Neutral Citation Number: [2018] EWHC 3354 (Admin)

Case No: CO/3085/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 11 December 2018

Before :

PHILIP MOTT QC
Sitting as a Deputy High Court Judge

- -

Between :

THE QUEEN on the application of S (by his father and litigation friend AG)	**Claimant**
- and -	
LONDON BOROUGH OF CAMDEN	**Defendant**

- -
- -

Claire Darwin (instructed by **Sinclairslaw**) for the **Claimant**
Holly Stout (instructed by **Camden BC**) for the **Defendant**

Hearing dates: 29 November 2018

- -

Approved Judgment

Philip Mott QC :

1. This claim for judicial review concerns a seven-year-old boy who has been granted anonymity and is to be known in this action as "S". His father and litigation friend is to be known as "AG". The Defendant is the London Borough of Camden, which I shall call "Camden".

2. S is one of a pair of twins. His sister's development has been normal, but S suffers from Autistic Spectrum Disorder ("ASD"). This case has not involved any detailed investigation of its effects, but from the information before me it appears to be quite severe in that he has delayed language, communication, play and social skills, as well as difficulties with his attention.

3. The claim concerns his parents' desire to secure an Applied Behaviour Analysis programme for him, to be procured and paid for by Camden. Camden considers that S's needs can be met by what has been described as an "eclectic mix" of other methods, which is available at Swiss Cottage Special School. The precise details are not at issue in these proceedings, and for simplicity I shall refer to the competing programmes as "ABA" and "eclectic mix" respectively.

4. The dispute has been protracted and, sadly, marked by distrust on both sides. I say "sadly" because at the heart of the claim is the welfare of a child with special needs, and the intention of the Children and Families Act 2014, as I shall set out, is that such issues should be dealt with collaboratively, with parental participation following the provision of information and support.

5. S initially attended a nursery school in Hampstead, where his difficulties were first identified. In Sep 2014 he transferred to a different nursery for three mornings a week, where he was supported by an ABA trained support worker. In Sep 2016 he started at a mainstream primary school in a class a year below his chronological age. That was not wholly satisfactory and it was agreed that he should have a reduced timetable so that he could follow an ABA programme off-site and his learning support assistant would be trained to deliver ABA in school. At the next Annual Review the school was of the view that provision of the required intensity could not be made in school and that S's progress would be reduced if he did not receive ABA support at the same intensity. As a result the parents withdrew him from the school and arranged ABA support at home.

6. Camden prepared an Education, Health and Care Plan ("EHC plan") for S in July 2017. It did not specify ABA in Section F dealing with the special educational provision he required. His parents appealed to the First-tier Tribunal ("FTT") and the hearing was in due course listed for 9 March 2018. The essential dispute was over whether ABA should be specified in the EHC plan.

7. Just before that hearing, on 5 March 2018, Camden sent a letter to S's parents with a draft of a revised EHC plan. The covering letter indicated that Camden was minded to name Swiss Cottage Special School in the final signed version. That was the only change contemplated by the revision. The parents were invited to comment within 15 days.

8. Both S's solicitor and the FTT refused to postpone the appeal hearing because of this. The hearing went ahead. On 26 March 2018 the FTT decision was sent out. It directed

that the ABA programme put forward by the parents should be included in Section F of the EHC plan.

9. On 4 April 2018 Camden sent the parents a signed revised EHC Plan to comply with the FTT decision. It included "30 hours per week of intensive ABA delivered by suitably qualified staff during term-time …" in Section F. This was a new provision which had not appeared in the original EHC plan of July 2017 or in the suggested draft of March 2018. Section I was unchanged, and (perhaps wrongly) referred to an election by the parents to provide home education as a reason why Camden should not have to provide and fund the ABA programme.

10. In correspondence shortly thereafter Camden sought to proceed with a revision of the EHC plan, in the form of the draft sent out on 5 March 2018. S's solicitor objected that any revision to name a school must also include the ABA provision directed by the FTT. The parties reached a stalemate. No further evidence was provided, nor any discussions entered into.

11. On 6 August 2018 this claim was issued, seeking to challenge Camden's failure to comply with its duty to secure the educational provision set out in the April amended EHC plan. On the same day Camden sent the parents what purported to be a finalised and signed amended EHC plan naming Swiss Cottage School, with the removal of reference to the ABA programme and the substitution of a different programme, more akin to the eclectic mix in use at that school. The Acknowledgement of Service two days later relied on that new EHC plan, suggesting that there were no outstanding issues for the court to consider.

12. S's solicitors served a Reply which unfortunately was not before Lambert J when she refused permission on paper on 29 August 2018. On 11 October 2018, at an oral permission hearing, S was given permission to amend his claim to challenge the August 2018 EHC plan and permission to seek judicial review on both grounds. The hearing was expedited.

13. Before me I had the advantage of detailed submissions from two counsel experienced in this field, Ms Claire Darwin for S and Ms Holly Stout for Camden. I am grateful to them for their assistance.

Preliminary matters

14. At the start of the hearing I dealt with the Claimant's application to introduce further evidence from S's father and Ms Fiddy from IPSEA. Camden raised no objection to the statement from S's father, but objected to Ms Fiddy's evidence.

15. Since I had to read Ms Fiddy's evidence to decide the application, it was pragmatically agreed that I should accept it *de bene esse*, but that the weight to be attached to it would be limited by the fact that it was not expert evidence and Camden had not had the opportunity to contradict it. In the end I have not found the need to rely on any parts of it in reaching my decision. Much of what she says is common knowledge for anyone practising in the courts.

The Statutory Framework

16. Part 3 of the Children and Families Act 2014 now deals with children with special educational needs or disabilities. Section 19 provides as follows:

> "In exercising a function under this Part in the case of a child or young person, a local authority in England must have regard to the following matters in particular –
>
> (a) The views, wishes and feelings of the child and his or her parent, or the young person;
>
> (b) the importance of the child and his or her parent, or the young person, participating as fully as possible in decisions relating to the exercise of the function concerned;
>
> (c) the importance of the child and his or her parent, or the young person, being provided with the information and support necessary to enable participation in those decisions;
>
> (d) the need to support the child and his or her parent, or the young person, in order to facilitate the development of the child or young person and to help him or her achieve the best possible educational and other outcomes."

17. Section 21(1) defines "special educational provision" (insofar as it applies to this case) as "educational or training provision that is additional to, or different from, that made generally for others of the same age" in mainstream schools in England.

18. Sections 37 to 50 inclusive deal with EHC Plans. Sections 51 to 60 deal with appeals, mediation and dispute resolution. Sections 61 to 69 deal with special educational provision: functions of local authorities. Sections 77 to 79 deal with the Code of Practice. Sections 80 to 83 contain supplementary provisions, including interpretation.

19. Section 38 deals with draft EHC Plans. It provides, inter alia:

> "(1) Where a local authority is required to secure that an EHC plan is prepared for a child or young person, it must consult the child's parent or the young person about the content of the plan during the preparation of a draft of the plan.
>
> …
>
> (5) The draft EHC plan sent to the child's parent or the young person must not –
>
> (a) name a school or other institution, or
>
> (b) specify a type of school or other institution."

20. Section 40 deals with finalising EHC plans where no request has been made for a particular school or other institution. It provides, inter alia:

> "(2) The local authority must secure that the plan –
>
> (a) names a school or other institution which the local authority thinks would be appropriate for the child or young person concerned, or

> (b) specifies the type of school or other institution which the local authority thinks would be appropriate for the child or young person.
>
> (3) Before securing that the plan names a school or other institution under subsection (2)(a), the local authority must consult –
>
> (a) the governing body, proprietor or principal of any school or other institution the authority is considering having named in the plan, and
>
> (b) if that school or other institution is maintained by another local authority, that authority.
>
> (4) The local authority must also secure that any changes it thinks necessary are made to the draft EHC plan."

21. Section 42 creates a duty to secure provision in accordance with an EHC plan. It provides, inter alia:

> "(1) This section applies where a local authority maintains an EHC plan for a child or young person.
>
> (2) The local authority must secure the specified special educational provision for the child or young person.
>
> …
>
> (5) Subsections (2) and (3) do not apply if the child's parent or the young person has made suitable alternative arrangements.
>
> (6) "Specified", in relation to an EHC plan, means specified in the plan."

22. Section 44 relates to reviews and re-assessments. Subsection (6) states that:

> "During a review or re-assessment, a local authority must consult the parent of the child, or the young person, for whom it maintains the EHC plan"

23. Section 51 provides for an appeal to lie to the FTT against various matters, including the child's special educational needs as specified in an EHC plan. Such an appeal may be brought when the EHC plan is first finalised or following an amendment or replacement of the plan.

24. Section 61 allows a local authority to arrange special educational provision to be made otherwise than in a school (which includes home education), but "only if satisfied that it would be inappropriate for the provision to be made in a school".

Regulations

25. The Special Educational Needs and Disability Regulations 2014 were made under the 2014 Act. Part 2 deals with children and young people with special educational needs.

It sets out the procedure for assessments, EHC plans, reviews and re-assessments, and appeals, among other matters.

26. Regulation 22 is accepted as governing the amendment of S's EHC plan in the present case, as a result of the operation of regulation 28 which requires amendment without a review to be conducted as if it were proposed after a review. Regulation 22 provides inter alia:

> "(1) Where the local authority is considering amending an EHC plan following a review it must comply with the requirements of … sections 39 and 40 of the Act (as appropriate).
>
> (2) Where the local authority is considering amending an EHC plan following a review it must –
>
> (a) send the child's parent … a copy of the EHC plan together with a notice specifying the proposed amendments, together with copies of any evidence which supports those amendments;
>
> (b) provide the child's parent … with notice of their right [to] request the authority to secure that a particular school is or other institution is named in the plan …
>
> (c) give them at least 15 days … in which to –
>
> (i) make representations about the content of the draft plan;
>
> (ii) request that a particular school or other institution be named in the plan;
>
> (iii) request a meeting with an officer of the local authority, if they wish to make representations orally.
>
> (d) advise them where they can find information about the schools and colleges that are available for the child or young person to attend."

27. Regulation 43 sets out the powers of the FTT, including under paragraph (2)(f) the power to "order the local authority to continue to maintain the EHC plan with amendments" to the special educational provision. Where such an order is made, regulation 44(2)(e) requires the local authority to "issue the amended EHC plan within 5 weeks of the order being made".

Code of Practice

28. Statutory guidance is given in a Code of Practice issued in January 2015. The general principles relating to participation in decision making are set out in paragraphs 1.1 to 1.7.

29. EHC plans are dealt with specifically in Chapter 9. By way of example, paragraph 9.7 states that "It is vital that a timely process is supported by high quality engagement with

the child and his or her parents … throughout the assessment, planning and review process". The vital importance of effective consultation is underlined in paragraphs 9.21 to 9.23.

30. Finalising and maintaining the EHC plan is dealt with from paragraph 9.125 onwards. Paragraph 9.125 includes the following:

> "The final EHC plan can differ from the draft EHC plan only as a result of any representations made by the child's parent … and decisions made about the school or other institution (or type of school or institution) to be named in he EHC plan. The local authority **must not** make any other changes – if the local authority wishes to make other changes it **must** re-issue the draft EHC plan to the child's parent …" [emphasis in the original]

The FTT decision

31. The FTT dealing with special educational needs and disability is, of course, a specialist jurisdiction. On this occasion the Panel consisted of a Tribunal Judge and a Specialist Member. No criticism is made of its decision, Camden has not sought to appeal it or have it reviewed.

32. The decision records, in paragraph 6, that S's father asked for a ruling to be made as to the appropriateness of home-based provision. The Panel accepted [paragraph 7] that it

> "could not name a home programme of ABA although, if we were persuaded that ABA was provision that was reasonably required to meet [S's] special educational needs, it could be included in Section F. The LA would then have to find a suitable school to deliver the provision in Section F."

33. The Panel heard in particular from Ms Peel, an ABA consultant called on behalf of S's parents, and from Ms Shaw, the Vice-Principal of Swiss Cottage School, called by Camden. Ms Shaw said that "although some of the staff were trained in ABA, they did not use it as they had found that a combination of approaches was more successful". She said that "some of the children were following an ABA programme at home".

34. The Panel's conclusions contain a number of relevant findings:

> "30. … we do not consider that there is anything in the evidence to suggest that it would be inappropriate for [S's] provision to be made in a school where he can receive intensive and specialist intervention … There was nothing to suggest that in a specialist setting, where the environment is appropriate [,] staff have expertise and training to address needs such as [S's] and where class sizes are small, with a high staff to pupil ratio, his needs could not be appropriately met.
>
> 31. … We find from the evidence before us that [S] has made some, albeit slow, progress in some areas of his functioning since he has been following the ABA programme, while at … Primary School and since he left. We cannot say whether he would have made similar progress if he had been

> following the eclectic approach described by Ms Shaw in a special school with the professional support of Speech and Language and Occupational Therapists as we have no evidence of this.
>
> 32. We could not disregard that some progress had been made and that it appears that the ABA programme followed by [S] has worked for him … We conclude in the absence, to date, of any alternative proposals for provision, that it should be included in the provision of Section F … As set out in paragraph 30, we do not consider that the programme needs to be delivered in the home environment but is likely to be beneficial to [S] if carried out in a school setting where he would have opportunities for social interaction."

35. Accordingly, the Panel ordered Camden to amend the July 2017 EHC plan to include 30 hours per week of ABA. Following that, on 4 April 2018, Camden did make the amendment ordered, and sent a copy of a revised EHC plan to S's parents.

36. I should note that there is an earlier letter in the Bundle, dated 28 March 2018, which appears to send a copy of an amended version of the EHC plan, and gives notice that Swiss Cottage School will be named in the final EHC plan. S's parents deny ever receiving that letter, and Camden does not rely on it in these proceedings. It looks to me likely that what was envisaged was a revised version of the March draft EHC plan, to be finalised once a placement had been decided. To comply with the FTT decision, this must have included the ABA provision ordered by the FTT. I assume that someone at Camden took the view (probably correctly in the light of Regulation 44(2)(e)) that the amendment ordered could not be made to a draft EHC plan, but must be made to the existing finalised EHC plan (which was the July 2017 one), and this is what was sent out on 4 April 2018 instead.

The proposed amendment in March 2018

37. The FTT was made aware that Camden had started the process to amend the July 2017 EHC plan. That began with a letter dated 5 March 2018, accompanied by a revised draft EHC plan. It did not name a school, in compliance with section 38 of the 2014 Act. Instead Section I was left blank, but the covering letter stated that Camden would be likely to name Swiss Cottage School. The evidence it relied upon was the expertise of that school, as in due course that was explained in evidence to the FTT a few days later.

38. It is significant that at this date the subsisting finalised EHC plan was that dated July 2017 which was under appeal, and this made no mention of ABA. That section of the draft put forward in March 2018 was effectively unchanged, so no notice was required of any amendment nor evidence to support it. The only change relevant to the present claim was in relation to placement in Section I.

39. The covering letter was technically defective, when compared with Regulation 22(2), in one respect. It said nothing about the parents' right to request a meeting to make representations orally. I shall consider the significance of this later.

April to August 2018

40. On 16 April 2018 S's solicitor wrote to Camden's Special Education Manager, Darryl Prezens. The letter was sent by email only, and copied to Camden's solicitor in the FTT proceedings, Mark Small. It asserted that Camden was under an obligation to arrange the ABA provision in the amended April EHC plan, and asked how this was to be done. It suggested three ways in which it could be delivered; at an independent ABA school, at another school where an intensive ABA programme could be delivered, or at home. It expressed the parents' willingness to continue the home-based ABA programme (though at Camden's expense) if Camden agreed that school was inappropriate (as it would have to before funding home education, by virtue of section 61 of the 2014 Act). The letter requested a reply "by return" and in any event by 23 April 2018

41. The reply came within 8 minutes, and was from Mr Small. It pointed out that Section I in the amended April EHC plan (like its predecessor the July 2017 EHC plan) identifies that S would be

> "home educated at parental expense. Therefore there is no obligation to do anything. This was pointed out to you at the hearing. As parents are now not able to maintain this arrangement, the Local Authority will be proposing a school. As advised, the Local Authority will be issuing a revised EHC Plan and has proposed Swiss Cottage School. I understand that your clients have not formally proposed [sic] to the Draft. Thus, I will chase this up with the Local Authority and subject to any representations will ask that this is finalised."

42. It is clear from this that Camden was now considering continuing with the amendment process started on 5 March 2018. Of course, Section F of the draft followed the old July 2017 EHC plan, which the FTT had ordered to be amended. By 16 April 2018 the effective EHC plan was no longer the July 2017 one, but the new April 2018 one. What was not clear was whether Camden accepted that any amended EHC plan must therefore start with the April 2018 version, including the ABA provision ordered by the FTT.

43. S's solicitor responded later the same day by email to Mr Small and Mr Prezens. He pointed out that the parents had always made it clear in the FTT appeal that they were seeking that Camden fund and arrange the ABA provision. He asserted that Section F in any revised EHC plan should be as ordered by the FTT. Any attempt to remove that, he said, would be an abuse of process. On the other hand, if the 30 hours of intensive ABA remained in the EHC plan, as ordered by the FTT, Swiss Cottage School would not be suitable or appropriate as a placement. He again suggested that Camden should fund home-based provision under section 61 of the 2014 Act.

44. So the battle lines were drawn. There was no reply from Camden or Mr Small. A Pre-Action Protocol letter was sent by email to Mr Prezens and Mr Small on 14 May 2018. Initially Camden denied that it had been received, which might have affected S's ability to seek relief. It is now accepted that the letter was received by Mr Small, although it is said that he was not instructed in judicial review matters and a copy was only obtained from him after proceedings had started. That is more than a little surprising since Mr Small was the one who responded to the 16 April 2018 email so promptly, but I do not have to make any finding about it to deal with this judicial review. Mr Prezens says that

he did not knowingly receive the email, but cannot say it was not sent as he may have missed it in his Inbox.

45. The PAP letter sets out the duty under section 42(2) of the 2014 Act, and requires Camden to "Make a decision in respect of the request for home education" for S, and "In any event, ensure that the provision set out in [S's] EHCP is secured, and provide details of how this would be done". A reply was sought by 21 May 2018.

46. There was, of course, no reply, but Camden did apparently finalise the March 2018 draft EHC plan by adding the name of Swiss Cottage School as the placement, and signing it with an issue date of 1 June 2018. That document was not sent to S's parents until after these proceedings had been started. Apart from the added school name there was another very significant addition to the March 2018 draft EHC plan. In Section F, where a box had been added to the start of the April 2018 amended EHC plan to specify 30 hours of intensive ABA, a box was added describing a version of the "eclectic mix" available at Swiss Cottage School.

47. In the absence of any reply to the PAP letter, S's solicitors issued this claim on 6 August 2018. The same day, Camden sent the parents the final amended EHC plan signed and dated 1 June 2018. An acknowledgement of service was filed and served on 8 August 2018. It states very shortly that the PAP letter was not received, the final amended EHC plan signed in June was not sent then by an oversight which had been rectified, and that the proceedings should therefore be withdrawn. That was what led Lambert J to refuse permission on 28 August 2018.

The issues

48. The Amended Statement of Grounds raises challenges under two heads. First, Camden is in breach of its statutory duty under section 42(2) of the 2014 Act to make the provision specified in the EHC plan (that is, the April 2018 one) available to S. Secondly, Camden's decision to amend the EHC plan in June 2018 was unlawful. It seeks relief in the form of a declaration that the decision to issue the June 2018 amended EHC plan was unlawful, and an order quashing it; a declaration that Camden is in breach of its obligations under section 42 of the 2014 Act; and a mandatory order requiring Camden to arrange the ABA programme specified in the April 2018 EHC plan forthwith.

49. The Detailed Grounds of Defence maintained that the first Ground was academic, because the June 2018 amended EHC plan made the necessary provision in time for the new school term. Any challenge to that amended EHC plan could and should be made to the specialist FTT, which provided a suitable alternative remedy. As to Ground 2, it maintained that Camden was entitled to amend the EHC plan at any time, and any deficiencies in the process were insignificant or would have made no difference to the result, so that the claim should be dismissed under section 31(2C) of the Senior Courts Act 1981.

50. The parties elaborated their submissions before me and in the end the following issues arose:

    i) What duty was owed by Camden after the amendment of the EHC plan in April 2018? Was it in breach of duty?

ii) Was Camden entitled to amend the EHC plan so soon after the FTT decision, so as to overturn the amendment ordered? Was it an abuse of process?

iii) What was the effect of the FTT decision and the April 2018 EHC plan on the March 2018 draft EHC plan? Could the process be continued after the FTT decision as if that had not happened?

iv) Was the process compliant with Regulation 22? If not, does that render the amendment unlawful and liable to be quashed?

v) Would it have made any difference? Does section 31(2A) of the Senior Courts Act 1981 apply?

vi) Is a further appeal to the FTT available as a suitable alternative remedy?

vii) What remedies should be granted if the Claimant succeeds?

The duty owed by Camden from April 2018

51. Ms Darwin points to the clear provisions of section 42(2) of the 2014 Act. She relies on the decision of Turner J in *R v London Borough of Harrow, ex parte M* [1997] ELR 62 and the Court of Appeal in *R (N) v North Tyneside Borough Council* [2010] ELR 312 in relation to the equivalent legislation before the 2014 Act. In the latter case Elias LJ refers in paragraph [5] to the well-established principle that "the duty to arrange for the specified provision is a mandatory one". As Sedley LJ pointed out at paragraph [17]:

> "There is no best endeavours defence in the legislation … In a margin of intractable cases there may be reasons why a court would not make a mandatory order, or more probably would briefly defer or qualify its operation."

52. Ms Stout raised a novel argument, not foreshadowed in her skeleton argument, that section 42(2) did not apply to the April 2018 amended EHC plan because it was effectively a draft EHC plan. She says this because it did not name a school or other institution as required by section 40 of the 2014 Act. Until that was done, she submitted, section 42 did not apply to impose a duty on Camden to secure the provision specified in Section F.

53. In answer to this Ms Darwin makes three points. First, section 51(3) allows an appeal to the FTT only "when an EHC plan is first finalised", or "following an amendment or replacement of the plan". There is no right of appeal against a draft EHC plan. Neither Camden nor the FTT took any objection to the appeal against the July 2017 EHC plan, in which Section I was in exactly the same terms as the April 2018 amended EHC plan. Secondly, the April 2018 amended EHC plan calls itself "Amended Final", and says that "It will become the final plan once it is signed and dated". At the end it is signed and dated. This may be contrasted with the March 2018 draft EHC plan, which is neither signed nor dated. Thirdly, she submits that even if it is technically deficient that does not stop it being effective as a final EHC plan.

54. In my judgment Ms Darwin is right, for the reasons she advances. The April 2018 amended EHC plan was intended to become effective on being signed and dated. It was sent to the parents with a letter stating that it was the revised EHC plan. Moreover, the

FTT order was to amend the EHC plan, not to produce or amend a draft plan (that, as I indicated in paragraph 36 above, may explain why the letter of 28 March 2018 was not sent). As the Panel said in paragraph 6 of its Decision, "The LA would then have to find a suitable school to deliver the provision in Section F". That clearly shows that the Panel envisaged an amended final EHC plan to which the duty under section 42 would apply. Although the FTT was not dealing with placement, the Panel expressed the clear view in its conclusions that the ABA programme did not need to be delivered in the home environment but was likely to be beneficial if carried out in a school setting.

55. For these reasons I conclude that from at least 16 April 2018, when S's solicitor made it perfectly clear that they looked to Camden to secure the provision ordered by the FTT, Camden has been in breach of its duty under section 42 of the 2014 Act.

56. Ms Stout did raise a further point, which might be more relevant to whether mandatory relief should be granted. She says that 30 hours of intensive ABA is a lot, and leaves very little time for other school tuition. The difficulty about that submission is that I do not have any details about the ABA programme save for the report of Ms Peel to the FTT. It does seem to me from this (although I am no expert) that the intensive ABA would not be instead of school tuition, but would run alongside it, so as to ensure that S could retain concentration, absorb what he was being taught, and not be disruptive to others. I raised this in the course of argument, without any dissent from Ms Stout.

Abuse of process

57. Although there is mention within the papers of res judicata and issue estoppel, Ms Darwin did not found her arguments on either of these principles. She relies on the general procedural rule against abusive proceedings, referred to by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiak Seats UK Ltd* [2014] AC 160, at paragraph [17].

58. However, although Lord Sumption groups a number of different lines of authority under that general principle, they all relate to "proceedings", and he speaks of a general rule against "abusive proceedings". What Camden was doing by way of purported amendment to the EHC plan did not amount to "proceedings". The complaint is that they simply ignored proceedings in the FTT which were complete and which had not been appealed.

59. Ms Darwin also referred me to *G v London Borough of Barnet and Aldridge QC (President of the Special Educational Needs Tribunal)* [1999] ELR 161, and in particular the principles set out in four numbered paragraphs at page 8 of the printout of that case, and to *White v Aldridge QC and London Borough of Ealing* [1999] ELR 150 at pages 156-157. But those cases too relate to proceedings and the need to achieve finality in litigation by avoiding issues being reopened in subsequent litigation.

60. For these reasons this is not, in my judgment, an abuse of process case, even under a broad general principle. In some cases, where a party acts contrary to an order of a superior court of record, that may give rise to contempt proceedings. That does not arise here, but it shows that the remedy is not properly described as abuse of process. The remedy here lies in the supervisory jurisdiction of this court. If Camden has simply chosen to circumvent the FTT decision by making an amendment when there is no justification for doing so, save that it disagrees with the FTT decision, its purported amendment is liable to be struck down as irrational and unlawful.

61. Ms Stout submitted that the process to amend the EHC plan was both lawful and necessary in this case. A local authority may at any time amend an EHC plan, using the procedures set out. In this case, once the parents required Camden to secure the provision, rather than them funding it at home instead, it became necessary to amend the EHC plan to name a school. That in turn raised the question of how S's needs could best be met in the context of that particular placement. In addition, she claimed, the package of support in the June 2018 amended EHC plan is different from that put in evidence to the FTT, as the intensive interaction specified is new. There is also new evidence in support, namely Ms Shaw's statement in these proceedings.

62. Ms Stout drew my attention to the decision of Andrew Nicol QC (as he then was) in *The Learning Trust v MP and the Special Educational Needs and Disability Tribunal* [2007] ELR 658, and in particular paragraph [42]. There the special educational provision in what is now Section F of an EHC plan is likened to a medical prescription; "only once the necessary educational provision has been identified can one specify the institution or type of institution which is appropriate to provide it". This seems to me to undermine Ms Stout's submission that the choice of school may affect the provision which is required, but she relies on the comment in the judgment that "one cannot be over-prescriptive in this regard". If, for example, "a residential school is necessary to meet an identified educational need, the precise form of the provision can be influenced by what is available at a particular school".

63. She also took me to the provisions of the Education Act 1996, and in particular Schedule 27 paragraph 5(2), comparing this with section 40(4) of the 2014 Act. Her submission was that the 2014 Act allows more "wriggle room" for changes to be made consequential on naming a school. This, however, ignores the mandatory provisions of the Code of Practice, paragraph 9.125.

64. I accept, as Ms Darwin did, that the legislation entitles the local authority to initiate the process for amending an EHC plan at any time. But to be a lawful and rational use of that power there must be some legitimate trigger for it. That may simply be the need to name a school. It may consist of further evidence, whether about the child, the child's parents, the proposed school, or some other change of circumstances.

65. It is not at all clear to me that Ms Stout is right in submitting that Ms Shaw's statement in these proceedings really amounts to new evidence, but I should approach my decision on the assumption that it does.

66. In the end, although there is much to suggest that Camden was determined to use the amendment process to thwart the FTT decision, I have concluded that the court's powers to quash the June amended EHC plan cannot be exercised simply as a matter of principle because the amendment was done so soon after the FTT decision. There is no yardstick of time or any other factor which can safely be applied to all cases. It is necessary to look at the specific circumstances to determine whether that process was unlawful. I therefore turn to consider those circumstances.

The effect of the FTT decision and the April 2018 amended EHC plan

67. Ms Stout submitted that what was sent after the FTT decision, with the letter of 4 April 2018, was a draft EHC plan, because it did not name a school or other institution in Section I. Therefore it did not in law replace any preceding EHC plan. For the reasons set out in paragraphs 52 to 54 above, I reject this submission.

68. Camden's case, set out in the Detailed Grounds of Defence and essential to Ms Stout's alternative submissions to me, is that the March 2018 draft amended EHC plan was the start of a "parallel process" which survived the FTT decision and the April 2018 amendment of the June 2017 final EHC plan. I disagree.

69. Once the FTT had handed down its decision, and Camden had made the amendment ordered, there was a new EHC plan, dated April 2018 and signed as finalised. That superseded the old July 2017 EHC plan, which thereupon ceased to have effect. In my judgment that meant that the pending revision of the July 2017 EHC plan, started on 5 March 2018, also ceased to have effect. It was no longer possible to amend a plan which had ceased to have any effect.

70. Any amendment would then have to be of the April 2018 amended EHC plan. No process to amend that plan was ever started. For that reason, there was no power simply to produce, sign and send out the June 2018 final amended EHC plan, without any consultation process following the issue of the April 2018 final amended EHC plan. The June 2018 EHC plan is liable to be quashed for that reason.

Was the process compliant with Regulation 22?

71. If Camden could have continued with the amendment process started with the March 2018 draft EHC plan, was it procedurally compliant with Regulation 22? If not, are the defects such that it should be quashed?

72. Ms Darwin initially relied on a number of procedural errors in relation to the requirements of Regulation 22(2)(b), (c)(iii) and (d). Ms Stout produced the full document sent in March 2018 which showed that the requirements of (b) and (d) had been complied with. As a result, when the process was started in March 2018 the only failure was to give the parents the option within 15 days of requesting a meeting with an officer of the local authority, if they wish to make representations orally.

73. Ms Stout drew my attention to the principle of substantial compliance in *R v Soneji* [2006] 1 AC 340, particularly the quotation from the Canadian Federal Court of Appeal at paragraph [22]. If this were the only failure I would not hold that it invalidated the procedure.

74. Regulation 22(2)(a) requires the local authority to send "a copy of the EHC plan together with a notice specifying the proposed amendments, together with copies of any evidence which supports those amendments". When the draft was sent out in March 2018 that provision was complied with sufficiently in my judgment.

75. Ms Stout submits that the local authority is entitled to make consequential changes after discussions with the school, and there is no duty to consult again with the parents even if that leads to a fundamental change to Section F (although her submission was that this was not a fundamental change).

76. In my judgment that argument is untenable in the present case. What happened is contrary to the whole tenor and wording of the statutory provisions and the Regulations and Code of Practice made under them.

77. The result of the FTT decision and the order to amend the EHC plan was a major and fundamental variation to the provision required in Section F. It specifically required 30 hours of intensive ABA each week. On any showing that required a complete re-think

of the appropriate placement for S. It was impossible simply to continue with a draft which said nothing about ABA, and to write in a new provision about an intensive "eclectic mix" without any consultation with the parents.

78. Section 44 of the 2014 Act makes it mandatory for the local authority to consult the parents on a review of the EHC plan. Paragraph 9.125 of the Code of Practice says "if the local authority wishes to make other changes [than simply naming a school] it **must** re-issue the draft EHC plan to the child's parent". That is expressed in mandatory terms. The emphasis is in the Code of Practice.

79. In my judgment, if the process could be continued after the FTT decision Camden could not ignore the fundamental change ordered by the FTT which had by 4 April 2018 been incorporated into the EHC plan maintained by it. Yet that is what it did, in clear breach of the Code of Practice requirements.

80. Whatever may be the position in relation to more limited amendments, this was a procedural breach which could not, it seems to me, be covered by the *Soneji* principle of substantial compliance.

81. For that reason, in my judgment, even if Camden was entitled to continue with the March 2018 proposed amendment as a "parallel process", it failed to consult in such a fundamental way that the June 2018 amended EHC plan is unlawful and liable to be quashed.

Would it have made any difference?

82. Ms Stout relies on section 31(2A) of the Senior Courts Act 1981 to submit that relief should be refused. The test is whether "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". That, I assume, is to be applied assuming a local authority prepared to listen and apply the principles behind the 2014 Act.

83. Although I agree that the error relating to the option of a meeting would not have been likely to have made any substantial difference, the same cannot be said about the error in failing to re-issue the draft EHC plan with the amendment to Section F. If things had been done properly the parents would have been alerted to the proposed change, which was effectively a deletion of the ABA provision, and been told of the evidence supporting that. That evidence, presumably, would have consisted of the information in Ms Shaw's statement in these proceedings (although the statement itself is dated 18 October 2018). If it did not, the parents could have applied for judicial review to prevent the process going further, as there was no significant difference in evidence since the FTT rejected what Camden wanted to include.

84. Ms Shaw's evidence has not been tested, so I must assume that it may be accurate. She says, significantly in this respect:

> "7. … At Swiss Cottage, we have staff who are trained in ABA and who act as ABA facilitators outside school (i.e. who work with individuals such as the Claimant). The Lead for the Early Years department who has overall responsibility for the teaching and learning within the Foundation Stage also previously worked in an ABA provision and therefore has a good

> level of knowledge and understanding around the practices and how learners make progress using the approach.
>
> 8. ABA is thus one ASD approach that we can use at Swiss Cottage School, although in practice we do not do this because we consider that other approaches, including in particular SCERTS, works better in a School environment and is also better at improving children's social skills and generalisation of skills from one context to another.
>
> …
>
> 13. Subject to meeting and assessing the Claimant and discussion with his family, we would propose a very individual curriculum that would place a lot of emphasis on the kind of intensive adult interaction that he has had at home with ABA."

85. If that evidence had been disclosed as part of the consultative process, S's parents could have argued that Swiss Cottage should make the apparently quite small adjustments required to ensure that the intensive programme was based on ABA. Alternatively, they could have argued that Camden should be looking at a different school, or type of school, to ensure that ABA was available and used. It would be wrong to require the parents to mount a further appeal to the FTT without having had the opportunity to have those sort of discussions and make those submissions to Camden. I cannot say that it is "highly likely" that the result would have been the same if Camden had complied with both the letter and the spirit of the Act, Regulations and Code of Practice.

Would a further FTT appeal be a suitable alternative remedy?

86. I can deal with this quite shortly. Any further appeal to the FTT would have to be conducted on the basis that the June 2018 amendments were lawfully made. The FTT has no power to quash that EHC plan as unlawful. Furthermore, the FTT has no jurisdiction to enforce compliance with its orders. It follows that the FTT would have no power to grant interim relief to require Camden to secure the provision in the April 2018 amended EHC plan pending the appeal.

87. As a result, in the interim period until a further appeal decision is issued Camden's duty would be to secure the provision in the June 2018 amended EHC plan. S's parents would either have to accept the "eclectic mix" at Swiss Cottage School, without ever having been properly consulted about it, or continue to pay for the ABA programme at home. I do not need to rely on Ms Fiddy's statement for the likely timescale. The last appeal was launched on 11 December 2017 and the decision issued on 26 March 2018. A similar timescale is likely for any further appeal. In addition, the parents are now out of time, and would have to obtain permission to appeal out of time.

88. That very clearly is not a suitable alternative remedy. Even if a further appeal proves necessary, to look again at the merits of the competing educational programmes, it should be conducted after a proper consultation, and with Camden under a duty to secure the ABA programme as ordered in March 2018 in the interim.

Remedies

89. In view of my conclusions it is clear that S is entitled to a declaration that the decision to issue the June 2018 amended EHC plan was unlawful, and an order quashing it.

90. S is also entitled to a declaration that Camden is in breach of its obligations under section 42 of the 2014 Act, and has been since 16 April 2018. There is no claim for compensation or damages in relation to past breaches. The Claimant seeks only a mandatory order for the future.

91. As to this, I am mindful of the comments of Sedley LJ in *R (N) v North Tyneside Borough Council* that some qualification may be appropriate in a margin of intractable cases. The question of feasibility may be relevant here, although I have made my views plain in paragraph 56 above. I will allow the parties to make further written submissions limited to this point. In view of the urgency of this case they must be filed by 4 pm on Thursday 6 December 2018, having seen the draft of this judgment, so that they can be dealt with when it is handed down in the following week.

92. If, of course, the parties can agree how to proceed, a mandatory order may not be required at all.

93. I will deal with issues of costs when this judgment is handed down. If the consequential orders can be agreed, so that no attendance is necessary when judgment is handed down, costs submissions may be made in writing in the usual way.

Postscript

94. In paragraph 91 of my draft Judgment sent to the parties I left open the question of a mandatory order requiring Camden to secure the special educational provision for S set out in the April 2018 amended EHC plan. I invited further written submissions on this point, which have now been provided.

95. Camden has agreed to pay for the home-based ABA programme pending any amendment to the EHC plan for S, on the basis that it is inappropriate for it to be made in a school. The remaining dispute is as to whether this should continue until such amendment becomes effective or until any appeal against such amendment is concluded.

96. It is agreed that the general statutory provisions mean that the duty to secure the special educational provision under an EHC plan ceases as soon as an amended EHC plan is finalised. From that date the duty applies to the provision in the amended EHC plan, even if it is subject to appeal. There is no statutory provision for a stay pending appeal, no recommendation in the Code of Practice that there should be one, and no power in the FTT to order one.

97. Ms Darwin submits that this case should be treated differently for a number of reasons:

    i) Paragraphs 87 and 88 of my Judgment recognise that Camden should secure the currently specified provision unless and until a second FTT panel decides otherwise, or S's parents do not pursue an appeal against the amendment.

ii) Camden has sought to use the amendment process to thwart the decision of the FTT, and there is every reason to suspect that it will try to do so again. There is no new evidence which would justify an amendment.

iii) Camden has been in breach of its duty since 16 April 2018. As a result S's parents have suffered considerable uncertainty and financial losses.

iv) There would be a significant emotional and financial cost if they had to return to the FTT to re-litigate the same issue on which they succeeded last time.

98. Paragraph 87 of my Judgment deals with the position which would exist if the June 2018 amended EHC plan were not quashed. Paragraph 88 concludes that S's parents are entitled to a proper consultation in respect of any proposed amendment to the EHC plan, with Camden securing the current April 2018 provision in the interim. It does not consider what should happen in the event that the EHC plan is amended and S's parents wish to appeal. That is because it deals with the question whether a further FTT appeal against the June 2018 amended EHC plan would be a suitable alternative remedy. It does not deal with the remedy appropriate if that plan is quashed. Paragraph 91 expressly left open that question for further submissions.

99. Ms Darwin points to my comment in paragraph 66 of my Judgment that "there is much to suggest that Camden was determined to use the amendment process to thwart the FTT decision". But as I went on to conclude in that paragraph, there is no yardstick of time or any other factor which can safely be applied to all cases. It will therefore be necessary for a court to look at the specific circumstances of any future purported amendment to determine whether the process was unlawful, if challenged by S's parents. If not unlawful, or if not challenged as such, the normal statutory procedure should apply.

100. The past period of breach, and the financial and other cost to S's parents as a result, cannot be a proper basis for changing the normal statutory procedure for the future. S's parents could have sought compensation, but have chosen not to do so in the present proceedings.

101. As to any future FTT decision, if the amendment triggering it is lawful, it will not be the same issue which is re-litigated. If the issue is exactly the same, S's parents may have the option of further judicial review proceedings to quash the new amendment. If it is not the same, the FTT is the right specialist tribunal to decide any dispute.

102. For these reasons, in my judgment the Defendant's proposed wording of the Order is appropriate in relation to the question of mandatory relief, as follows:

> "The Defendant shall with effect from the date of this Order fund 30 hours ABA provision for the Claimant at home for each of the 38 weeks of the normal school year. Such funding will continue unless or until the Defendant amends the Claimant's Education and Health Care Plan ("EHCP") in the exercise of its relevant powers under the Children and Families Act 2014 and the Special Educational Needs and Disability Regulations 2014 so as to identify different provision and/or so as to name a school or type of school in the Claimant's EHCP. This paragraph of this Order shall lapse and cease to have effect upon the issuing of such an amended EHCP or, in the event of that EHCP

> specifying that the different provision will commence from a date in the future, with effect from that specified date."

103. The remainder of the Order (paragraphs 1 to 4 inclusive, and the provision for costs) is agreed between the parties.