did not suggest in its skeleton argument for the hearing that the Judge should decline to decide the construction issues on the grounds that they were academic. The Judge raised this issue himself at the hearing. He gave the parties the opportunity to make submissions about it, including further written submissions after the hearing. He heard full argument on the construction issue. Mr Broach told us that the oral argument about the construction point took up about two thirds of the hearing.

The reasoning in the judgment

19. The Judge summarised the claims in paragraph 1 of his judgment, and the grant of permission to apply for judicial review in paragraph 2.
20. In paragraph 7 the Judge noted three points about the claims. None was a phase transfer case. No final EHC plan had been issued when proceedings were filed. By the time permission to apply for judicial review was granted, the final EHC plans had been issued. The Judge recorded a concession from Mr Broach that he was entitled to take a different view from Eady J about whether the claims were academic.
21. The Judge also noted the parties' submissions to the effect that once an EHC plan was issued, the As had various rights of appeal to a specialist independent tribunal (SENDIST). The As submitted that the effectiveness of those rights depended on the local authority's compliance with statutory time limits, so that the appeals could be brought promptly. The Judge said he found those submissions problematic. He could not see that there were any decisions in the statutory scheme which were not the subject of a right of appeal. The As were not seeking to challenge any non-appealable decisions. If they had been, they could have argued that judicial review should be available to challenge them. The As were not arguing that R had refused to take a decision it was obliged to make. The As's case was that R had misdirected itself about 'the timeframe required of its relevant decision-making and that its decision-making was unlawfully late'.
22. 'At [that] point in the analysis however, I must remind myself that judicial review is a discretionary remedy of last resort' (judgment, paragraph 10). 'It is so well established as not to require the citation of authority that discretion should not be exercised where events have overtaken the dispute and the need for orders sought has become academic'. By the time of the permission decision, 'the decisions to defer the issuing of finalised amended EHC plans had been overtaken in all 3 cases by the fact that such finalised plans had been issued'. The relief sought had become 'unnecessary and academic'. The decisions had now been taken, and could be the subject of an appeal. 'There remained, therefore, no need to quash the decisions to defer'. The quashing relief sought in the claim form had 'become unnecessary and academic'.
23. Eady J had known when she gave permission that 'the relevant decisions which paragraph 7(c) of the claim form sought to be mandated had also become academic'.

It was agreed that anyone disappointed by those decisions could appeal to SENDIST. The Judge added, ‘That is an alternative remedy and again, it is so well established as not to require citation of authority to observe that the discretion to grant judicial review, or even permission to apply for it, should not be exercised where a suitable alternative remedy exists’.

24. The Judge recorded the As’ complaint that ‘the suitability of the alternative remedy of appeal is dependent on the local authority complying with its statutory and regulatory timeframes’. He recorded the submission that two of the As had ‘suffered detriment’ because their appeals would not be decided before the start of the new school year. He also recorded a concession that the appeals could be expedited by SENDIST. The Judge found it difficult to accept the submission that any of the As had suffered any detriment when expedition is available, and had been sought and given. A delay in starting a new school was ‘less than ideal’, but ‘any “detriment” would be transient, and each would “catch up” the schooling “lost” during the length of a placement and educational phase that will last for years’. He added that if that was a significant detriment, SENDIST ‘would be amenable to an application for a mandatory order to provide a timely appeal, not [R]’. It was difficult to allege detriment in the case of P, who had not yet appealed.
25. The relief sought in paragraphs 7(b) and (c) of the claim form ‘should not be granted, are no longer sought by [the As], and those claims are hereby dismissed’ (judgment, paragraph 14).
26. The Judge observed that the question underlying the claim for declarations was ‘a very interesting hotly contested question of pure statutory interpretation...’ (judgment, paragraph 15). He described that issue in paragraph 16 of the judgment. The point was ‘a short one’. The difference between the parties was that if the As were right, there was a fixed time limit for every stage of the process, whereas if R was correct, ‘there is a gap in the middle of the fixed timeframe that is only subject to a requirement that the stage in question be undertaken within a reasonable timeframe, which concept would therefore permit consideration of the resources available to [R] and the volumes of work it faced’.
27. The Judge ‘concede[d] and ‘accepte[d]’ that the question gave ‘rise to general issues of public importance’. There was no authority on the point. Nevertheless, ‘again, it is so well established as not to require the citation of authority to observe that courts are reluctant and should not determine academic issues unless there subsists a patent dispute that requires determination. Put another way, however interesting or important the point might be, courts should not determine academic points of legal principle or dispute where the parameters of the substantive dispute between the parties do not require that determination to be made’ (judgment paragraph 18).
28. The Judge had had submissions about whether the declaration sought was academic. He described those. In short, and in particular, the declaration was relevant to the future reviews which were likely in all three cases. The Judge referred to three cases which R relied on in its opposition to that argument. They were *R (C) v Nottingham City Council* [2010] EWCA (Civ) 790 (which, in turn, cited *Cowl v Plymouth City Council* (Practice Note) [2001] EWCA (Civ) 1935; [2002] 1 WLR 803), *R (Cronin) v Sheffield Justices* [2002] EWHC (Admin) 2568, and *Tshikangu v Newham London Borough Council* [2001] EWHC 92 (Admin). The Judge quoted extensively from the judgments in those cases (judgment, paragraph 23).

29. The Judge's citation from *Tshikangu* included a citation from the speech of Lord Slynn in *R v Home Secretary ex p Salem* [1999] AC 450 at p 457. In that passage, Lord Slynn accepted (as both counsel had agreed) that the House of Lords had a discretion to hear an appeal where there is an issue involving a public authority on a point of public law, even if, by the time of the hearing 'there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.' Statements to the contrary in other cases and in the relevant Practice Direction 'must be read accordingly as limited to disputes concerning private law rights...' He qualified that by saying that 'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future'.
30. The Judge then asked, 'not rhetorically' when there was no ground to give the relief sought in paragraphs 7(b) and (c) of the claim form, when there was a procedure for litigating 'any remaining dispute concerning the content of the EHC plans', what it was in the case that 'still requires this court to determine the correct construction of the relevant statute and regulations as to timeframe?' He further asked what made a decision on that claim 'unavoidable' as described by Lord Woolf in *Cowl*, or what made it 'necessary', or what is it, 'to adopt the language of Lord Woolf in *Cronin*, that, "so far as the particular case is concerned" (I emphasise his use of the word 'particular') made it more than of limited significance to determine the construction point in issue?' (judgment, paragraph 24).
31. The Judge had come to the 'clear conclusion' that the answer was 'nothing'. It made no difference that Eady J had given permission, any more than it had made any difference in *Cronin* that Sedley LJ had given permission to apply for judicial review (judgment paragraph 25). His view was supported by the fact that R's historic approach to the construction of the provisions neither bound it in the future, nor other local authorities (judgment, paragraph 25). His view was also supported by his opinion, contrary to R's submissions, that it was not 'safe or appropriate to decide such a point in a vacuum outside the parameters of a substantive dispute between the parties'. This appears to be a reference to paragraph 68 of R's skeleton argument for the hearing in the Administrative Court, in which R submitted that this ground was 'a pure point of construction' in contrast with the other ground in the case, 'to which most of the witness evidence was directed', and which had therefore imposed additional costs on R. Every example given by R in oral argument only reinforced the Judge's provisional view that 'the construction may well turn on what in fact was the dispute between the parties, and what were the facts relating to the dispute'. The Judge expanded on this point (judgment, paragraph 27).
32. For 'all of these reasons', the Judge decided that the claim to the relief sought in paragraph 7(a) was also academic. He recorded that the As nevertheless asked him to decide the issue of construction, relying on the statement by Lord Slynn at page 457 of *ex p Salem* (judgment, paragraph 28). The Judge summarised the As' submissions in paragraph 29 of the judgment.
33. The Judge 'decline[d] to exercise any such jurisdiction that I may have' for the three reasons he gave in paragraph 30 of the judgment.

- i. *Ex p Salem* concerned the jurisdiction of the House of Lords to decide academic questions. The Judge considered that it was ‘questionable whether a court of first instance has, or should exercise any such jurisdiction’.
- ii. The cases in which any such jurisdiction had been exercised at first instance were ‘examples where it has been sparingly exercised’. The declarations were sought ‘to adjudicate upon current disputed rights presently existing and presently disputed between the parties, whereas what is sought in this case is declaratory relief as to future rights’. The only exception was *Brooks*. The Judge questioned whether ‘exercise of any such jurisdiction can be characterised as necessary’ as per Lord Woolf in *Cronin*. He was bound by the ‘the appellate approach on *Cronin* and certainly prefer it to the approach in *Brooks*’. Who knew whether what he had said to counsel in the course of oral argument might cause the local authority to rethink its approach, ‘in which event the issue will not resurface’.
- iii. ‘Most importantly of all however, in view of my determination of the academic nature of the issue’ any decision of his would be obiter. As such it would not bind another court. ‘Moreover, quite possibly it would not be amenable to reconsideration on appeal, and if the issue is of such general importance, it ought to be open to reconsideration on appeal, especially when there is no authority or decided example on the point in issue’.

Submissions

34. On ground one, Mr Broach accepted, as he had before the Judge, that it was open to the Judge to revisit Eady J’s view that the claims were not academic. However, he submitted that, on the facts, the Judge should not have revisited this question. First, the application for permission to apply for judicial review is an important filter, which chooses which cases the Administrative Court should decide. Second, R had not invited the Judge to do so. Third, in consequence, the parties were ready to argue the point of construction. Fourth, the parties had incurred the costs of preparing to argue the point at the hearing. Fifth, the Judge entertained oral argument on the point for two thirds of the hearing. He then reserved his judgment. The Judge had indicated during the hearing that he would, at least, give an obiter view on the construction point. The As had not realised, until they received the draft judgment, that the Judge was not going to express any view on the construction point. In those circumstances, it was contrary to the overriding objective for the Judge to decline to decide the point or to express any view on it.
35. Mr Broach submitted, on ground two, that there was, to put it at its lowest, a ‘high likelihood’ and, at its highest, a ‘virtual certainty’ that the point would crop up again in the case of one or more of the As at the next annual review. Contrary to the Judge’s apparent view, there was no reason to think that R would change its approach to the construction of the Regulations, so the dispute would still be live in the future. The As contended that Eady J’s view that their claims were not academic was correct, for the reasons which she gave. In a further note sent to the Court after the hearing, he referred to two cases, *R (Bushell) v Newcastle upon Tyne Licensing Justices* [2006] UKHL 7; [2006] 1 WLR 496 and *PO (Nigeria) v Secretary of State for the Home Department* [2011] EWCA (Civ) 132; [2011] Imm AR 466.

36. The As' fall-back submission, on ground three, was that this was a paradigm case for the exercise of the court's discretion to hear an academic claim. Mr Broach relied on the points he had made on ground one. He relied on Lord Slynn's speech in *Salem*. The point at issue is a short point of statutory construction, as the Judge accepted in paragraph 16 of his judgment. The Judge also accepted that the case gave 'rise to general issues of public importance' (judgment, paragraph 18). The point could affect, not only the As in the future, but other children and young people who are subject to the framework of annual reviews, and the local authorities who are responsible for maintaining and reviewing EHC plans. The Judge's view that the construction of the Regulations could be influenced by the facts of individual cases 'could not be right', as R had correctly accepted before the Judge.
37. Mr Broach relied on other authorities, including the decision of Lewis J (as he then was) in *R (Brooks) v Islington London Borough Council* [2015] EWHC 2657 (Admin); [2016] PTSR 389. There were two issues in that case; an issue of statutory construction (about the meaning of section 188 of the Housing Act 1996) and a question which depended on whether or not the defendant had acted reasonably in a certain respect. Lewis J described the issues as 'academic in the sense that there is no longer any live issue between the parties. As the parties accept, on any analysis, any duty under section 188... would have ended, at the latest, on 16 June 2015... The claimant is not now entitled to any remedy in relation to the duty under section 188'. The parties nevertheless asked the court to decide the point of statutory construction (judgment, paragraph 24).
38. Lewis J referred to *ex p Salem* in paragraph 25 of his judgment. He noted that it dealt with appeals, but said that 'similar principles apply to hearings at first instance'. In paragraph 26, he gave four reasons for deciding the first issue, even though it was academic.
- i. It was an issue of statutory construction.
 - ii. It was important to housing authorities and to homeless applicants.
 - iii. It might not otherwise be resolved, if it was not decided in the present case, because it related to the interim duty, which was usually owed for a relatively short time, and the question of enforcing the duty would, in most if not all cases, have ceased to be a live issue before the matter could be tested in an application for judicial review. 'There may not be a case where the issue has not become academic before the court considers it'.
 - iv. The issue arose against the background of actual, not hypothetical, facts. It is usually better to approach questions of construction against the background of actual facts, because it is then easier to test possible interpretations.
39. Mr Broach submitted that the analogy between *Brooks* and this case was powerful. It could not make a decisive difference, contrary to R's submissions, that the parties in *Brooks* had agreed that the court should decide the academic issue. At most the agreement of the parties was a factor which was potentially relevant to the exercise of the discretion. It was notable that Lewis J had not relied on it in paragraph 26 of his judgment.

40. The As accepted that this Court should not lightly interfere with the exercise of a discretion. Mr Broach nevertheless submitted that the Judge's exercise of discretion was flawed in principle. He had not engaged with the approach in *Salem* and *Brooks*. Instead, he had referred to cases which were not in point, because, either, they dealt with whether or not there was a suitable alternative remedy (*Cowl* and the *Nottingham* case) or (*Cronin*) dealt with a change in circumstances between the grant of permission to apply for judicial review and the substantive hearing (that is, the service of the evidence which justified the issue of the warrant which was the subject of the application for judicial review). They were not about the court's discretion to decide academic points of statutory construction. The tests the Judge applied derived from those authorities, and not from the relevant line of cases, starting with *Salem*.
41. The reasons the Judge gave in paragraph 30 of the judgment for not exercising the discretion were tautologous and 'hopelessly circular'. In reply, Mr Broach submitted that it was notable what Mr Anderson had not, in his oral submissions, attempted to support the Judge's reasoning in paragraph 30 of the judgment. The Judge had not given one valid reason for not exercising the discretion.
42. Mr Anderson, relying on paragraph 35 of *R (Rusbridger) v Attorney General* [2003] UKHL 38; [2004] 1 AC 357, submitted that the question was whether there was a 'live practical question to decide'. In a note which he sent to the Court after the hearing, he replied to Mr Broach's submissions about *Bushell* and *PO (Nigeria)*. He referred to a later case in which *Bushell* was cited. He submitted that it would be 'grossly disproportionate' for the court to resolve an otherwise academic claim in order to decide who should pay the costs.
43. In answer to a question from the Court, he accepted that it was 'possible' that the issue would arise again between these parties, but not that it was 'virtually certain to'. Later in his submissions he described that possibility as 'a speculative possibility of a future live issue which was not probable or certain'. He made it clear that R accepted that it had not complied with earlier stages of the legislative timeframe, and that that should not have happened. Mr Anderson acknowledged that, perhaps, after the grant of permission, R should have 'stuck to its guns' and continued to argue that the point was academic. He accepted both that the court did have a discretion to decide academic claims, and that that discretion could be exercised by courts below the House of Lords, but 'only in exceptional circumstances'.
44. Mr Anderson submitted that, by the time the claims reached Eady J, they were academic, because R had issued the regulation 22(2)(a) notices, and the final amended EHC plans. The claims of L and M were academic by the time R filed its acknowledgement of service. By the time of the hearing, R's reliance on the eight-week period was no longer a live issue (except in relation to costs). By the time of the hearing, all the practical issues had been resolved, because the As had their regulation 22(2)(a) notices and their amended final plans. That meant that the claims were academic.
45. On ground one, he submitted that the Judge was not bound by Eady J's decision that the claims were not academic. The permission stage is a filter. The Judge was entitled to conclude that the claims were academic, despite the decision of Eady J.
46. On ground three, he submitted that the starting point was that the discretion should only be exercised in exceptional circumstances. The Judge took into account that the

case raised questions of public interest, but was still entitled not to exercise the discretion in these cases. Contrary to the As' submission, *Cowl*, the *Nottingham* case and *Cronin* were all relevant. They were illustrations of the court's reluctance to decide academic claims, even if the term 'academic' was not used. He accepted that the passage in *Cronin* on which he relied might be obiter, because the Divisional Court in that case had in fact decided the substantive application for judicial review. He relied on a passage in *R (Raw) v Lambeth London Borough Council* [2010] EWHC 507 (Admin) in which Stadlen J referred to the importance of declining to decide academic issues as a deterrent to the bringing, and pursuit, of academic claims by other litigants who were not before the court.

47. If necessary, R would rely on its Respondents' Notice. In it, R did not concede that the Judge had erred, either, in his approach to whether the claims were academic, or in exercising his discretion not to decide the claims. If contrary to that position, the Judge did err, then R submitted his decision should be upheld on other grounds. First, the claims were academic because they challenged delay in the issue of the EHC plans, and the EHC plans had been issued, and any delay in the future was speculative. Second, the Judge was correct to refuse to decide the claims in all the circumstances. In this context, Mr Anderson referred to the judgment of this Court in *R (Rehouné) v Islington London Borough Council* [2019] EWCA (Civ) 2142. I note that that case is not in point, because the issue on that appeal was not 'any discrete issue of statutory construction' (judgment of Simler LJ, paragraph 24; the other members of the Court agreed with her judgment).

Discussion

48. I have summarised the background, the Judge's decision, and the submissions in some detail. This section of my judgment can therefore be relatively short. Although the grounds of appeal identify three discrete issues, they are closely linked, at least on the facts of this case.
49. The first issue, logically, is whether the claims were academic. For reasons which should become clear, I do not consider it necessary to reach a final view on this issue. I will assume that they were academic, notwithstanding the view of Eady J to the contrary, which is, of course, worthy of respect.
50. Judicial review is a flexible and practical procedure. All remedies in judicial review are discretionary, including declarations (a substantial topic on which we received no distinct submissions). The Administrative Court has at its disposal a range of doctrines, with discretionary elements, to control access to its scarce resources. They include the doctrine that judicial review will not generally be available where there is a suitable alternative remedy, and its approach to timeliness. The discipline of not entertaining academic claims is part of this armoury. It enables the court to avoid hearings in cases in which, although the issue may be arguable, the court's intervention is not required, because the claimant has obtained, by one means or another, all the practical relief which the Court could give him. I incline to the view that the claims in these cases were academic, because the As had obtained all the practical relief for which they had asked, that is, the issue of the final amended statements. There was still a potential issue between the parties about the construction of the Regulations, but it was no longer live. It was no longer live in these proceedings, whether or not it was possible, probable, or virtually certain that it would arise again in a future year. As a matter of judicial policy, the best way of controlling access to the court for claims such as these is the rigorous filter of the test in *Salem*.

51. The next question is whether, on the assumption that the claims were academic, the Judge should have refused to decide them. I should make clear that I accept Mr Broach's submission, which was not disputed by Mr Anderson, that the Administrative Court has a discretion to decide academic claims. There are many examples of the exercise of this discretion in the decided cases. The parties drew the Judge's attention to some of these at the hearing, including the statement in paragraph 25 of the judgment in *Brooks* (see paragraph 38, above), with which I agree.
52. I will consider first the factors which indicate that he should have decided the claims. The parties were before the court. Eady J had given permission to apply for judicial review. She had explained why she considered that the claims were not academic. In the light of that, the parties incurred the costs of preparing for a hearing. R did not suggest in its skeleton argument for the hearing that the construction issue should not be decided because it was academic. Not only were the parties ready to argue the construction point, but they argued it fully at the hearing. The Judge accepted both that the construction point was a short point, and that it raised 'general issues of public interest'. Mr Broach told us that the Judge even indicated during the hearing that he would, in any event, give his view on the construction issue. The parties had expended time and money in preparing for, and attending the hearing, and precious court time had been devoted to the hearing. In those circumstances, the overriding objective would have been furthered by deciding the claims, and frustrated by declining to do so.
53. The last question is whether there was anything in this case which compelled the Judge not to decide the issue. The Judge had a discretion to decide the claims, even if they were academic, as Mr Anderson rightly concedes. I accept Mr Broach's submissions that the reasons which the Judge gave for refusing to exercise that discretion are circular. They are, either, an argument that he had no discretion, or reasons which would apply to every academic claim and would, if valid, mean that the court could never exercise its discretion to hear an academic claim. I also accept Mr Broach's submissions that the Judge applied the wrong tests to the exercise of the discretion (whether it was 'unavoidable' or 'necessary'), rather than the test in *ex p Salem*.
54. The Judge's use of the wrong test, reinforced by his extensive citations from *Cowl*, the *Nottingham* case, and *Cronin*, and by passages in paragraphs 10, 12 and 13 of the judgment, suggest a confusion between a claim for which there is an alternative remedy and a claim which is academic. Paragraphs 18 and 30 of the judgment suggest a further confusion between the question whether the claims were academic and the distinct question whether, if they were academic, he should nevertheless have exercised his discretion to decide them.
55. The points I have just described show that the Judge fundamentally misunderstood the nature of this discretion. There is nothing in the authorities about the exercise of the discretion which compelled him to conclude that he should not decide the issue of construction.
56. As the Judge erred in principle in the exercise of the discretion, this Court can exercise it afresh. The dispute in this case is a pure issue of statutory construction. The issue potentially affects many children and young people who have EHC plans (and their parents), and the local authorities which are responsible for maintaining those EHC plans. Even R concedes that it is possible that the issue will arise again in

the future between these very parties. The issue concerns a short period in a longer process, so it is unlikely ever to be live by the time an application for judicial review reaches a substantive hearing, and, therefore, unlikely to be decided unless in these claims. There are three cases before the court, and the facts of those cases are not in dispute. It follows that there are good reasons in the public interest for the claims to be heard. Those reasons were strongly reinforced, at the time of hearing before the Judge, by the factors I have described in paragraph 52, above. I consider that the discretion should have been exercised then so as to decide the issue of statutory construction and that it would not be right to take a different course now because that did not happen.

57. Before the hearing of this appeal, the Court had asked the parties to be ready to argue the construction point if necessary, in which case we could have constituted ourselves as a Divisional Court. They were prepared to do so at the hearing of the appeal, but, in the event, there was not enough time for the Court to hear their submissions on that issue. It is unfortunate that, if my Lords agree with my conclusion, it will now be necessary to remit the construction point to the Administrative Court. That exercise will necessarily impose further costs on the parties and result in further expenditure of court time.

Conclusion

58. For those reasons I would allow this appeal and remit the construction issue to the Administrative Court.

Lord Justice Haddon-Cave

59. I agree with the judgments of Lady Justice Elisabeth Laing and Lord Justice Peter Jackson.

Lord Justice Peter Jackson

60. I also agree that the appeal should be allowed for the reasons given by Elisabeth Laing LJ. I only add some general observations about two concepts: academic claims and *obiter dicta*.
61. We have concluded that, whether or not the claims were academic, the Judge should have addressed the construction issue. I agree that it is therefore unnecessary for us to reach a conclusion about whether the claims were in fact academic. As has been said before (see below) it is not always easy to decide whether a claim is academic. The present case is one in which, in my view, there are good arguments either way.
62. What do we mean when we describe a claim as ‘academic’? A claim will be academic if the outcome does not directly affect the rights and obligations of the parties. The matter has been put in a number of similar ways in the authorities. In one private law case, *Sun Life Assurance Co. of Canada v. Jervis* [1944] AC 111, Viscount Simon LC referred to “an academic question, the answer to which cannot affect the respondent in any way”, while in another, *Ainsbury v. Millington* [1987] 1 WLR 379, Lord Bridge described the case as one where “neither party can have any interest at all in the outcome of the appeal”. In the public law case of *R v. Board of Visitors of Dartmoor Prison, Ex parte Smith* [1987] QB 106, the applicant was described by this court as “having no interest in the outcome”, and similarly in *R v Secretary of State for the Home Department, Ex parte Abdi* [1996] 1 WLR 298, it was said that “the outcome of these appeals will not directly affect the applicants.”

63. These are the authorities that were reviewed by Lord Slynn in *Salem*, where he referred to cases where “there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.” In *Rusbridger*, Lord Hutton spoke of “hypothetical questions that do not impact on the parties” and he cited Lord Justice-Clerk Thomson’s statement in *Macnaughton v Macnaughton’s Trustees* [1953] SC 387:

“Our Courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The Courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case.”

64. In *Brooks*, Lewis J described the issues as “academic in the sense that there is no longer any live issue between the parties”. In passing, like My Lady, I agree with him and with Silber J in *R (Zoolife International Limited) v Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin), that the guidance given in *Salem* applies equally to the lower courts, although of course the context in which it comes to apply is likely to be different.

65. Whether a claim is academic will, as is said above, depend on the particular circumstances. One reason why the present case is difficult to categorise is because the relationship between the parties is ongoing. The process of review and reassessment is an iterative one and the children are likely to need annual EHC plans throughout their education. There is at least a real likelihood that the issue that arose this year will arise for one or more of the claimants in future years. It was in that sense that Eady J considered that the issues remain live between the parties. At all events, the outcome is of potential future significance for the claimants, as opposed to being a dispute that is now, so far as they are concerned, in the past. It is also of significance for the respondent and other education authorities.

66. In a case where there is real doubt about whether a claim is academic, that will no doubt be one of the factors that the court will take into account when deciding whether to hear it. In the present case, the Judge would certainly have done well to have taken the course followed by Silber J in *Zoolife*, where he found the claim academic but went on to resolve the outstanding issues in case he was wrong, and so that he could deal with the question of costs. (I note that the Judge’s order here provides for the claimants to pay the Council’s costs: although the order is most unlikely to be enforced, that seems hard when the claimants had not had a ruling on a claim that they had obtained permission to bring.)

67. The other matter I wish to express a view about is that, as appears from paragraph 33(iii) above, one of the matters that most impressed the Judge as a reason for not deciding the construction issue was a belief that any decision in relation to an academic issue would by definition be *obiter* and would accordingly not bind another court; nor would it be amenable to an appeal.

68. In my view this may confuse the question of whether a case should be decided with the question of what a case decides.
69. The border between the *ratio decidendi* of a case and judicial *obiter dicta* is not always easy to chart: see the judgment of Leggatt LJ in *R (Youngsam) v The Parole Board* [2019] EWCA Civ 229. However, every judicial decision in relation to a given set of facts should (or ought to) have a *ratio*. In the present case, the Judge was faced with three established sets of facts against which to test the interpretation of the Regulations. Had he made a decision, I see no reason in principle why its *ratio* should not have represented a precedent for other cases. It would also have been open to either of the parties to have sought to appeal, though of course it would have been a matter for this court as to whether to grant permission.
70. That much seems to me to be persuasive as a matter of logic. However, Mr Anderson has argued that it is not correct on the basis of high authority to which he drew the Judge's attention: *R v Secretary of State for the Home Department ex parte Wynne* [1993] 1 WLR 115. Mr Wynne was a prisoner who wanted to be produced at court to pursue some litigation. He was required to fill in a form and undertake to pay the costs of his production if required. He tore up the form and made no request. He then applied for a declaration that the requirement was unlawful. His application was dismissed by this court because he had not made a request and there had therefore been no decision about his production. The question of what decision would have been made on such a request was therefore a hypothetical one. Nevertheless this court granted permission to appeal, a course that was not well received. Lord Goff, with whom the other members of the House of Lords agreed, stated that:
- “It is well established that this House does not decide hypothetical questions. If the House were to do so, any conclusion, and the accompanying reasons, could in their turn constitute no more than obiter dicta expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future”.
71. This passage has been cited a number of times without further comment and certainly without demur, for example in *Fletcher v NHS Pensions Agency* [2006] EWCA Civ 517 at [20], *Secretary of State for Work and Pensions v Menary-Smith* [2006] EWCA Civ 1751 at [22], *Zoolife* at [33], *Raw* at [52], and *R (Tewkesbury Borough Council) v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1775 (Admin) at [22], in each case in support of the cautious approach to academic litigation that was laid down in *Salem*.
72. Mr Anderson rightly describes Lord Goff's remarks as authoritative. But authoritative for what proposition? The court in *Salem* did not refer to *Wynne*, although it was cited by counsel, who submitted that it showed that the court “will not allow litigation to proceed that is hypothetical in the sense that there is no necessary factual foundation for the point in issue.” Lord Slynn's reasoning did not rely upon decisions in academic appeals being of necessity *obiter* but instead stated:
- “The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless

there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

73. It therefore seems to me that Lord Goff’s reasoning may best be understood by taking account of the fact that he described a decision and reasons as being *obiter* when they are made “without the assistance of a concrete factual situation”. In *Wynne*, no decision had been taken about producing the prisoner and there was accordingly no decision to scrutinise. In a case like the present, where the court is dealing with concrete and undisputed factual situations, it seems to me that even a decision on an academic claim may very well constitute binding authority and that a court should hesitate to use the statement in *Wynne* as an additional reason for declining to hear a claim.