



**IN THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

**Appeal No. UA-2023-000768-HS  
[2024] UKUT 128 (AAC)**

**ON APPEAL FROM THE FIRST-TIER TRIBUNAL (HESC)  
(SPECIAL EDUCATIONAL NEEDS & DISABILITY)  
Tribunal Ref EH850/21/00192**

**BEFORE UPPER TRIBUNAL JUDGE WEST**

**Appellant HAMPSHIRE COUNTY COUNCIL**

**and**

**Respondents (1) GC  
(2) GC**

**APPEAL AGAINST A DECISION OF A TRIBUNAL**

**ON APPEAL FROM**

<b>Tribunal</b>	<b>SENDIST</b>
<b>Tribunal Case No:</b>	<b>EH850/22/00221</b>
<b>Tribunal Hearing Date:</b>	<b>20/3/2022</b>

**ORDER**

**Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child in these proceedings. This order does not apply to (a) the child's parents (b) any person to whom the child's parents, in due exercise of their parental responsibility, disclose such a matter or who learns of it through publication**

**by either parent, where such publication is a due exercise of parental responsibility (c) any person exercising statutory (including judicial) functions in relation to the child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.**

## **DETERMINATION**

The decision of the First-tier Tribunal (HESC) (Special Educational Needs & Disability) (which sat on 20 March 2023) dated 30 March 2023 under file reference EH850/22/00221 does not involve an error on a point of law. The appeal against that decision is dismissed.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

**Representation: Mr Alex Line, counsel, for the Appellant  
(instructed by Hampshire County Council)**

**Mr Tom Gillie, counsel, for the Respondents  
(instructed by Clifford Chance)**

## **REASONS**

### **Introduction**

1. This case concerns inter alia the following questions:

(1) the effect of military service overseas on a child's Education, Health and Care Plan

(2) the effect of a breach of regulation 31 of the Special Educational Needs and Disabilities Regulations 2014

(3) ss. 24 and 45 of the Children and Families Act 2014 and in particular whether (a) the local authority was still responsible for the child "in the authority's area" (b) the test for determining

whether the child is “in the authority’s area” is that of presence or ordinary (or habitual) residence

(4) whether an Education, Care and Health Plan can be “paused” or “frozen” during the family’s deployment overseas.

### **Background**

2. The parties to the appeal are Hampshire County Council (“the Council”), which is the Appellant, and the Respondents, who are the child’s parents (“the parents”). In order to preserve his anonymity, and meaning no disrespect to him, I shall refer to their son only as “T”. The appeal was against the decision of the Council dated 19 January 2022 to cease to maintain the EHCP for T.

### **The Tribunal’s Decision**

3. In its decision of 30 March 2023 (after an oral hearing on 20 March 2023) the Tribunal found that

#### **“Appeal**

1. [The Appellants] appeal under section 51(2)(b) of the Children and Families Act 2014 against the LA’s decision to cease to maintain an Education Health and Care Plan (EHCP) for their son, T.

#### **Attendance**

2. T’s father attended the hearing, representing himself. He was back in the UK at the time of the hearing, and so we did not have any jurisdictional issues in relation to giving evidence. Mrs Jo Wieczorek represented the LA. There were no other witnesses in attendance for either party.

#### **Mode of hearing**

3. The hearing was held remotely by video, using a Kinly platform. We considered that all issues could be determined in a remote hearing. Both parties said that they were content for the appeal to be heard remotely.

4. We had no difficulty with connecting everyone to the hearing and we were satisfied that both parties had effectively engaged with the appeal as a video hearing.

**Background to the appeal**

5. T is 7 years old and in year 3 at [School] in Dubai. T has diagnoses of Autism Spectrum Disorder (ASD) and Global developmental delay (GDD).

6. T started school in Reception at [C] Primary School in September 2019 and his first EHCP was issued on 14 October 2019. T had individualised literacy and numeracy programmes provided for in Section F of his EHCP, amongst other provision, in order to help address his significant barriers to learning.

7. In August 2021, T and his family moved to Dubai for three years due to his father's deployment there with the Royal Navy. The family had been told by an email from Ms Sawka, their case worker at the LA, dated 1 April 2021, that T's EHCP would be paused until the family returned to Hampshire in August 2024.

8. The appellants received a letter by email from the LA dated 19 November 2021 notifying them that T's plan would cease from "this date". The appellants received a further letter by email dated 19 January 2022, setting out that "the local authority has now ceased to maintain the Education, Health and Care plan for T".

9. The LA maintained their position that they had ceased to maintain T's EHC Plan until the hearing on 20 March 2023. The LA took the position that the appellants had no standing to bring an appeal to the Tribunal of this decision, and they refused to enter mediation with the appellants.

10. The Appellants issued an appeal on 22 May 2022, which the LA sought to have struck out. By order of Tribunal Judge Brownlee on 22 September 2022 the application to strike out the appeal was refused. The appeal was adjourned on one occasion due to [T's father's] lack of availability to attend the original hearing date, but was ultimately re-listed for hearing on 20 March 2023.

11. At the commencement of the hearing on 20 March 2023, Mrs Wiczorek, the LA solicitor, conceded that the letters sent to the appellants on 19 November 2021 and 19 January 2022 did not comply with regulation 29 and 31 of the Special Educational Needs and Disability Regulations (SEND Regs) 2014. She also conceded that the LA must maintain the plan until the end of the period of notice for ceasing to maintain a plan, but because the letters had been defective, this time had never started to run. She also conceded that the plan must be maintained until such time as an appeal against the decision to cease to maintain had been determined. For all these reasons, Mrs Wiczorek confirmed that the LA has now reinstated T's EHC Plan.

12. The LA's position at the hearing was that the Tribunal should conclude that the LA may cease to maintain T's EHC Plan due to the

fact that they cannot carry out their non-delegable duties to maintain his EHC Plan because they cannot secure the provision for T when he is outside the LA in Dubai.

### **Preliminary matters**

13. In preparation for the hearing, the LA provided a bundle of documents which contained 217 paginated pages.

14. We also received some late evidence in the form of an email from [T's father], dated 27 February 2023, which sets out that [his] deployment to Dubai is ending a year early in the summer of 2023. We have decided that it would be in accordance with the overriding objective to allow the Appellant to adduce this late evidence as the LA has had ample time to consider it, and it is relevant to the issues in dispute.

### **Issues**

15. The LA position is that we should dismiss the appeal and allow the LA to cease to maintain T's EHCP because the LA is prevented from securing the provision [he] requires under Section F, by virtue of the fact that [he] is currently attending a school in Dubai.

16. The Appellants' position is that s45 of the CFA 2014 sets out that the LA may cease to maintain an EHCP when the LA is no longer responsible for the child or young person, but there is no requirement that they must cease to maintain. It is the Appellants' position that the LA should instead "freeze" T's EHCP until he returns to the UK, which the Appellants say is what was promised to them by the email of Ms Sawka dated 1 April 2021, but is also how other LAs deal with the issue of children from Service families.

### **Legal Framework**

17. Section 45 of the Children and Families Act (CFA) 2014 specifies when a LA can cease to maintain an EHCP. It is supplemented by regulation 29 of the Special Educational Needs and Disability Regulations 2014 and paragraphs 9.199 to 9.205 of the Special Educational Needs and Disability Code of Practice: 0 to 25 years (January 2015). We have regard to this legal framework.

18. S45 of CFA 2014 provides that:

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

(a) The authority is no longer responsible for the child or young person [...]

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

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

19. Regulation 31 of the SEND Regs 2014 provides that:

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

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

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

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

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

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

a) their right to appeal that decision;

b) the time limits for doing so;

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

d) the availability of—

(i) disagreement resolution services; and

(ii) advice and information about matters relating to the special educational needs of children and young people.

20. Reg. 15 of the SEND Regs 2014 which deals with the transfer of EHC plans provides that:

(3)(a) the EHC plan is to be treated as if it had been made by the new authority on the date on which it was made by the old authority and must be maintained by the new authority.

21. The SEND code of practice provides at 10.55:

In having regard to this Code of Practice and in meeting the aspirations of the Armed Forces Covenant, which attempts to eliminate or mitigate some of the potential disadvantages faced by Service families, all those with statutory responsibilities towards Service children with SEN should ensure that the impact of their policies, administrative processes and patterns of provision do not disadvantage such children because of their Service-related lifestyle.

### **Evidence**

22. We did not hear oral evidence from the parties in relation to the appeal. It was agreed that the issues in dispute today, related to application of the CFA 2014, the SEND Regs 2014 and the Code of Practice.

### **Findings of the Tribunal**

23. We carefully considered all the written evidence submitted to the Tribunal in advance and contained in the hearing bundle, together with the submissions made by [T's father] on behalf of both Appellants, and Mrs Wieczorek for the LA (even if we have not mentioned it within the decision). We also took account of the Code of Practice and the relevant sections of the Children and Families Act 2014, SEND Regulations 2014 and statutory guidance.

24. As a Tribunal, we note that the wording of s45 of CFA 2014 is that the LA may cease to maintain the EHCP of a child or young person for whom they are no longer responsible. We note also that if they decide to exercise that power to cease to maintain the EHCP, they must follow the procedure set out in reg. 31 of the SEND Regs 2014. The LA conceded in the hearing on 20 March 2023 that they have not correctly followed that procedure. We find, that having made that concession, the LA should also have conceded the appeal, because it is mandatory that they comply with reg.31 and they have not. Having failed to comply with the mandatory requirements of reg. 31, the LA cannot cease to maintain T's EHCP, even at the conclusion of this appeal.

25. We need go no further in deciding the merits of the appeal in these circumstances. However, we note that if [T] had moved to a different LA, rather than his family being posted overseas with the armed forces, his EHCP would not have come to end on the LA ceasing to maintain, but instead been transferred to the new LA. 10.55 of the Code of Practice directs that all those with statutory responsibilities towards Service children with SEN should ensure that the impact of their policies, administrative processes and patterns of provision do not disadvantage such children because of their Service-related lifestyle.

26. For the LA to cease to maintain [T]'s EHCP, in circumstances where he is expected to return to the UK, would be to put him at a significant

disadvantage to children or young people who simply move between local authorities within the UK. In order for the LA to act consistently with 10.55 of the Code of Practice, we find that they should not cease to maintain T's EHCP, but instead should implement a "freezing" or "pausing" of his EHCP. It is self-evident that the LA cannot comply with its duty to secure the provision in Section F of T's EHCP whilst he attends school in Dubai, but to require [him] to commence the process of applying for an EHCP afresh on the family's return to the UK, may well result in T being without the provision he requires for a considerable portion of that academic year. A process where all parties are agreed that the EHCP is frozen for a period of time is a proportionate response to mitigate the disadvantage T would otherwise suffer as a Service child.

27. The LA has made an offer that they will commit to providing T with the funding previously in place under his EHCP until a new EHCP process could be completed. However, this would place T at significant disadvantage, due to the fact that [his father], as Service Personnel, may yet be posted to a different LA in the UK, and T would have to start the EHCP application process in that new LA with no guarantee of funding in the meantime. If, however, the LA "freezes" T's EHCP, then it would be transferred to the new LA pursuant to Reg. 15.

28. Therefore, we have concluded that Hampshire County Council may not cease to maintain T's EHCP."

### **The Tribunal's Order**

4. Consequent upon its findings, the Tribunal made an order that the Council should continue to maintain an EHCP for T.

### **Permission to Appeal**

5. The Council sought permission to appeal to the Upper Tribunal from that decision. Permission to appeal was granted by Tribunal Judge Ozen on 26 July 2022.

6. The Council sought permission to appeal on four grounds:

**Ground 1:** the Tribunal erred by concluding that the Council was not entitled to cease to maintain T's EHC Plan. T was no longer in the Council's area; therefore the decision to cease to maintain was correctly made notwithstanding any procedural failings that had been conceded by the Council.



**Ground 2:** the Tribunal erred in its approach to the appeal. It should have re-determined the decision to cease to maintain based on whatever evidence it had before it, standing in the Council's shoes. Instead, it exercised a quasi-judicial review approach to its decision which was not in accord with its functions in a statutory appeal.

**Ground 3:** the Tribunal erred by taking into account irrelevant considerations, namely: past procedural failings; a comparison between children moving abroad and those who moved between local authorities; an incorrect assumption that transferring a plan to a different local authority would necessarily result in it being maintained on an ongoing basis; an incorrect belief that ceasing to maintain the EHCP created unfairness or prejudice to T; and an incorrect belief that it was permissible to 'pause' or 'freeze' an EHCP. Alternatively, the decision was perverse.

**Ground 4:** the Tribunal erred by concluding that the duty to maintain an EHCP could be paused or frozen.

7. Judge Ozen granted permission to appeal on all four grounds. In her decision she stated that

**“Grounds 1 and 4**

9. The LA submits that it is only responsible for children in its area (section 24 of the Children and Families Act 2014 (“the Act”). Accordingly, as T is no longer in the LA's area, it was entitled to cease to maintain his EHC Plan pursuant to section 45(1)(a) of the Act regardless of any procedural failures in determining whether or not to exercise that power.

10. In any event, the LA says that there is no mechanism in the statutory framework to pause or freeze an EHC Plan in the way the panel suggested. Such an approach would be inconsistent with the absolute duty to maintain an EHC Plan pursuant to section 42(2) of the Act. Given that the LA cannot maintain T's EHC Plan while he is in Dubai the panel's decision places the LA in breach of that statutory duty.

11. Three questions of law arise which the panel either failed to consider altogether or the panel determine[d] without a sufficiently clear analysis of the legislative framework. It is therefore likely that there has been an error of law in the panel's decision.

12. The first question is whether or not an LA remains responsible for a service child with special educational needs who has moved abroad temporarily. The legislative framework appears to be as follows.

13. Regulation 3 of The Education (Areas to which Pupils and Students Belong) Regulations 1996 states that the general principle is that a person shall be treated as belonging to the area of the education authority in which he is ordinarily resident. Regulation 2 defines “ordinarily resident” as a reference to the address where that person is habitually or normally resident apart from a temporary absence.

14. Temporary absences are therefore permitted. Given that [his father] was posted to Dubai on a finite basis it appears to be arguable that T’s absence from the LA’s area was temporary. However, from the evidence available to me, it does not appear that the Appellants retained an address in the LA’s area. Therefore, on a strict interpretation of the regulation cited above, T does not appear to meet the definition of being ordinarily resident in the LA’s area.

15. The Send Code of Practice offers guidance which cannot, of course, displace or alter the legislative framework. However, it nevertheless merits mention. In particular, paragraphs 10.53 to 10.59 of the Code of Practice clearly envisages circumstances in which local authorities remain responsible for service children with SEN who either move between local authority areas or who are provided education by Service Children’s Education in overseas locations.

16. I also note that paragraph 9.201 of the Code of Practice outlines the circumstances where a LA is no longer responsible for a child as including when a child moves to another local authority area. This paragraph is silent on a temporary move abroad of service children, which further bolsters the apparent intention of paragraphs 10.53 to 10.59 cited above.

17. It is also important to highlight, as the panel correctly identified, that the LA’s power to cease to maintain an EHC Plan under section 45 is discretionary. It follows that Parliament envisaged that there may be circumstances in which an LA can continue to maintain an EHC Plan even if it is no longer responsible for a child. As stated above, paragraphs 10.53 to 10.59 of the Code of Practice intimate that service children abroad can remain the responsibility of a local authority.

18. There therefore appears to be an incompatibility between The Education (Areas to which Pupils and Students Belong) Regulations 1996 and the Send Code of Practice which requires the Upper Tribunal’s guidance. I am aware that in these circumstances the law overrides the Code of Practice. However, the Upper Tribunal may wish to give guidance about whether this apparent incompatibility is an unintended consequence given the Government’s support of service personnel.

19. The second question is whether the LA is able to exercise its power to cease to maintain an EHC Plan if it has breached the relevant procedural requirements when deciding to do so.

20. Section 45(5) of the Act expressly refers to the fact that regulations may make provision for the procedure to be followed when determining whether to cease to maintain an EHC Plan. The applicable procedure in this appeal, as identified by the panel and accepted by the LA, is outlined at Regulation 31 of The Special Educational Needs and Disability Regulations 2014. The appellants were not consulted in accordance with that procedure. They also say that they contacted T's previous primary school and the school had also not been consulted.

21. Regulation 31 is couched in mandatory terms which is further reinforced by paragraph 9.205 of the Send Code of Practice. Therefore, given the express reference to regulations in section 45(5), it is certainly arguable that the LA's power to cease to maintain an EHC Plan, and by extension the power of the Tribunal standing in the shoes of the LA, can only arise if the correct procedure has been followed.

22. As an aside, I also note that there is no evidence that the LA sought the advice of The Children's Education Advisory Service before deciding to cease to maintain the EHC Plan which would have, arguably, been good practice pursuant to the Send Code of Practice.

23. The third question is whether the LA is able to pause or freeze an EHC Plan. If it cannot, then whether the panel's determination arguably places the LA in breach of its statutory duty.

24. There is no direct answer to this in either the legislative framework, regulations, case law or the Code of Practice. However, I note that paragraphs 9.132 to 9.133 of the Code of Practice offers guidance that the LA can be relieved of its duty to secure the special educational provision in an EHC Plan if a child's parents have made suitable alternative arrangements. It therefore appears that there may be circumstances in which that LA's duty can, in effect, be paused without the need to cease to maintain an EHC Plan.

25. The Code of Practice is silent on whether or not T's circumstances of being abroad would fall into a similar category of alternative arrangements for special educational provision and thereby temporarily relieving the LA of its statutory duty until he returns to the UK. This is therefore a further area that properly falls to the Upper Tribunal to resolve and it would be an error for the First-tier Tribunal to usurp that role.

## **Ground 2**

26. The LA is right in stating that when considering an appeal the Tribunal ought to re-determine the decision afresh based on the

evidence available. However, an appeal is based on both facts and law. Therefore, if the Tribunal determines that the LA applied the law incorrectly to a decision it made then it is within the Tribunal's discretion to review and replace that decision. I do not consider that this would amount to a quasi-judicial review approach.

27. The error here, however, is that the panel failed to give clear reasons as to why it decided that the LA's procedural failings meant that it could not cease to maintain the EHC Plan. I have already addressed that question under Ground 1 above and it will remain for the Upper Tribunal to consider and determine.

### **Ground 3**

28. The relevance, or otherwise, of the LA's procedural failings and whether or not an EHC Plan can be paused or frozen will be necessarily dictated by the Upper Tribunal's determination of Grounds 1 and 4 above. I do not, therefore, address these issues further under this heading as they amount to repetition.

29. The panel's findings in relation to why it concluded that T would be disadvantaged, including its comparison between children moving to another local authority area and moving abroad, were factual findings that were entirely within its discretion to make based on the evidence available to it. The LA's submissions in this regard therefore amount to mere disagreement which does not constitute an error of law.

30. Finally, the submission in relation to the panel's incorrect assumption about the EHC Plan continuing on an ongoing basis if transferred to another local authority area is misconceived. It is clear from paragraph 25 of the panel's decision that it was not stating that an EHC Plan would continue indefinitely if transferred. The point the panel was clearly making is that if T had moved to another local authority area, as opposed to moving abroad, then the LA would have transferred his EHC Plan pursuant to section 47 of the Act as opposed to ceasing to maintain it.

31. For these reasons, I grant permission to appeal to the Upper Tribunal on a point of law pursuant to Section 11(1) of the Tribunals Courts and Enforcement Act 2007. The points of law arise primarily in relation to Grounds 1 and 4 for the reasons I have given above. However, given the overlap with Grounds 2 and 3 both in terms of law and fact, I grant permission to appeal on all of the LA's grounds."

Accordingly she granted permission to appeal on all 4 grounds, but refused the Council's request to suspend the panel's decision in the meantime because it was under a duty to maintain the EHCP until the appeal was finally determined (s.45(4)(b)). The effect of the

panel's decision therefore remained effective even whilst under challenge and the Council was obliged to continue to maintain T's EHCP until the Upper Tribunal's final determination.

8. On 22 June 2023 I made directions for the oral hearing of the appeal, but again refused the Council's application for suspension of the decision because s.45(4)(b) of the Children and Families Act 2014 required the Council to maintain the EHCP until the appeal was determined.

9. I heard the appeal on the morning of 5 October 2023. The Council were represented by Mr Tom Gillie and the Respondents by Mr Alex Line, both of counsel, to both of whose able and concise submissions I am indebted. It subsequently became necessary to ask for further submissions, which I received in January and February, and which were followed by a further round of submissions, as I shall explain below.

10. It is important to remember that an appeal to the Upper Tribunal lies only against a decision of the First-tier Tribunal. The reasons given for refusing permission to appeal are not part of that decision. The Upper Tribunal does not review those reasons: **CIS/4772/2000** at [2]-[11]. Nor may they be used to show that a point of law arises (or does not arise) from the decision: **Albion Water Ltd v Dŵr Cymru Cyf** [2008] EWCA Civ 536, [2009] 2 All ER 279 at [67]. To the extent that Judge Ozen's comments have been adopted by the Council as part of its grounds of appeal, I deal with them hereafter, but it must be borne in mind that the appeal is against the decision of the Tribunal on 30 March 2023 and that the remarks of Judge Ozen (who was not a member of the panel which reached the decision under appeal) on 14 June 2023 do not form part of that decision.

### **The Legislative Framework**

11. So far as material, the Children and Families Act 2014 ("the 2014 Act") provides that

**"22 Identifying children and young people with special educational needs and disabilities**

A local authority in England must exercise its functions with a view to securing that it identifies—

(a) all the children and young people in its area who have or may have special educational needs, and

(b) all the children and young people in its area who have a disability.

...

#### **24 When a local authority is responsible for a child or young person**

(1) A local authority in England is responsible for a child or young person if he or she is in the authority's area and has been—

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

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

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

...

#### **42 Duty to secure special educational provision and health care provision in accordance with EHC Plan**

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

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

...

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

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

...

#### **45 Ceasing to maintain an EHC plan**

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

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

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

...

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

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

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

(5) Regulations may make provision about ceasing to maintain an EHC plan, in particular about—

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

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

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

...

### **51 Appeals**

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

(2) The matters are—

...

(f) a decision of a local authority under section 45 to cease to maintain an EHC plan for the child or young person.

...

### **83 Interpretation of Part 3**

...

(6) A reference in this Part to a child or young person who is “in the area” of a local authority in England does not include a child or young person who is wholly or mainly resident in the area of a local authority in Wales or who would be wholly or mainly resident in the area of a local authority in Wales were it not for provision secured for the child or young

person under Part 2 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018”.

12. The Special Educational Needs and Disability Regulations 2014 (“the 2014 Regulations”), so far as material, provide that

**“Transfer of EHC plans**

15(1) This regulation applies where a child or young person in respect of whom an EHC plan is maintained moves from the area of the local authority which maintains the EHC plan (“the old authority”) into the area of another local authority (“the new authority”).

(2) The old authority shall transfer the EHC plan to the new authority (“the transfer”) on the day of the move or, where it has not become aware of the move at least 15 working days prior to that move, within 15 working days beginning with the day on which it did become aware.

(3) From the date of the transfer—

(a) the EHC plan is to be treated as if it had been made by the new authority on the date on which it was made by the old authority and must be maintained by the new authority; and

(b) where the new authority makes an EHC needs assessment and the old authority has supplied the new authority with advice obtained in pursuance of the previous assessment the new authority must not seek further advice where the person providing that advice, the old authority and the child’s parent or the young person are satisfied that the advice obtained in pursuance of the previous assessment is sufficient for the purpose of the new authority arriving at a satisfactory assessment.

(4) The new authority must, within 6 weeks of the date of the transfer, inform the child’s parent or the young person of the following—

(a) that the EHC plan has been transferred;

(b) whether it proposes to make an EHC needs assessment; and

(c) when it proposes to review the EHC plan in accordance with paragraph (5).

(5) The new authority must review the EHC plan in accordance with section 44 of the Act before the expiry of the later of—

(a) the period of 12 months beginning with the date of making of the EHC plan, or as the case may be, with the previous review, or

(b) the period of 3 months beginning with the date of the transfer.



(6) Where, by virtue of the transfer, the new authority comes under a duty to arrange the child or young person's attendance at a school or other institution specified in the EHC plan but in the light of the child or young person's move that attendance is no longer practicable, the new authority must arrange for the child or young person's attendance at another school or other institution appropriate for him or her until such time as it is possible to amend the EHC plan.

(7) Where, by virtue of the child or young person's move, another commissioning body becomes the responsible commissioning body for that child or young person, the original responsible commissioning body must notify the new responsible commissioning body of the move on the day of the move or where it has not become aware of the move at least 15 working days prior to that move, within 15 working days beginning on the day on which it did become aware.

(8) Where it is not practicable for that new commissioning body to arrange the health care provision specified in the EHC plan, it must, within 15 working days beginning with the date on which it became aware of the move, request that the new local authority makes an EHC needs assessment or reviews the EHC Plan, and where the new local authority receives such a request it must comply with that request.

...

### **Procedure for determining whether to cease to maintain EHC plan**

31(1) Where a local authority is considering ceasing to maintain a child or young person's EHC plan it must—

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

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

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

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

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

(a) their right to appeal that decision;

- (b) the time limits for doing so;
- (c) the information concerning mediation, set out in regulation 32; and
- (d) the availability of—
  - (i) disagreement resolution services; and
  - (ii) advice and information about matters relating to the special educational needs of children and young people; and
- (e) the First-tier Tribunal's power to make recommendations under the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017.

13. The Education (Areas to which Pupils and Students Belong) Regulations 1996 (“the 1996 Regulations” or “the Belonging Regulations”) provide that

**“ Interpretation**

2

...

(2) References in these Regulations to the place where a person is ordinarily resident are references to the address where that person is habitually and normally resident apart from temporary or occasional absences, except that no school pupil shall be treated as being ordinarily resident in the area of an education authority by reason only of his residing as a boarder at a school which is situated in the area of that authority.

(3) References in these Regulations to the person responsible for a school pupil are to—

(a) the parent with parental responsibility for him,

provided that if the parents of a school pupil with parental responsibility for him live in different education authority areas—

(i) the person responsible for the pupil shall be the parent with parental responsibility for him with whom the pupil is habitually and normally resident,

(ii) if the pupil is habitually and normally resident with more than one parent with parental responsibility for him, the person responsible for the pupil shall be the parent who is ordinarily resident nearest to the

school attended by the pupil or to the place at which the pupil receives education otherwise than at school,

(iii) if the pupil is not habitually and normally resident with a parent with parental responsibility for him, the person responsible for the pupil shall be the parent who is ordinarily resident nearest to the school attended by the pupil or to the place at which the pupil receives education otherwise than at school; or

(b) where there is no parent with parental responsibility for him, to the person (not being a local authority) who has care of him when he is not attending school or living in boarding accommodation or in hospital.

(4) These Regulations do not apply for the purpose of determining which authority's area a child is in for the purposes of section 321(3) of the Education Act 1996 and section 24 of the Children and Families Act 2014.

### **General principle**

3. Subject to regulations 4 to 10 below, a person shall be treated as belonging to the area of the education authority in which he is ordinarily resident or, where he has no ordinary residence, the area of the authority in which he is for the time being resident”.

(I shall refer again below to the history of these provisions, which necessitated the production of the further submissions in January and February of this year).

14. The Explanatory Note to the 1996 Regulations (which is not part of the Regulations) states that

“The regulations specify the circumstances in which school pupils and further education students are to be treated as belonging to the area of a particular local education authority for the purposes, principally, of section 51 of the Education (No 2) Act 1986 (recoupment). In addition by virtue of paragraph 1 of Schedule 2 to the Education Act 1962 a person who, if he were a further education student, would under these Regulations be treated as belonging to the area of an authority, will be treated as belonging to the area of that authority for the purposes of determining responsibility for providing awards under the Education Act 1962.

These Regulations revoke the Education (Areas to which Pupils and Students Belong) Regulations 1989 and the Education (Areas to which

Pupils and Students Belong) (Amendment) Regulations 1990 and re-enact the provisions with modifications. Apart from drafting amendments the main changes are:—

(a) the special provisions for part-time further education students are not re-enacted;

(b) a new definition of the person responsible for a school pupil is introduced (regulation 2(3));

(c) the special provisions for boarding school pupils only apply to school pupils for whom a statement of special educational needs is maintained (regulation 4);

(d) new provision is made for the case where the parents of a school pupil with a statement of special educational needs or at a special school are out of the country but the pupil is in the care of someone (regulation 5(5)(b));

(e) new provisions are made for a child who is looked after by a local authority (regulation 7);

(f) the special provisions for further education students educated in hospitals and for school pupils and further education students in refugee camps are not re-enacted”.

15. The Armed Forces Act 2006 (“the 2006 Act”) provides that

**“343AA Due regard to principles: England**

(1) In exercising in relation to England a relevant function, a person or body specified in subsection (3) must have due regard to—

(a) the unique obligations of, and sacrifices made by, the armed forces,

(b) the principle that it is desirable to remove disadvantages arising for service people from membership, or former membership, of the armed forces, and

(c) the principle that special provision for service people may be justified by the effects on such people of membership, or former membership, of the armed forces.

(2) In this section “relevant function”, in relation to a person or body specified in subsection (3), means—

...

(c) a relevant education function

...

(3) The specified persons and bodies are—

(a) a local authority in England;

...

(5) In this section “relevant education function” means a function under or by virtue of any of the following—

(a) the Education Act 1996;

(b) Part 3 of the School Standards and Framework Act 1998 (school admissions);

(c) section 175 of the Education Act 2002 (duties of local authorities and governing bodies in relation to welfare of children);

(d) any provision of Part 3 of the Children and Families Act 2014, so far as it deals with special educational provision.

...

(7) In this section “health care provision” and “special educational provision” are to be interpreted as if this section were in Part 3 of the Children and Families Act 2014 (see section 21 of that Act”).

## **The SEND Code Of Practice**

16. Again so far as is material, the SEND Code of Practice provides that

### **“Maintaining special educational provision in EHC plans**

Relevant legislation: Section 42 of the Children and Families Act 2014

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

## **10 Children and young people in specific circumstances**

...

10.8 A significant proportion of looked after children live with foster carers or in a children's home and attend schools in a different local authority area to the local authority that looks after them. Local authorities who place looked after children in another authority need to be aware of that authority's Local Offer if the children have SEN. Where an assessment for an EHC plan has been triggered, the authority that carries out the assessment is determined by Section 24 of the Children and Families Act 2014. This means that the assessment must be carried out by the authority where the child lives (i.e. is ordinarily resident), which may not be the same as the authority that looks after the child. If a disagreement arises, the authority that looks after the child, will act as the 'corporate parent' in any disagreement resolution, as described in Chapter 11.

...

### **Children of Service personnel**

10.53 The Children's Education Advisory Service (CEAS) within the Ministry of Defence provides advice and guidance to Service parents, educational establishments and local authorities on educational issues relating to Service children, including issues relating to SEN. Service Children's Education (SCE) provides mainstream education for Service children in some overseas locations. As the education, health and social care resources available overseas are different from the UK, MoD services complete an MoD Assessment of Supportability Overseas (MASO) for all Service children with complex needs before an overseas posting is agreed. Personal Budgets agreed in the UK cannot be transferred to SCE locations overseas.

10.54 Children whose parent(s) are Service personnel may face difficulties that are unique to the nature of their serving parent's employment. These needs may arise from:

- service induced mobility: Service personnel may relocate more often than the rest of the population and, sometimes, at short notice. Such transitions should be well managed to avoid Service children with SEN experiencing delays in having their needs assessed and met
- the deployment of serving parents to operational arenas, while not constituting SEN in itself, may result in a Service child experiencing anxiety, dips in educational performance and/or emotional difficulties. Children may

also be affected similarly by siblings' deployment

### **Action to take in respect of Service children with SEN**

10.55 In having regard to this Code of Practice and in meeting the aspirations of the Armed Forces Covenant, which attempts to eliminate or mitigate some of the potential disadvantages faced by Service families, all those with statutory responsibilities towards Service children with SEN should ensure that the impact of their policies, administrative processes and patterns of provision do not disadvantage such children because of their Service-related lifestyle”.

### **The Armed Forces Covenant: the Council**

17. On its website the Council states, with regard to the Armed Forces Covenant

“The Armed Forces Covenant is a promise from the nation to those who serve or have served in the armed forces, and their families, that they are treated fairly.

The Armed Forces Covenant was signed by the Leader of Hampshire County Council and representatives of the Armed Forces in June 2011. All local authorities have now signed the Covenant.

The County Council's approach is based on the following principles:

- No disadvantage - this ensures members of the armed forces community experience no disadvantage as a result of their service in the armed forces
- Smooth transition - this ensures appropriate actions are taken to support the transition from military to civilian life
- Work with partners to reduce duplication. Make efficient use of all available resources to deliver the best possible outcomes for members of the armed forces community

The ambition is that the County Council's support for the armed forces is embedded into mainstream services, based on evidenced need.

The Armed Forces Covenant is based upon two key principles:

- The Armed Forces community should not face disadvantage compared to other citizens in the provision of public and commercial services
- Special consideration is appropriate in some cases, especially for those who have given most such as the injured and the bereaved”.

## **The Factual Background**

18. The factual background is set out in paragraphs 5 to 12 of the Tribunal’s statement of reasons, but for the sake of clarity it is worth reiterating that T has special educational needs arising from his diagnoses of Autistic Spectrum Disorder (“ASD”) and Global Developmental Delay (“GDD”). In August 2021 he and his family moved to Dubai due to his father’s deployment there with the Royal Navy. At that time the deployment was expected to last for three years.

19. On 1 April 2021 Ms Sawka, one of the Council’s case workers suggested that T’s EHCP would be “paused” until his return in summer 2024 and would be resumed when they returned, endorsing a comment made by his school’s SENCO. The view was subsequently taken by the Council that the case worker had mis-advised T’s parents on that point, of which they were subsequently informed.

20. On 19 November 2021, the Council gave notice of its decision to cease to maintain T’s EHCP. The reason given was that he no longer resided in the local authority’s area and that, if he returned, he would be subject to re-assessment. That was confirmed by a brief letter to the same effect on 19 January 2022. His parents appealed against that decision on 22 May 2022, although it took until 20 March 2023 for a hearing of the appeal to take place.

21. On 2 February 2022 the Council’s Assistant SEN Manager wrote to T’s parents to the effect that

“You are unhappy with the County Council’s decision to cease your son’s Education, Health and Care (EHC) plan and the funding that is associated with the plan. This is because of your family relocating due to your posting overseas in the UAE for 3 years as an employee of the Royal Navy.

There are two elements to this complaint that I will address. The first is the information that you have been provided with by officers of the County Council, the second relates to the decision to cease T’s EHC plan. Regarding the first element of your complaint, I have upheld your complaint. The reason for this is that you were provided with incorrect information by T’s previous caseworker, Ms Jeanette Sawka. It is clear from the email you



have provided that Ms Sawka advised you that the funding attached to T's EHC plan will 'pause'. It is a reasonable assumption that you took this to mean the EHC plan would continue in some form and be reinstated upon a return to Hampshire.

Ms Sawka no longer works for Hampshire County Council, so I am unable to discuss this with her. However, as a matter of course the SEN Service will receive a refresher training session on duties to pupils with EHC plans, covering specifically the MODLAP principles, upon moving in and out of Hampshire.

I apologise unreservedly to you that you have been provided with incorrect information and any distress this has caused.

To address the second element of your complaint, I must explain the legislative considerations for the County Council.

When a pupil is no longer resident in a particular local authority, that authority becomes no longer responsible for them. This includes where a pupil leaves the country, including where a service child relocates. The MODLAP principles seek to facilitate continuity for a pupil, however they do not override the legislation. Furthermore, there is no principle in the MODLAP that permits an EHC plan to be maintained while a child is overseas; EHC plans have no function outside of England. The MODLAP does provide principles and agreements to minimise barriers to accessing education, which I will refer to later in my letter.

In the event that T returns to Hampshire, which you indicate is the intention, then a new EHC assessment will be required; presuming that is the legislative requirement at the time. This would be essential as T's needs, as would any young person, may change over time. This applies to all English local authorities.

I cannot see that the decision to cease T's EHC plan was flawed, and as such I do not uphold this part of your complaint. I do hope that this explanation assures you that this is not a case of the County Council reneging on an agreement; rather that you were provided with incorrect information which I have now been able to clarify for you. The County Council must work within the legislative framework and there is no power that I can determine to continue to maintain T's EHC plan while he is not resident in the country.

### **Summary**

I have considered the impact on T returning to Hampshire and requiring a new assessment. In doing so, I have considered the MODLAP principles:

- Each MODLAP local authority commits to reduce to the absolute minimum, the amount of time service children with SEND are out of education following transition to a new local authority area.
- Local authorities agree that consultation with schools for placement of a service child with SEND, will occur prior to the arrival of the family into the area – subject to an official letter from the MOD confirming the relocation date and where all necessary records have been provided to the new local authority at least 30 days ahead of the family's arrival date. An expectation is implicit within this set of agreed principles, that the originating local authority or appropriate authority (including MOD schools), will ensure all necessary child records (including MOD SCANS and EHC plans) have been provided to the new local authority within 15 days from when they first become aware of the move. This agreement is subject to parents or carers having given a minimum of 45 days' notice to their current local authority ahead of their move.

As such, upon notification of return to Hampshire and providing that the above conditions are met, a request for a new assessment for T will be considered upon notification of a return to the authority. Furthermore, all young people have a right to a mainstream school place. Upon securing a placement for T, the County Council will offer to provide, as an exceptional agreement to T, interim funding to that school equivalent to T's current level of EHC funding while an assessment is underway. However, I need to be clear that this offer is based on the legislation as it exists today, and that any changes made by the Department for Education are outside of the control of the County Council".

22. At the time of the hearing before the Tribunal, the family were still based in Dubai. Late evidence was admitted at the hearing which indicated that the deployment would end about a year early in July 2023, but it was not completely clear where T's father would next be deployed. It is not in dispute that the family did subsequently return to Hampshire, but that could not be known definitively at the date of the hearing.

23. At the hearing it was conceded by the Council that it had not fully complied with the 2014 Regulations when it ceased to maintain T's EHC Plan. Nevertheless its position at the hearing was that the Tribunal should conclude that it was entitled to cease to maintain the ECHP

because it was not able to carry out its non-delegable duties to maintain the EHCP whilst he was in Dubai and thus outside the Council's area.

### **The Extent of the Issue**

24. Given that by the time of the hearing of the appeal, T had returned to the UK and had been issued with a new EHCP, I raised with the parties in advance of the hearing whether I should proceed to determine the appeal.

25. Although by the time of the hearing before me, T and his family had returned to the UK with effect from 16 July 2023 and a new EHCP had been issued for T at his new mainstream junior school in September 2023, both sides were agreed that I should nevertheless hear the appeal because the issues involved were likely to be of general importance in other cases involving service personnel families and to local authorities with duties towards the children and young persons of such families.

26. To that end, I asked Mr Line whether the Council had any figures to demonstrate how many cases raising such issues it currently had on its books or had had in the previous 5 to 10 years and whether it had figures for any other local authorities.

27. Mr Line was not able to provide any figures going back over a 10 year period nor was he in a position to provide any information relating to other local authorities, but on the basis of enquiries which had been made from census and pupil premium data, he had been given the following information relating to the Council:

- spring 2023: 6180 service children, of whom 309 had an EHCP (these numbers are likely to have increased since spring).
- spring 2022: 6159 service children, of whom 262 had an EHCP.
- spring 2021: 5154 service children, of whom 228 had an EHCP.
- spring 2020: 6138 service children, of whom 199 had an EHCP.
- spring 2019: 6144 service children, of whom 192 had an EHCP.

28. In response to a question from me during the hearing, as to whether the Council was able to explain how many, within those numbers, were service families living abroad, Mr Line was subsequently in a position to tell me that there were not at present any service families living abroad who had an EHCP maintained by the local authority and that in the past, where service families had moved abroad, the Council had ceased to maintain the EHCP, as it did in the present case. The local authority had not been able to quantify how many times that had happened in the past. The Council would have been able to identify how many EHCPs it had ceased to maintain in a given year, but within that parameter it would not be possible to know what the reasons and circumstances were leading to that decision without reviewing individual case files. I did not require the Council to undertake any further such review.

29. Although by the time of the hearing before me, T and his family had returned to the UK with effect from 16 July 2023 and a new EHCP had been issued for T at his new mainstream junior school in September 2023, I am satisfied that it was correct to hear the appeal and to determine it on the basis of the arguments addressed to me and not merely on the narrow basis of the Council's admitted failure to comply with regulation 31 of the 2014 Regulations, given that the issues involved are likely to be of general importance in other cases involving service personnel families and to local authorities with duties towards the children and young persons of such families.

30. The Court of Appeal recently considered this question in its decision in ***HMRC v Arrbab*** [2024] EWCA Civ 16 where Falk LJ (with whom Snowden and Baker LJJ agreed) said

**“Whether to consider an academic appeal**

28. In *R v Secretary of State for the Home Department Ex p. Salem* [1999] 1 AC 450, 456-7 Lord Slynn recognised the existence of a discretion to hear an appeal on an issue of public law involving a public authority, even if by the time the appeal is heard its outcome will not directly affect the rights and obligations of the parties inter se, but added:

"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."

29. The conditions that will generally need to be met before this court may exercise its discretion to entertain an academic appeal were summarised by Lord Neuberger MR in *Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party)* [2011] EWCA Civ 1580, [2012] 1 WLR 782 at [15]:

"(i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."

More recently, the principles have been considered by this court in *R (L) v Devon County Council* [2021] EWCA Civ 358, [2021] ELR 420 and *R (on the application of SB) v Kensington and Chelsea RLBC* [2023] EWCA Civ 924.

31. HMRC's position is that the appeal raises a point of law that has implications for other cases, such that if it is not resolved now it is likely that they would seek to raise it in another case. Further, Mr Arrbab's legal team were content on his behalf for the appeal to proceed, subject to an undertaking as to costs which was provided following a brief adjournment for that purpose. We were also satisfied that both sides of the argument would be (and indeed were) fully ventilated. In the circumstances, we concluded that this is a case where the court should exercise its exceptional discretion to hear an academic appeal."

31. Both sides were agreed that the appeal raised points of law which had implications for other cases, such that if they are not resolved now it is likely that local authorities or parents would seek to raise it in another case. Further, the parents' legal team, who were acting pro bono, were content on their behalf for the appeal to proceed. I am also satisfied that both sides of the argument would be (and indeed were) fully ventilated. In the circumstances, I conclude that this is a case where the Upper Tribunal should exercise its exceptional discretion to hear an academic appeal.

### **The New Evidence**

32. On 26 September 2023, shortly before the hearing, Clifford Chance, who were acting pro bono on behalf of the parents, sought to adduce fresh evidence in the form of a witness

statement of even date from T's father, pursuant to Rule 15(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the 2008 Rules").

33. T's parents submitted that, pursuant to rule 15(2)(a), the Tribunal could admit further evidence whether or not it was available to a previous decision maker or would be admissible in a civil trial in the UK. They wished to introduce the witness statement to correct an error in the decision of the Tribunal, namely that T did not meet the definition of being ordinarily resident in the Council's area. That error failed to take account of the fact that their absence from the Council's area was as part of a naval deployment, how the residency of the family of naval personnel on deployment was treated by the Navy and UK authorities and, consequently, how that understanding of their residency was relied upon by T's parents themselves. The Council's case was that T was not resident in its area and that error was of material importance to the case. Evidence on that point was therefore clearly material to the proper determination of the case, which required a determination of ordinary residence as it pertained to T's parents, as naval personnel. (In fact, to be strictly accurate, the question of ordinary residence was not raised in the decision of the Tribunal under appeal, but in the grant of permission to appeal by Judge Ozen.) They submitted that the case was likely to be of importance and interest to other service personnel families and to local authorities with duties towards children and young people of such families. As such, a case with such importance should not be decided without reference to facts which were material to the Tribunal's determination. They submitted that they did not have the benefit of legal advice in front of the Tribunal at first instance and had only been in receipt of legal advice on a pro bono basis relatively recently. The application was therefore being made at the earliest opportunity. Whilst material to the matters in front of the Upper Tribunal, the factual information contained within the witness statement was straightforward and factual and its admission would not prejudice the Council. It would, however, significantly prejudice T's parents and any other service personnel families who might be impacted by the determination of the Upper Tribunal in this case, should the evidence not be admitted and duly considered.

34. What T's father said in that statement was that

**"A. Reasons for the Witness Statement**

6. On 14 June 2023, [Judge] Ozen ... issued a decision which granted Hampshire County Council (the "LA") permission to appeal the FTT Decision to the Upper Tribunal (the "PTA Decision").

7. In paragraph 14 of the PTA Decision, Judge Ozen concluded that "from the evidence available to [her], it does not appear that the [Respondents] retained an address in the LA's area." The Judge noted that it therefore appears that T does not meet the definition of being ordinarily resident in the LA's area.

8. I am submitting this witness statement to respectfully correct Judge Ozen's inaccurate statement that my family and I did not retain an address in Hampshire. This topic did not come up during the conduct of the proceedings in front of the FTT and it didn't occur to me to raise it.

9. After I became aware of the inaccurate statement in the PTA Decision dated 14 June 2023, I worked with the National Autistic Society to seek pro bono legal advice from solicitors at CC and a barrister from Matrix Chambers in relation to the appeal.

10. Due to their limited availability, it has taken a number of months to identify counsel who would be available to provide legal advice and attend the upcoming appeal hearing, and who can advise on the legal issues, including the significance of the "ordinary resident" test. Upon receiving advice, the privilege over which is not waived, I submit a witness statement addressing this discrete issue, which I have endeavoured to do promptly and without delay.

**B. History of Residence in Hampshire**

*History of residence*

*[Note: I have significantly redacted the next few paragraphs, not out of any disrespect for T's father's significant and longstanding naval service, but to minimise the risk of T being identified]*

11. I ... have been employed by the Royal Navy since February 2006.

12. I was born and raised in my family's home in Hampshire. My dad was also in the Navy, based in Portsmouth, and my mum was from Hampshire as well so I describe myself as "Hampshire born and bred". After joining the Navy in 2006, I was based in [Scotland and Plymouth] but maintained a residential address at my parents' house [in] Fareham, Hampshire. Hampshire has always been 'home' to me.

13. In July 2012, my now wife ... and I purchased a freehold property [in] Southsea, Portsmouth. After we married in 2013, [we] continued to live at this address.

14. In August 2014, we purchased a freehold property [also in] Fareham. We moved into the property immediately after and lived there until my deployment to Dubai.

15. T was born in 2015 and has lived [at our home] since birth. He attended [C] Primary School in Fareham from September 2019 to July 2021. He was issued an EHCP by the LA in October 2019, and received full educational support from the LA.

#### *Deployment*

16. My deployment to Dubai, UAE started in July 2021 and was expected to last 3 years.

17. Whilst I have always been based in the Portsmouth area in Hampshire, I have gone on 3 deployments (Bahrain in 2018, Scotland in 2006, Plymouth in 2008 and various 6 months deployments on ships). These were on my own without my family accompanying me. In my experience this is really common for servicemen in the Navy, more so than for the other armed forces, and the Navy provided practical and financial support for me to return back to Hampshire during those times. For example, during my deployments to Scotland and Plymouth, I would commute back from the Naval base to my residential address in Portsmouth every weekend to see my family. In the Navy, this is called "weekending", a recognised form of commuting between a naval base and home, and the Navy paid for my transportation costs of commuting back home. I've seen some recent reports on how common maintaining your home residence and "weekending" is in the Navy [this was a reference to the report at

[https://nff.org.uk/wp-content/uploads/2019/06/NFF\\_KCMHR\\_Full\\_Report.pdf](https://nff.org.uk/wp-content/uploads/2019/06/NFF_KCMHR_Full_Report.pdf)

#### *Presumption of return to Hampshire*

18. We went to Dubai with a very clear understanding that Hampshire remained home and we would be returning to Hampshire after the end of the deployment, because it is the only place my family has lived in and is where we intend to continue to live upon return. This is clear from the following:

18.1 We retained ownership of [our house in Fareham] and secured a tenancy contract for [it] for a term of 12 months, with a 3-month notice period. The tenancy started a few weeks before our departure to Dubai, but we remained in Hampshire until we left for Dubai, staying at my parents' house [in] Fareham. The lease was renewed in 2022.



19. The Navy also shared the same understanding that my family and I would return to Hampshire. The Navy offers all personnel on deployment a "get you home" allowance. My family and I were offered one free round-trip flight each from Dubai to London every year so we could visit our family in Hampshire.

20. Hypothetically, in the case of any emergency requiring deployed personnel to vacate the country they are deployed to, the Navy would be responsible for providing us with suitable temporary accommodation while we find more permanent housing for relocation. The Navy would have to move us back to our place of work or where our family networks are. For us, that is and has always been Portsmouth. It is very clear that the Navy agrees.

#### *Return to the UK*

21. We returned to the UK on 16 July 2023, following a shortening of my deployment in Dubai.

21.1 In early summer 2023, I was informed by the Navy of the possibility that I would complete the deployment early and return to the UK. Around the same time, the lease was up for renewal on our Hampshire property. As the end date of my deployment had not been confirmed, we were not sure if we would remain in for another year or return early. Therefore: (a) We applied to schools in both Dubai and Hampshire for T (b) We renewed the tenancy of [our home] property for 12 months to make sure that it was rented out if we were not going to come back early. It is due to expire in July 2024.

22. Ultimately we did return early and our house will not be available until at least next summer. The Navy therefore arranged military service accommodation in our home area, [elsewhere in Fareham], which is a rental property arranged by the Navy. We plan to stay here for at least the upcoming school year because it would be good for T not to move around too much. We want T to have some stability and predictability in his routines. We expect to move back to [our own house] at some point in the future.

23. It has been confirmed that my current role with the Navy will be based in Hampshire for at least the next 2 years. At the end of my current role in two years, I get a degree of choice in what role I go into and I hope to stay near Portsmouth. Even if I am based out of Hampshire in the future, my wife, T and our other children would remain living in our house.

#### *C. Status of Residence during Overseas Naval Deployment*

24. Whilst I maintained my property back in Hampshire, during our time in Dubai the Navy provided housing and education for the family, which I understand to be normal procedure for all military family deployments overseas. During this time each family member held British Diplomatic passports and we were the umbrella of the FCDO during this time on

post, this was on behalf of the Royal Navy, whilst we were in the UAE. In the British Embassy there were UK based staff (diplomats) and locally employed staff. As UK-Based staff, I was a British taxpayer whilst overseas and under the rules and regulations of the UK.

25. During the deployment, [my wife], T and I all had British diplomatic passports. We lived in Navy-assigned housing in Dubai and were treated as staff based in the UK Embassy. I was a "crown servant" and, for tax and benefit purposes, I remained a tax resident in the UK and was employed and paid by the Crown. We continued to be paid UK benefits and disability allowance for T as all military personnel deployed overseas and their accompanying immediate family members remain UK residents. Particularly in relation to the support available for T, understanding that this was the position was important to me when deciding if I was going to take my family with me to Dubai."

35. The Council opposed the introduction of the new evidence.

36. However, at the outset of the hearing, I told the parties that in my view, given that both sides sought to have the appeal heard as in essence a test case with wider ramifications for the families of service personnel and local authorities, the additional evidence should be admitted since otherwise the case might have to be decided only on the narrow point on which the Tribunal below determined the appeal, namely the Council's admitted failure to apply regulation 31 of the 2014 Regulations properly. In particular, what lay at the heart of the appeal was the question of whether the responsibility for the maintenance of an EHCP under s.24 of the 2014 Act if the child or young person "is in the authority's area" and the question of whether an authority might cease to maintain an EHCP under s.45 if "the authority is no longer responsible for that child or young person" was governed by a test of ordinary or habitual residence or some other test. To determine what was being treated by both sides as a test case without the admission of obviously relevant evidence which bore on the subject of ordinary or habitual residence would have defeated the very object of the exercise since the Tribunal below had not heard any oral evidence and had not made any determination as to the question of residence.

37. On that basis, after a short adjournment to take instructions, Mr Line, albeit with some reluctance, agreed that the further witness statement from T's father should be admitted and I have proceeded and determined the appeal on that basis. For the avoidance of doubt I make clear that I admit the witness statement of T's father pursuant to rule 15(2)(a) of the 2008 Rules in accordance with the overriding objective.

### **The Council's Submissions**

38. In his submissions on behalf of the Council, Mr Line made four preliminary points:

(1) the s.42(2) duty had been described as absolute and non-delegable: ***R(M) v Harrow LBC*** [1997] ELR 62, ***R(N) v North Tyneside BC*** [2010] EWCA Civ 135 at [27], ***R(ZK) v Redbridge LBC*** [2020] EWCA Civ 1597 at [13], ***R(BA) v Nottinghamshire CC*** [2021] EWHC 1348 (Admin) at [27].

(2) regulation 2(4) of the 1996 Regulations was clear that the definition in regulation 2(2) was confined to the application of the 1996 Regulations and had no bearing on the question of which local authority was responsible for a child or young person under Part 3 of the 2014 Act or the predecessor legislation. Therefore, the general principle that a person should be treated as belonging to the education authority in which he was ordinarily resident, as per regulation 3, was not a permissible aid to the construction of s.24 of the 2014 Act. That had been confirmed in case law pertaining to equivalent provisions of the predecessor legislation: ***R(G) v Kent CC*** [2016] EWHC 1102 (Admin) at [124]-[144].

(3) the Code of Practice was but guidance and did not create or override law: ***Devon CC v OH*** [2016] UKUT 292 (AAC) at [45].

(4) the role of the Tribunal in an appeal was to stand in the local authority's shoes as at the date of the hearing. It performed an inquisitorial function and remade the decision, as opposed to performing a review of it: ***Bromley LBC v SENT*** [1999] ELR 260, ***W v Gloucestershire CC*** [2001] EWHC 481 (Admin) at [15], ***DH and GH v Staffordshire CC*** [2018] UKUT 49 (AAC) at [19].

39. In his skeleton argument, Mr Line had rearranged the order of his submissions to reflect the order in which Judge Ozen had dealt with them, but for the purposes of exposition in this judgment I have reverted to the original order of the grounds of appeal.

### **The First Ground of Appeal**

40. Mr Line submitted that at paragraphs 24-25 the Tribunal held that the Council was not entitled to cease to maintain, because (which was not in dispute) there had been no consultation in accordance with regulation 31 of 2014 Regulations.

41. As was clear from s.24 of the 2014 Act, the duties under Part 3 of the Act only applied to a local authority in relation to a child or young person where that individual was “in the authority’s area”. S.45(1)(a) correspondingly stated that a local authority might cease to maintain an EHCP where it was no longer responsible for a child or young person. Those provisions were interrelated, such that, if an individual were no longer in a local authority’s area, then the local authority was no longer responsible for him and that created a lawful basis on which it might exercise discretion to cease to maintain his EHCP.

42. In T’s situation, he ceased to be in the Council’s area when he moved to Dubai. The above analysis applied and that created a lawful basis on which the Council could cease to maintain his EHCP. As at the time of the hearing in March 2023, when the Tribunal was standing in the Council’s shoes, T remained in Dubai, where he had been situated since around August 2021. He was not due to return until July 2023, but it was not clear where he would return. Thus the circumstances which applied when the Council took its decision to cease to maintain also applied when it heard the appeal.

43. For the Tribunal to conclude that the Council was not entitled to cease to maintain the EHCP because of procedural defect prior to that decision and that decision was thereby invalidated was circular. If that were right, then there would not have been a decision against which to appeal and the Tribunal would not have had jurisdiction to determine the appeal either.

44. Moreover, the Tribunal had no jurisdiction to determine whether there had been a public law breach in relation to compliance with the 2014 Regulations. Although the Council made no admission in relation to the point, procedural impropriety might, depending on circumstances, be capable of invalidating a cease to maintain decision made by a local authority under s.45 of the 2014 Act. However, to establish that, an affected person would need to commence judicial review proceedings and obtain a declaration and/or quashing

order from the High Court. In circumstances where that had not been done (as here), then the decision to cease to maintain the EHCP stood as lawful because it had not been overturned by the High Court, but instead the parents had submitted an appeal under s.51 of the 2014 Act.

45. As to s.45(4) of the 2014 Act, that was a protective provision which merely delayed the implementation of a local authority's decision to cease to maintain until such point as the time for appealing had expired or, if there had been an appeal, until the appeal was finally determined. That did not give scope for the Tribunal to order that the maintenance of an EHCP should be paused or frozen after the determination of an appeal in an appellant's favour. Nor did it provide a basis for the Tribunal to uphold the appeal in a situation where, as here, s.24 of the 2014 Act did not apply, thus justifying the Council's decision to cease to maintain.

46. S.45(5) was an enabling provision which permitted the making of regulations *inter alia* in relation to the procedure to be followed by a local authority when determining whether to cease to maintain an EHCP. It did not create a freestanding mandatory duty in relation to the procedure created by regulation 31 pursuant thereto. It was accepted that regulation 31(1) stated that there "*must*" be a consultation before a cease to maintain decision was made, but, as above, there was no public law challenge to the non-compliance with that provision and the prior procedural failings could not invalidate a decision which had then been appealed.

47. In the circumstances, prior procedural failings could not create a basis for the Tribunal to conclude that the Council's decision was invalidated or for the appeal to be determined in the parents' favour. The only proper conclusion for the Tribunal to reach was that, notwithstanding the admitted procedural failings, the Council had ceased to maintain T's EHCP and it was for the Tribunal to determine the appeal against that decision in the ordinary way as at the date of the hearing. As T was residing in Dubai, then s.45(1)(a) was still engaged, meaning that the appeal should have been dismissed.

### **The Second Ground of Appeal**

48. Mr Line submitted that the Tribunal approached its task as if it were subjecting the Council's decision to a review, as opposed to a *de novo* merits appeal. At paragraph 22 it stated that it did not hear oral evidence and at paragraphs 23-28 there is no reference to

documentary evidence. Paragraph 24 and the first sentence of paragraph 25 showed that the Tribunal was prepared to allow the appeal on procedural impropriety grounds, rather than in relation to the substantive merits. The Tribunal then went on at paragraphs 25-27 to determine that the EHCP could be paused or frozen after its decision allowing the appeal – which was in error for the reasons stated in relation to Ground 4.

49. That approach, which was closely linked to the arguments in Ground 1, obscured the approach which should be taken in a statutory appeal, which was to stand in the decision maker's shoes and remake the decision as at the date of the appeal hearing. The fact that the Tribunal relied on procedural impropriety as a basis for upholding the appeal was a strong indication that it was performing a review (in a quasi-judicial review sense), which was not its role.

50. If, in properly exercising its jurisdictional function, the Tribunal had simply evaluated whether the EHCP should be ceased for the reason relied on by the Council (i.e. under s.45(1)(a), linked with s.24), then the clear answer was that the EHCP should be ceased and the appeal should be dismissed, because T had been residing (and at the time of the hearing was still residing) abroad. In altering the scope of its approach, as per the arguments above, the Tribunal did not perform its function properly or lawfully and therefore erred.

51. Moreover, for reasons stated in relation to Ground 1, the procedural failing in question (a failure to consult pursuant to regulation 31 of the 2014 Regulations) was not of such a kind to vitiate the decision to cease to maintain and, even if in principle it could have been, it would need a decision of the High Court to quash that decision. It was not for the Tribunal, which had no jurisdiction to determine breaches of the 2014 Regulations, to substitute the function of the High Court in an appeal where its jurisdiction is limited by statute (s.51(2)(f) of the 2014 Act).

52. In any case, Judge Ozen noted that *“the error here, however, is that the panel failed to give clear reasons as to why it decided that the LA’s procedural failings meant that it could not cease to maintain the EHC Plan”*. The Council submitted that the errors in the Tribunal's approach went beyond that, but at the least Judge Ozen was correct that Tribunal's decision had not been adequately reasoned.

### **The Third Ground of Appeal**

53. Thirdly, Mr Line submitted that the Tribunal's decision was erroneous because it was influenced by irrelevant considerations, which were:

(1) as per Grounds 1 and 2, it wrongly determined the appeal in the parents' favour because of an admission by the Council that it had not consulted in accordance with regulation 31.

(2) at paragraph 25-26, it made a comparison between children or young people who were abroad and those who moved between local authority areas. The two situations were not analogous. Regulation 15 of the 2014 Regulations catered for transfer of EHCPs where a child or young person moved to a different local authority area. It had no relevance to a situation where a child or young person moved abroad - beyond the territorial scope of the 2014 Act. The Tribunal essentially concluded that it was "unfair" that there were protections afforded to families in an inter-local authority transfer case, but not when families moved abroad, but fairness or equity was not a relevant consideration. Parliament had created protection in one situation, but not the other. It was for the Tribunal to apply the law as it stood, not to reach a decision which it thought equitable even though it did not reflect the law (i.e. pausing or freezing the s.42(2) duty). In any event, T's situation was not unfair. Local authorities could not be expected to have legal obligations in relation to EHCPs which were impracticable to maintain because a child or young person was abroad for a lengthy period. If the child or young person returned to the local authority area, then s.24 of the 2014 Act would apply again and the identification and assessment duties in ss.22 and 36 would "bite".

(3) further as to paragraphs 25-26, the Tribunal wrongly assumed that regulation 15 of the 2014 Regulations guaranteed continuity of EHC provision for children or young people when they moved between local authority areas. That was incorrect, because the "new" local authority retained the power to re-assess or review and change the content of the EHCP (regulations 15(3)(b), (4)(b)-(c) and (5)). It would also be open to a new local authority to cease to maintain under s.45.

(4) the Tribunal wrongly concluded that T would encounter detriment if he were required to undergo a new EHC needs assessment upon his return. However, his EHCP could not

reasonably be subject to annual review whilst he was abroad for two years. During that period the EHCP inevitably became out of date. It would always have been necessary to re-assess him and produce a new EHCP on his return anyway. Pausing or freezing his EHCP thus did not actually create any benefit to him. Furthermore, the Council had put in place adjustments for T because he was a service child. As the Tribunal noted at paragraph 27 of the decision, the Council was committed to providing funding equivalent to that catered for in his old EHCP when he returned, pending a fresh EHC needs assessment. It had also given assurances that it would complete the assessment expeditiously.

(5) as per Ground 4, the Tribunal erroneously concluded that an EHCP could be paused or frozen.

#### **The Fourth Ground of Appeal**

54. In support of his final ground of appeal Mr Line submitted that at paragraphs 26-27 the Tribunal concluded that the EHCP could, and should, be “paused” or “frozen” pending T’s anticipated return to the United Kingdom.

55. That conclusion was contrary to the nature of the s.42(2) duty and was wrong in law. That duty, as recognised in the relevant case law cited above was absolute. It could not be paused or frozen. It either applied or it did not apply. It was not a matter of proportionality. Nor could it be delegated.

56. The effect of the Tribunal’s decision was to place the Council in breach of statutory duty. It wrongly overrode the lawful basis on which the decision to cease to maintain was made under s.45(1)(a).

57. The terminology of “pausing” the EHCP came from a case worker, adopting the language initially used by a school SENCO – from which the Council later distanced itself from upon realising that it did not correctly reflect the law. That language had now filtered its way into the Tribunal’s decision, but those terms were not used in the primary or secondary legislation, or the Code of Practice. They mischaracterised the s.42(2) duty. The Tribunal should not have adopted that terminology (and the Council did not invite it to do so).



58. Dealing with additional points related to this ground which arose from Judge Ozen's decision on permission and the response to the appeal:

(1) although the power to cease to maintain under s.45(1) was discretionary, in the circumstances of this case there was a lawful exercise of discretion because T was not residing in the Council's area. The fact that the discretion was capable of being exercised in a different way did not mean that it must be, or that the s.42(2) duty could be paused or frozen. Circumstances where a child or young person was abroad would vary. At one end of the spectrum they would be absent for a short period because of a family holiday. The Council was not suggesting that, in that situation, it would be reasonable for a local authority to conclude that s.24 of the 2014 Act ceased to apply, thereby invoking a cease to maintain situation. However, T's situation was at the opposite end of the spectrum. He was due to be abroad for three years, and in fact was abroad for two years, during which time there would ordinarily be either two or three annual review cycles and likely change to the content of an EHCP. That clearly was a situation where s.24 did not apply and a local authority could cease to maintain under s.45(1)(a).

(2) Judge Ozen considered that it was relevant to ask whether the Council remained responsible for T during his time in Dubai. She cited the 1996 Regulations as being relevant to that question, a position adopted by the parents in their response to the appeal. That was a misconceived position in the light of regulation 2(4) of the 1996 Regulations and **R(G) v Kent CC**. The Council submitted that the 1996 Regulations were irrelevant to the issues in the appeal and that the question of whether a local authority was responsible for a child or young person under s.24 of the 2014 Act was not governed by ordinary or habitual residence principles which applied in different legal contexts, as confirmed in **R(G)** at [134]. Accordingly, the reliance by the parents on **A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)** [2013] UKSC 60 at [54], was misplaced. It was also to be noted that in **R(G)** at [143] the High Court held that whether a child permanently lived in an area was a question of fact for the local authority, which could only be challenged by way of judicial review: "[m]any other decisions relating to special educational needs can be the subject of a merits appeal to the First-tier Tribunal, but a decision that a child with a statement [now an EHCP] has moved to another authority is not one of them."

(3) the facts known to the Tribunal were that T had been absent from the Council's area since around August 2021. The initial period of the deployment was due to be three years, but it was understood that it would be ending early in July 2023. There was not a clear evidential picture as to where the family would next be deployed, save that it was his father's preference to be drafted in the same area as the family home when he returned.

(4) as at the date of the hearing, it was not in dispute that T was not in the Council's area, and had not been for a considerable period of time. It was agreed that he was not living in Hampshire. As noted by Judge Ozen, there was no evidence before the Tribunal that T's family had retained an address in the United Kingdom during the deployment. As per the parents' response to the appeal, what was now known was that the property was rented out so that the family could retain an income from it, demonstrating that their relationship to the property during the period of deployment was principally financial. Thus, even if that had been information put before the Tribunal, it would not have formed a valid basis for a finding that s.24 of the 2014 Act applied whilst the family were abroad. Moreover, the length of the posting and uncertainly as to where the next deployment would be (even in March 2023), further supported the contention that the absence was not of a sufficiently temporary nature for s.24 to be engaged.

(5) in any event, in **R(G)** it was held that it was for a local authority to determine whether an individual lived in its area (for the purposes of a provision in the predecessor legislation which was equivalent to s.24 of the 2014 Act). There had been no public law challenge to that determination by the parents, or any relevant change of circumstances showing that T was in the Council's area by the time of the hearing. It was, therefore, not appropriate for the Tribunal to proceed on any basis other than that T was not in the Council's area and the Council did not owe any duty to him because of s.24 of the 2014 Act. Importantly, the Tribunal did not make any finding of fact that T was in the Council's area (whether by reference to ordinary or habitual residence principles or otherwise). At paragraph 16 of her decision Judge Ozen highlighted that paragraph 9.201 of the Code of Practice, which referred to situations where a local authority ceased to be responsible for children or young people with SEN, did not refer to families moving abroad. That might be so, but the paragraph was not drafted in exhaustive fashion and in any event was not a binding statement of law.

(6) the Tribunal referred to paragraph 10.55 of the Code of Practice. Judge Ozen also cited paragraphs 10.54-10.59. The parents also relied on those paragraphs of the Code of Practice in their response to the appeal. The Council disputed that those aspects of the Code of Practice supported a conclusion that an EHCP could be paused or frozen – they simply did not say that at paragraph 10.57 (which was the part of the section of the Code which was directed specifically to local authorities) or elsewhere. If the Upper Tribunal considered that the Code of Practice stated otherwise (whether expressly or by inference), then the Council submitted that it mischaracterised the s.42(2) duty as interpreted in case law – which the Code of Practice could not override because it was not a source of law. It could not render a local authority responsible for a child or young person when, by operation of law, it did not owe duties to him.

(7) the parents relied on s.42(5) of the 2014 Act, but the Council did not make any decision as to the school in Dubai being a suitable alternative arrangement. The decision to move to Dubai and find an alternative school for T, was made unilaterally by the parents, although of course it was acknowledged that deployment abroad was a feature of his father's employment. Paragraphs 9.132-133 of the Code of Practice stated that it was for a local authority to determine if alternative arrangements were suitable, in the absence of which it was not relieved of its duty under s.42(2) (see **White v Ealing LBC** [1998] ELR 2303 at pp.223H-224A.36 In this case, the Council made no such determination. Accordingly, s.42(5) did not apply in this case, nor did the Tribunal make any finding that it did. It was also, in any event, far from clear if the consequence of s.42(5) applying would be that the s.42(2) duty was paused or frozen – as opposed to be discharged altogether (which, the Council suggested, was the more likely conclusion).

(8) it was not clear what the purpose of maintaining the EHCP (even in a paused or frozen state) would be in T's circumstances. His absence from Hampshire was for a period of two years. His SEN would obviously need to be re-assessed upon his return after this period, with the EHCP under appeal being significantly out of date by that point and a new school would need to be found for him (as indeed transpired). There was no dispute that, upon returning to Hampshire, s.24 of the 2014 Act applied again to T's circumstances. On the facts of the case, the Council was also committed to providing additional support to T when he returned, to mitigate or remove any disadvantage caused by his absence.

(9) the parents cited the Armed Forces Act 2006. That was not referred to by the Tribunal in its decision, nor was it raised at the hearing before it; it was therefore irrelevant to the appeal. In any event, The Council submitted that s.343AA(1) of the Act did anything more than create a “have regard duty”, in relation to which the Tribunal had no jurisdiction.

### **Disposal**

59. The Council’s primary submission was that the Tribunal’s decision contained clear error of law. If the Upper Tribunal agreed, it was invited to set aside and remake the decision in accordance with s.12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). Should the appeal succeed, the Upper Tribunal should remake the decision because there was only one possible answer – T was out of the country at the time of the cease to maintain decision and the appeal hearing; therefore the appeal should have been dismissed.

60. For the avoidance of doubt, the Council did not accept that the appeal was academic because:

(1) at the time of the hearing, and when permission to appeal was granted, T was still in Dubai.

(2) whilst he was now back in Hampshire, the nature of his father’s work was such that he (and his family) might be deployed abroad again, with the same issues arising.

(3) his father’s situation was not unique – there would be other families, in and outside of Hampshire, who had service personnel in them who, similarly, could be deployed abroad.

(4) there might be other situations, outside of a service personnel context, where for work reasons families moved abroad, to which the present case could also be relevant.

61. Therefore, this was not a situation in which the Upper Tribunal should exercise discretion not to set aside the decision upon finding that an error of law existed, as per s.12(2)(a) of the 2007 Act.

62. As the Upper Tribunal was aware, T's circumstances as of the hearing date were that he was back in Hampshire and was registered at a local school. In the event that the Upper Tribunal declined to set aside the decision and re-make it, contrary to the Council's submissions, it was still invited to find that the Tribunal's decision contained error of law in accordance with s.12(1).

63. It will be apparent from what I have said in paragraphs 24 to 31 above that I was satisfied that it was proper to hear and determine the appeal, even though in my judgment the appeal as between the parties had subsequently become academic by virtue of T's return to the UK and the creation of his new EHCP.

## **The Parents' Submissions**

### **The First Ground of Appeal**

#### **(i) S.45 of the 2014 Act ("the statutory procedure issue")**

64. With regard to the first ground of appeal, Mr Gillie submitted that the primary conclusion of the Tribunal was that that the Council had not followed the mandatory procedure required to exercise its discretion to cease maintaining T's EHCP. Therefore, the Council's decision was invalid and it could not cease to maintain the EHCP. That conclusion was dispositive of the s.51 appeal before the Tribunal. The Council had to demonstrate that that particular conclusion was wrong in law; if it did not, then none of its other grounds of appeal was relevant. The Tribunal's reasoning on the issue was set out in its judgment at paragraph 24 and the first line of paragraph 25.

65. The parents submitted that the Tribunal's reasoning was entirely right. The proper construction of the legislation led inexorably to a conclusion that a decision pursuant to s.45(1) of the 2014 Act would be invalid unless the mandatory provisions of that section, and the mandatory regulations made under it, were followed.

#### *The legislative provisions governing an authority's decision to cease maintaining an EHCP*

66. S.45(1) of the 2014 Act provided the only relevant circumstances under which the Council might cease to maintain an EHC plan. S.45(2) had the effect of suspending a decision to cease to maintain an EHCP while an appeal to the Tribunal against that decision was pursued (***B & M v Cheshire East Council*** [2018] UKUT 232 (AAC) at [58]). S.45(5) was an enabling

power for regulations to be made about the procedure which a local authority must follow when determining whether to cease to maintain an EHCP.

67. The regulations made pursuant to s.45(5) were the 2014 Regulations which “supplement the procedural framework established by Part 3 of the CFA 2014” (***R (on the application of Milburn) v Local Government and Social Care Ombudsman*** [2023] EWCA Civ 207 at [39]). Regulation 31 established a mandatory procedure which local authorities must follow when determining whether to cease to maintain an EHCP. It mandated that a local authority must undertake a consultation and, thereafter, provide mandatory information to the parents or child, including information about the right to appeal.

*The decision below*

68. The Tribunal correctly identified the relevant statutory provisions (i.e. s.45 and regulation 31 at paragraphs 32–33 of its judgment. It found that “*having failed to comply with the mandatory requirements of reg. 31, the LA cannot cease to maintain T’s EHCP, even at the conclusion of this appeal*”. The parents submitted that that analysis was correct for the following reasons.

69. First, there was no reason to depart from the plain, mandatory language of the legislation. S.45(5) rendered the discretion in s.45(1) of the 2014 Act subject to the 2014 Regulations. The use of the words “to be followed by a local authority” in s.45(5)(c) denoted a mandatory step; if it were otherwise, permissive language would have been used.

70. That submission was supported by the Explanatory Memorandum to the 2014 Regulations at paragraph 2.1, which stated that the purpose of the Regulations was to set out “*the detailed requirements on local authorities for assessing children and young people’s education, health and care needs and where necessary drawing up Education, Health and Care plans*”. The provisions of regulation were written in mandatory terms (“must”). All the relevant legislative provisions therefore pointed in the same direction: the local authority might take the decision to cease to maintain an EHCP, but only a decision taken on mandated grounds according to a mandated process would be valid.

71. Second, the steps set out by regulation 31 (consultation, notification and the provision of information about how to appeal) were all integral to the effectiveness of the decision itself. That strongly suggested that the local authority's compliance with regulation 31 was a condition precedent for a valid exercise of its decision pursuant to s.45(1):

(1) "the process of consulting the child and obtaining their views is integral to the decision-making processes of the local authority" under s.45(1), see **R(Milburn)** at [45].

(2) upon the presentation of an in-time appeal, the ceasing decision was suspended and had no legal effect until the appeal was determined. The requirements of notification and information imposed by regulation 31 ensured that all parents knew of their right to appeal and could trigger the suspension of the local authority's decision. In that respect the procedure mandated by regulation 31 went to the very heart of the effectiveness of a decision under s.45(1) and was integral to it.

72. In the instant case, the Council took the decision to cease maintaining the EHCP without any consultation and notified the parents without alerting them to their right to appeal to the Tribunal (see the letters of 19 November 2021 and 19 January 2022).

73. Third, the protective nature of the legislative regime also supported the parents' submission. The purpose of the legislation was the welfare of children and the purpose of s.45 was to protect children with SEN from having their special educational provision withdrawn without proper consideration by the local authority. That tended towards a protective construction of s.45(1) and (5): proper consideration by the local authority was secured by the fact that, without it, its decision would be invalid.

74. For those reasons alone, the parents submitted that the Tribunal should dismiss the appeal: it was incapable of disturbing the primary conclusion of the Tribunal.

75. Without prejudice to that position, they set out their submissions on the rest of the grounds of appeal below. In summary, the judgment below disclosed no error of law and the Council's challenge was, in reality, nothing more than a disagreement with the Tribunal's secondary conclusions.

**(ii) S.24 of the 2014 Act (“the local authority area issue”)**

76. The central issue in the remainder of the grounds of appeal was whether the children of servicemen remained “in the local authority’s area” for the purposes of s.24 while they were temporarily absent accompanying their parents on deployment abroad.

77. The Council sought to vitiate the conclusion of the Tribunal that it was not entitled to cease maintain T’s EHCP. The Council’s in essence was that T was not “in the local authority’s area” as required by s.24 because he was abroad in Dubai. T’s parents submitted that the challenge on that ground was wrong, principally for two reasons:

(1) first, a child might be deemed to be in a local authority’s area, notwithstanding a temporary absence, because the local authority was the place of his ordinary residence.

(2) second, military personnel were deployed abroad temporarily to fulfil their duties to the country. The deployment was compulsory and their children might accompany them. In respect only to this narrow category of children, the time-limited, temporary absence abroad for reasons of deployment ordered by the State should be construed as a temporary absence which did not displace the fact of a child’s ordinary residence in a local authority area.

*Purported jurisdictional issue*

78. It was important at the outset to recognise the parameters of the Council’s appeal. At no point has the ground of appeal been founded (nor given permission to proceed) on the Tribunal exceeding its jurisdiction by determining whether T was in the local authority’s area or not. It was now suggested by the Council that (1) whether a child permanently lived in an area was ultimately a question of fact for the local authority, subject only to challenge by judicial review and thus not within the jurisdiction of the Tribunal, on the authority of **R(G)** and (2) the Tribunal made no finding of fact that T was living within the Council’s area for legal purposes whilst he was in Dubai, but in any case, even if it had, that would not have been within its gift for the reasons stated in **R(G)**. The Council’s decision that he was not in its area was a matter which could only be challenged through judicial review. It was therefore wrong for the Tribunal to proceed on any basis other than that, being resident in Dubai, T was not living within the local authority’s area.



79. The parents submitted that those jurisdictional contentions were misconceived for the following reasons:

(1) **R(G)** was not authority for the proposition that the question whether a child lived in a local authority's area could only be challenged by judicial review. That case simply stated that the question was only reviewable in accordance with public law principles (at [144]), which was unsurprising given that the case was *a judicial review claim*.

(2) the Tribunal plainly was empowered to determine whether a child was or was not in the local authority's area as part of its jurisdiction under the 2014 Act. That was a necessary and natural corollary of its power to determine appeals against a ceasing decision, as well as "a decision of a local authority not to secure an EHC needs assessment for the child or young person" pursuant to s.51(2)(a) and (f). Those appeals would often (though not always) lie against a decision that the local authority was not responsible for the child because he did not meet the threshold criteria in s.24. S.45(1) provided expressly that an appeal could be brought in the Tribunal against a decision that the local authority was not responsible for a child.

(3) it was the Council which was suggesting, as a matter of law, that the duty it owed towards T ended when he moved out of its area and relocated to Dubai. His parents were simply responding to that contention and submitted that the Council had identified no error of law.

#### *Ordinary residence test*

80. The starting point was s.24(1) of the 2014 Act. That provision mandated that a local authority was responsible for a child if he were in the authority's area and had been identified by the authority as someone who had, or might have, special educational needs.

81. The phrase "a person in the authority's area" included a person who was ordinarily resident in that area, but temporarily absent. That construction was well within the statutory purpose of the 2014 Act and concordant with the relevant legislative framework for several reasons.

82. The purpose of the legislation was the welfare of children: (***R(D and others) v Hackney LBC*** [2019] PTSR 1947 at [54]). That purpose tended towards a protective approach to s.24.

83. The statute itself envisaged a permissible degree of absence from the local authority area. That must mean that mere presence was not the correct test to apply. S.83(6) (“interpretation”) provided that:

“a reference in this Part to a child or young person who is “in the area” of a local authority in England does not include a child or young person who is wholly or mainly resident in the area of a local authority in Wales”.

84. The inclusion of the word “mainly” in that section demonstrated that a person might be partly resident in Wales and nevertheless be “in the area” of a local English authority. That was consistent with the test under s.24 as being one of ordinary residence and not presence.

85. The Code of Practice provided, in respect of looked-after children, that that “*the authority that carries out the assessment is determined by Section 24 of the Children and Families Act 2014. This means that the assessment must be carried out by the authority where the child lives (i.e. is ordinarily resident)*” (at 10.8 page 210). That guidance in the Code of Practice was concordant with the test under s.24 being one of ordinary residence.

86. A related concept was whether a child had “moved” from a local authority’s area (s.23). A temporary or transitory move did not relieve a local authority from its responsibility to the child, see ***R(G)*** at [133]: “*I agree that it is necessary to distinguish a situation where there has been a permanent move from one which is temporary or transitory*”. That also supported the submission that ordinary residence was the test for whether a child was in a local authority’s area pursuant to s.24.

87. Regulation 5(3) of the 1996 Regulations governed the allocation of financial responsibility for meeting a child’s SEN needs. Regulation 5(3) provided that

“Where the person responsible for such a pupil is ordinarily resident in the area of an education authority the pupil shall be treated as belonging to that area.”

As to that:

(1) the regulation determined residence expressly according to a test of ordinary residence. That was consistent with the other legal provisions set out above. It was further evidence that s.24 imposed a test of ordinary residence rather than simple presence.

(2) the residence of a child would almost always be aligned with the residence of his primary carer (save for some very narrow exceptional circumstances). It would be illogical for the question of residence of a parent under the 1996 Regulations to be determined according to ordinary residence, but the question of his child's residence under s.24 to be determined according to a test of mere presence.

(3) it was right that regulation 5 of the 1996 Regulations expressly did not apply for the purpose of determining which authority's area a child was in under s.24, but that took the Council's arguments no further. It was plain that the statutory material and the Code of Practice all pointed towards a test of ordinary residence. In other words, the 1996 Regulations were part of a legal framework which relied on a test of ordinary residence for the purposes of determining who could properly be said to be in a local authority's area.

*Temporary absence*

88. A temporary absence from the local authority's area did not defeat the ordinary residence test required by s.24. A temporary absence included an absence by reason of deployment in the armed forces.

89. First, there was an important distinction to be made between a permanent and a temporary move away from a local authority area. A permanent move might relieve a local authority from responsibility for a child, but a temporary move will not (**R(G)** at [133]).

90. Second, the features which had been identified in other contexts for deciding a child's ordinary residence were helpful (**R(G)** at [133]). The judgment of the Supreme Court in **A v A** at [54] also provided a helpful pointer.

91. In the instant case, T was integrated into a social and family environment in Hampshire. He was not integrated into a family and social environment in Dubai. The only reason he was present in Dubai at all was because he was the dependent of his father, who was serving in the Royal Navy and who was deployed to Dubai by the Royal Navy on a temporary basis. T should, therefore, be seen as habitually resident at all material times in Hampshire for the purposes of s.24. The witness statement of his father supported that submission:

(1) the only place where T and his family had lived was Hampshire: *“We went to Dubai with a very clear understanding that Hampshire remained home and we would be returning to Hampshire after the end of the deployment, because it is the only place my family has lived in and is where we intend to continue to live upon return”* (paragraph 18)

(2) the Navy acknowledged that T’s home and family remained in Hampshire: *“The Navy also shared the same understanding that my family and I would return to Hampshire. The Navy offers all personnel on deployment a “get you home” allowance. My family and I were offered one free round-trip flight each from Dubai to London every year so we could visit our family in Hampshire”* (paragraph 19)

(3) T’s family and social network was in Hampshire: *“Hypothetically, in the case of any emergency requiring deployed personnel to vacate the country they are deployed to, the Navy would be responsible for providing us with suitable temporary accommodation while we find more permanent housing for relocation. The Navy would have to move us back to our place of work or where our family networks are. For us, that is and has always been Portsmouth, it is very clear that the Navy agrees”* (paragraph 20)

(4) the Navy recognised that T’s home area was Hampshire and had arranged for replacement accommodation there for him on return from Dubai: *“Ultimately we did return early and our house will not be available until at least next summer. The Navy therefore arranged military service accommodation in our home area in Hampshire, which is a rental property arranged by the Navy”* (paragraph 22).

92. In circumstances where a child’s family network was in a local authority area, the child was only temporarily absent due to his parent’s military deployment in the Navy and the Navy

itself recognised that the child's home area was in the local authority's area, it would be undesirable as a matter of public policy to construe the child as anything other than ordinarily resident in that area.

### **The Second Ground of Appeal**

93. Mr Gillie argued that ground 2 disclosed no error of law. The Tribunal was entitled to assess whether the Council applied the law incorrectly and it was entitled to review and replace the Council's decision.

94. The Tribunal was entitled to assess whether the local authority came to the correct conclusions of matters of fact and law, see ***DH and GH v Staffordshire CC*** [2018] UKUT 49 (AAC) at [19]. The Tribunal's judgment fell well within the permissible approach in ***DH***:

(1) the judgment below had to be considered holistically: it was clear that the Tribunal considered all the documentation before it and turned its mind to questions of law and fact. It formed its own view about the appropriateness of the decision in light of the facts and the law. It did not exceed its statutory function. That was simply another instance of the Council disagreeing with the Tribunal's conclusions on the basis of narrow textual analysis, which was to be deprecated (***Volpi v Volpi*** [2022] EWCA Civ 464 at [2]).

(2) the Tribunal was entitled to determine whether the Council came to the correct conclusion on matters of law. That was what the Tribunal was doing. The Council's contentions were simply wrong. In focusing on the Council's procedural failings the Tribunal was considering a matter of law and a matter of fact; it was entirely open to it to do so on a general appeal.

(3) the Tribunal did not, in any event, make a finding of unfairness. However, what it was doing was assessing the facts to determine whether the local authority came to the correct conclusion. That was a permissible approach. It did not amount to a review akin to judicial review.

(4) the Tribunal did not find that the Council was prevented from maintaining the plan abroad; it found that the "LA cannot comply with its duty to secure the provision in Section F of T's

EHCP whilst he attends school in Dubai”. That was a permissible consideration of the facts and judgment relevant to the Council’s decision. It was not akin to a judicial review.

95. The Tribunal’s decision was not vitiated by a lack of clear reasoning. It was perhaps true that the judgment below might have been worded better, but that was not a ground to depart from it in the instant case, because the central conclusions of the Tribunal and the reasons for them were clear:

(1) the primary conclusion was that the provisions of regulation 31 were stated to be mandatory so that the Council’s (conceded) failure to comply with it invalidated its ceasing decision; or

(2) as a secondary conclusion, the Council should make adjusted provision for T as the child of a serviceman because he faced a disadvantage not faced by others in different circumstances and the Council could maintain the EHCP without breaching its duty to secure the educational provision in Dubai.

96. In the alternative, the Upper Tribunal should determine for itself that the Council was not entitled to cease to maintain the EHCP and the appeal should be dismissed.

### **The Third Ground of Appeal**

97. Mr Gillie submitted that ground 3 was parasitic on grounds 1 and 4 and repeated the submissions made in respect of those grounds.

98. Ground 3 was an impermissible attempt to disagree with the findings and reasons of the Tribunal. The specific factors raised by the Council had been traversed earlier in his skeleton argument, but by way of a brief summary:

(1) the “procedural failings” were not irrelevant; they were a failure to comply with a mandatory and integral part of the legislation.

(2) the Council’s contentions about “comparisons” were misplaced. The Tribunal was entitled to find that T would be prejudiced compared to the children of civilian families. That

comparative disadvantage was precisely why the Armed Forces Covenant existed at all. The Tribunal did not make findings of “unfairness”. The Council’s contentions simply amounted to a different analysis of the facts before the Tribunal. That was insufficient to found an error of law.

(3) the Tribunal did not assume that transferring an EHCP guaranteed continuity of provision, but in any event, that again was an impermissible attack based on an overly narrow textual analysis of the judgment.

(4) the Tribunal’s conclusions about prejudice were entirely open to it. The Council simply disagreed with them. That was insufficient to vitiate the Tribunal’s findings, but in any event, it was quite right to conclude that prejudice was a relevant matter in this case.

99. The Council had not even begun to get over the high hurdle of perversity. The parents relied on the reasoning of the Tribunal, the reasons and factual findings of which were neither irrational nor perverse; the Council’s challenge under that ground was misconceived for the reasons set out by the Court of Appeal in *Volpi v Volpi* at [2].

#### **The Fourth Ground of Appeal**

100. As to the last ground of appeal, Mr Gillie submitted that, although the Council challenged the Tribunal’s findings at paragraph 26 of the judgment, the conclusions there set out were entirely open to it as a matter of fact and law for the following reasons.

##### *Finding of prejudice was permissible*

101. It was open to the Tribunal to find that not maintaining the plan while T was abroad, by reason of the military deployment, put him at a disadvantage compared to children who simply moved between local authorities in the UK. The particular disadvantage which the Tribunal identified was set out in the penultimate sentence of paragraph 34, namely the risk that: “*to require T to commence the process of applying for an EHCP afresh on the family’s return to the UK, may well result in T being without the provision he requires for a considerable portion of that academic year*”. The Council’s challenge to that finding was simply an instance of it disagreeing with the facts found by the Tribunal and disclosed no basis to vitiate the finding:

(1) the Council asserted that “*Contrary to the Tribunal’s analysis, it is not ‘unfair’ that individuals in the latter scenario lose their right to an EHC Plan – that is just a consequence of them moving out of the United Kingdom*”. That was simply irrelevant. The Tribunal did not find that it was “unfair” that individuals lose their right to an EHCP. It made a finding that there was a risk that T might be without the provision which he required for a significant period on his return. That, on any view, was a risk which amounted to prejudice.

(2) the Council asserted that the “*Tribunal appears to have assumed that transferring an EHC Plan under regulation 15 procedure guarantees continuity of provision in the terms of the inherited EHC Plan*”. It did no such thing. It simply identified the risk that there would be no continuity of provision in the instant case should the EHCP cease. That was plainly a risk which it was entitled to find. In any event, the fact that “*a receiving local authority could also cease to maintain the EHC Plan*” was neither here nor there because the undisputed circumstances before the Tribunal were that there was no receiving local authority. The Tribunal was dealing with a certainty that, if the local authority ceased the plan while T was in Dubai, there would be no prospect of a receiving local authority continuing it.

(3) the Council was simply attempting to disagree with the finding of prejudice made by the Tribunal because it had a different assessment of the evidence. The factor identified by the Council was the stuff of pure conjecture. Fundamentally, the finding about prejudice by the Tribunal was not one which no reasonable tribunal could have made (and the Council did not suggest that it was a perverse finding on the evidence).

#### *Pause of EHCP*

102. The Tribunal’s finding that the EHCP could be frozen or paused so as to sit consistently with para 10.55 of the Code of Practice was permissible and open to it for the following reasons.

103. First, it was correct to identify that the unique position of members of the armed forces and their children required local authorities to exercise their duties differently from the norm. That was necessary to mitigate the disadvantages which children faced by reason of their parents’ enormous sacrifices to the nation and the special circumstances which arose from



their commitment to military service. That principle was clearly reflected in the legal and policy framework in issue:

(1) the Code of Practice provided, inter alia, that local authorities should ensure that their provision did not disadvantage children because of their parents' lifestyle, including deployment and to consider how any service-related issue might affect the child's needs and how provision might be made to meet the service-related issue (paragraphs 10.54, 10.55 and 10.57)

(2) the Armed Forces Covenant contained in the 2006 Act required the local authority, when exercising that discretionary power, to have due regard to:

(i) the unique obligations of, and sacrifices made by, the armed forces

(ii) the principle that it was desirable to remove disadvantages arising for service people from membership, or former membership, of the armed forces

(iii) the principle that special provision for service people might be justified by the effects on such people of membership, or former membership, of the armed forces

(iv) the Council itself had signed up to the Armed Forces Covenant and had committed to an "approach based on the following principles: No disadvantage - this ensures members of the armed forces community experience no disadvantage as a result of their service in the armed forces".

104. Second, contrary to what the Council contended, the 2014 Act permitted it to maintain the EHCP without breaching its statutory duty:

(1) s.45(1) bestowed a discretion on a local authority to cease to maintain an EHCP: "a local authority may cease to maintain an EHC plan for a child". That was also, apparently, the view of the Secretary of State for Education which was referred to before the Tribunal.

(2) the local authority did not need to “secure the specified special educational provision” in the EHCP if “the child's parent has made suitable alternative arrangements”: s.42(5).

105. The Council had seized on the words “freezing” or “pausing” as having some special significance and being outwith the legislative framework, but that was the sort of over analysis of a Tribunal judgment’s linguistic exposition which should be deprecated. The Tribunal was plainly saying that, in the circumstances, the Council could maintain the plan, but not take steps to secure the provision specified within it. That conclusion was correct as a matter of law for the reasons stated above.

106. The Council contended that it was for the local authority to satisfy itself that suitable alternative provision had been made and the authority in the present case had not done so. The parents did not dispute that that was the case; nevertheless, it does not defeat their submission:

(1) the question before the Tribunal was whether the Council came to the correct conclusion that “*T is no longer in full-time education or training in England from September 2021. Accordingly, T’s Education, Health and Care (EHC) plan will cease from this date*”, which was the rationale provided by the Council. That question necessarily fell to be answered with reference to the Council’s actual conclusions.

(2) the Council *precluded itself* from answering the question of suitable alternative provision by (i) contravening regulation 31 of the 1996 Regulations by failing to consult with the parents and (ii) by erroneously stopping its analysis prematurely at the mere fact that T had been transferred to Dubai. It would not be just for the Council to benefit from its own failures.

(3) If it were accepted as a matter of law that there were circumstances in which an EHCP might be maintained, but temporarily not implemented, the Council’s argument to the contrary must fail and the Tribunal’s conclusion should be upheld. The question of whether there was suitable alternative provision was properly a secondary question which could either be determined by the local authority upon review or assessment of the EHCP or by the Tribunal pursuant to its power to amend the educational provision in the EHCP and make any other consequential amendments under regulation 43(2)(f) of the 2014 Regulations.

### **The 1996 Regulations/The Belonging Regulations**

107. In the course of writing the judgment, an issue arose on which I sought further submissions. The matter was not raised by either side in argument (in saying this I was not being critical of either side), but given that the case had taken on the nature of a test case with wider ramifications for local authorities and service personnel and their families, it seemed to me that it would be inappropriate to perfect and promulgate the decision without giving both sides the opportunity to make submissions on it. Accordingly on 18 January 2024 I directed sequential submissions from the parties on the matter (there were to be yet further sequential submissions, which were not originally anticipated, as I explain below.) In the light of those additional submissions it was not necessary to convene a further hearing, although the option of holding one was left open by my directions if requested by the parties.

108. The issue concerned the genesis and effect of regulation 2(4) of the 1996 Regulations (or the Belonging Regulations), as inserted in 2009 and amended in 2014. The particular matters on which I sought the further submissions were as follows:

(1) the decision of Rabinder Singh QC in ***R(L) v (1) Waltham Forest LBC and (2) Staffordshire CC*** [2007] EWHC 2060 (Admin)

(2) the consultation paper issued by the Department for Children, Families and Schools (“DCFS”) on 19 January 2009 on amendments to the Belonging Regulations

(3) the effect of the amendment effected by the insertion of regulation 2(4) in light of that background

(4) the statement in paragraph 2.4 of the consultation paper to the effect that “*The forthcoming Children, Skills and Learning Bill will address the meaning of ‘in their area’*”, which appeared not to have been followed through

(5) the position given that that legislative amendment was apparently not made good

(6) the DCFS 2009 “Guidance on Looked After Children with Special Educational Needs placed out-of-authority”.

109. So far as the legislative history of the relevant Belonging Regulations is concerned, the interpretation provision in the Regulations in their original form stated that

“(2) References in these Regulations to the place where a person is ordinarily resident are references to the address where that person is habitually and normally resident apart from temporary or occasional absences, except that no school pupil shall be treated as being ordinarily resident in the area of an education authority by reason only of his residing as a boarder at a school which is situated in the area of that authority.

(3) References in these Regulations to the person responsible for a school pupil are to—

(a) the parent with parental responsibility for him,

provided that if the parents of a school pupil with parental responsibility for him live in different education authority areas—

(i) the person responsible for the pupil shall be the parent with parental responsibility for him with whom the pupil is habitually and normally resident,

(ii) if the pupil is habitually and normally resident with more than one parent with parental responsibility for him, the person responsible for the pupil shall be the parent who is ordinarily resident nearest to the school attended by the pupil or to the place at which the pupil receives education otherwise than at school,

(iii) if the pupil is not habitually and normally resident with a parent with parental responsibility for him, the person responsible for the pupil shall be the parent who is ordinarily resident nearest to the school attended by the pupil or to the place at which the pupil receives education otherwise than at school; or

(b) where there is no parent with parental responsibility for him, to the person (not being a local authority) who has care of him when he is not attending school or living in boarding accommodation or in hospital”.

110. Regulation 2 was amended by regulation 2(3) of the Education (Areas to which Pupils and Students Belong) (Amendment) (England) Regulations 2009 which provided (with effect from 24 June 2009) that

“(3) In regulation 2, after paragraph (3) insert—

“(4) These Regulations do not apply for the purpose of determining which authority’s area a child is in for the purposes of section 321(3) of the Education Act 1996.””.

111. The new regulation 2(4) was itself amended by regulation 5(2) of the Special Educational Needs (Consequential Amendments to Subordinate Legislation) Order 2014 (with effect from 1 September 2014) to the effect that

“(2) In regulation 2(4) (interpretation) insert at the end “and section 24 of the Children and Families Act 2014””,

so that regulation 2(4) now reads

“(4) These Regulations do not apply for the purpose of determining which authority’s area a child is in for the purposes of section 321(3) of the Education Act 1996 and section 24 of the Children and Families Act 2014”.

112. My directions were not a general invitation to reargue what had already been argued and to the extent that paragraphs 3 to 13 of the Council’s supplementary submissions and paragraph 4 of the parent’s supplementary submissions seek to reargue the respective cases by way of summary I have not set them out here.

### **The Council’s Further Submissions**

#### ***R(L) v (1) Waltham Forest LBC and (2) Staffordshire CC***

113. **R(L)** concerned a looked after child based in one local authority area attending a residential placement in another.

114. By reference to paragraph 7 of the decision, it could be seen that s.321(3) of the Education Act 1996 (“the 1996 Act”) was not drafted in directly equivalent terms to s.24 of the 2014 Act, in that the 1996 definition partially referred to registration of the pupil at a school. S.24 removed the reference of the term ‘pupil’, replacing it with ‘child’ or ‘young person’ and did not incorporate any reference to ‘school’ – in a sense streamlining the statutory language.

115. Paragraph 11 of the decision referred to s.579(4) of the 1996 Act, which stated that

“For the purposes of this Act a person shall be treated as belonging, or as not belonging, to the area of a particular local authority in accordance with regulations; and any question under the regulations shall, in the case of a dispute, be determined by the Secretary of State.”

At paragraph 12, it is explained that the regulations made pursuant to s.579(4) were the Belonging Regulations.

116. Paragraph 12 of the decision cited regulations which came into force in 2001 under the 1996 Act which dealt with the transfer of responsibility for a statement of special educational needs between local authorities. In broad terms, that was a predecessor to what was now contained in regulation 15 of the 2014 Regulations.

117. At paragraph 15 of the decision, it could be seen that Waltham Forest argued that the Belonging Regulations were concerned solely with financial recoupment and not with any wider question of which local authority was responsible for a statement of special educational needs. However, at paragraph 17 the Court preferred the submissions of Staffordshire, giving a wider interpretation to their relevance. The effect of the decision was that Waltham Forest was responsible for the child, even though he resided at a placement in Staffordshire.

118. The Council submitted that the Court’s approach in **R(L)** to the Belonging Regulations was wrong, but, in any event **R(L)** had been overtaken by events and/or could be distinguished from the present case:

(1) in **R(L)** the Court at paragraph 17 expressly found that regulation 7 of the Belonging Regulations applied on the facts.<sup>1</sup> However, in the present case, the parents were not able properly to point to any substantive provision within the Belonging Regulations which was applicable to their circumstances.

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<sup>1</sup> Unlike the present case, **R(L)** was concerned with a looked after child (as defined by s.22(1) of the Children Act 1989).

(2) the decision was inconsistent with **R(G)**, a later authority. It was evident from the judgment in **R(G)** that the High Court heard full argument about ordinary/habitual residence principles and cited relevant case law. It did not appear that that happened in **R(L)**.

(3) the Belonging Regulations had been amended since the decision in **R(L)** by insertion of regulation 2(4). The case of **R(G)** considered the Belonging Regulations in their *amended* form, which was another reason to attach greater weight to it over **R(L)**. Over and above that, **R(L)** was not a reliable authority because the main reason for amending the Belonging Regulations was to reverse the **R(L)** decision. The analysis provided by the High Court in **R(L)** was therefore no longer reliable or sustainable because of regulation 2(4).<sup>2</sup>

119. Therefore the Council submitted that no weight should be attached the decision in **R(L)**.

### The 2009 consultation paper

120. The DCFS explained in the consultation document that it was not the intention for the Belonging Regulations to apply generally, but that they should apply only to recoument cases. On the first page of the consultation document, it stated that the proposals *inter alia* would

“... mean that the Regulations will no longer determine which local authority is responsible for identifying children's special educational needs (SEN), assessing them, drawing up SEN statements and maintaining those statements in respect of looked after children placed outside their home local authority areas.”

121. Paragraph 1.1 of the document stated that this was the “*most important*” aspect of the proposals. Paragraph 1.2 stated that the reason for the proposal to amend was the **R(L)** decision (see further paragraph 2.3):

“The decision to amend the Belonging Regulations follows the judgement in the case of a looked after child (LAC) with an SEN

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<sup>2</sup> See The Law of Education, Division D, at [7581]: “It should be noted that reg 2(4), as inserted by SI 2009/1301 for England and SI 2009/1338 for Wales, provides that these Regulations do not apply for the purpose of determining the education authority responsible for identifying, assessing, making and maintaining statements and performance of other functions under Pt 4 of the EA 1996 relating to children with special educational needs. This change effectively reverses *R (L) v Waltham Forest LBC and Staffordshire CC* [2007] EWHC 2060 (Admin), 29 June 2007– see, further, the ‘Regulations’ note to s 579, B [4149].”

statement placed by Waltham Forest in *Staffordshire (R (on the application of L) v the (1) London Borough of Waltham Forest and (2) Staffordshire County Council)*. The judgement said that the Belonging Regulations had wider application than just for assigning which authority had financial responsibility in inter-authority recoupment cases and, in particular, were applicable when deciding which authority is responsible for identifying a child's SEN, assessing the child, and drawing up and maintaining an SEN statement. The Department's view has been that the Belonging Regulations do not apply for this purpose and its guidance is that it should be the authority where the LAC is placed rather than home/placing authority that should carry out these SEN duties, recouping the costs from the home authority."

122. Paragraphs 2.1-2.4 supported the Council's submissions previously (consistent with the **R(G)** case) that the Belonging Regulations were concerned only with financial recoupment, not any wider issues. To 'belong' to a local authority did not bear the same meaning as being 'in the area' of a local authority.

123. Paragraph 3.2 stated that the purpose of amending regulation 2 was to "*re-establish*" the policy intention behind the Belonging Regulations that they

"do not apply for the purposes of determining which local authority is responsible for identifying children's SEN and, where necessary, assessing, drawing up and maintaining a statement for a child, and performing other functions under Part IV of the Education Act 1996".

As such, that was not a new policy focus arising after **R(L)**. It reflected the underlying intention behind the Belonging Regulations from the outset, with which the decision in **R(L)** was considered to be at odds.

124. The **R(L)** case (which concerned a looked after child) prompted the DFCS consultation. That eventually led to the insertion of regulation 2(4) into the Belonging Regulations. However, regulation 2(4) restricted the application of the *entire* Belonging Regulations in relation to s.24 – not just regulation 7 (which concerned looked after children). That was the obvious interpretation of regulation 2(4) arising from the wording used:

"(4) These Regulations do not apply for the purpose of determining which authority's area a child is in for the purposes of section 321(3) of the Education Act 1996 and section 24 of the Children and Families Act 2014."



125. The Upper Tribunal must apply the plain and literal meaning of those words, which in the Council's submission was clear – the Belonging Regulations were irrelevant to the approach under s.24 of the 2014 Act and any reliance on them as an interpretative aid would be a clear error. That still left open the question of how s.24 should be interpreted, but in the Council's submission it would be inappropriate for the Upper Tribunal to apply an ordinary/habitual residence principles to the s.24 "area issue" because:

(1) the wording of s.24 of the 2014 Act did not support that approach.

(2) the case law (**R(G)**) did not support that approach.

(3) the intention, but in any event certainly *the form*, of the amendment to the Belonging Regulations implemented through regulation 2(4) was completely at odds with that approach.

### **The effect of the amendment effected by the insertion of regulation 2(4) in the light of that background**

126. The amendment came into effect in 2009 following **R(L)**. The effect of regulation 2(4) was as set out above. The ordinary/habitual residence approach which applied to the Belonging Regulations was irrelevant to the question of what area the child was in for the purposes of s.24 of the 2014 Act. At best, an ordinary/habitual residence approach *might*, in a given case and depending on the circumstances, provide some 'indirect pointers' to how any question arising in relation to s.24 should be answered, but it could be taken no higher than that for the reasons stated in **R(G)** and ultimately that was an area of discretionary decision making for the local authority with which, subject to judicial review, there should be no interference.

### **The statement in paragraph 2.4 of the consultation paper**

127. The statement at paragraph 2.4 of the consultation document was made in the context of the consultation rationale more generally, i.e. to reverse the effect of **R(L)**. To the Council's knowledge, the definition of "*in the authority's area*" in s.24 of the 2014 Act was not subject to any further definition, save except for s.83(6):

“A reference in this Part to a child or young person who is “in the area” of a local authority in England does not include a child or young person who is wholly or mainly resident in the area of a local authority in Wales.”

That was likely to be aimed at the fact that the equivalent devolved SEND system in Wales was governed by a distinct legislative regime to which the 2014 Act did not apply and therefore that qualification was of no assistance to the issue in the present appeal.

128. Given that (i) the Belonging Regulations expressly applied a test of ordinary/habitual residence, (ii) the clear effect of regulation 2(4) was that the Belonging Regulations (and, thus, the ordinary residence test applied in them) was not relevant to the approach under s.24 of the 2014 Act and (iii) the ordinary/habitual residence approach was rejected by the High Court in **R(G)**, the only safe conclusion which the Upper Tribunal could reach was that an ordinary/habitual residence test was not applicable to any question arising under s.24 of the 2014 Act.

129. The fact that Parliament might not have followed through on a *possible* intention to define the term ‘in the Local Authority’s area’ more specifically was, ultimately, irrelevant to the present appeal, because the Upper Tribunal must apply the statutory language which Parliament chose to adopt in s.24 of the 2014 Act as it found it. But it was certainly reasonable to infer that, if Parliament had wanted to use the terminology of ordinary/habitual residence in s.24, it could have done so in clear and unambiguous terms. Therefore, the absence of such wording must be taken to be deliberate. It would not be appropriate for the Upper Tribunal to impose a test on s.24 which went against the grain of what could be reasonably ascertained of Parliamentary intention.

### **The position given that that legislative amendment was apparently not made good**

130. There was nothing further to add to that question beyond what had already been stated immediately above.

### **The DCFS 2009 Guidance**

131. The Guidance was cited in **R(G)** at paragraph 132-133. It was noted that ‘in their area’ was construed by the DCFS in the guidance as “*ordinarily resident in their area*” in accordance with established practice, despite that not being defined in the legislation (see

page 4). The High Court stated, in response to that, *“I agree that it is necessary to distinguish a situation where there has been a permanent move from one which is temporary or transitory”*. The Council did not disagree with that, but submitted that that was a matter for a local authority to decide on, subject only to judicial review.

132. It was clear from the High Court’s conclusions in **R(G)** that it did not treat the guidance as being determinative of whether an ordinary/habitual residence test was applicable to the question of which local authority area a child was in (quite the opposite, in fact, given the High Court’s overall conclusion in the case). In the Council’s submission, neither should the Upper Tribunal.

133. The guidance (which appeared to have been drafted shortly after the amendment to the Belonging Regulations was made in 2009 – see p.9) appeared to be non-statutory guidance. It did not hold binding status. It also only applied to looked after children, to which particular considerations applied; therefore it could not be given any wider application. T was not a looked after child.

134. The Council submitted that the guidance was of limited, if any, assistance and that no weight should be attached to it.

## **Conclusion**

135. In all the circumstances of this case, it was submitted that the parents’ move abroad had a sufficient degree of permanence, in the sense that it was not short-term or sufficiently temporary. The family was absent for a period of years not weeks or months (therefore it was not “short term”). They also took steps to rent their property to tenants, demonstrating that they had no intention to return for the duration of the lengthy period of deployment. Without any consultation with the Council, they made their own alternative arrangements for T’s education in Dubai, in relation to which the Council did not (and was not reasonably able to) make any determination of suitability.<sup>3</sup> The Council’s decision to cease to maintain because T was not in its area, in those circumstances was reasonable, lawful and rational. The

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<sup>3</sup> Therefore, s.42(5) of the 2014 Act had no relevance to the case, see SEND Code of Practice paragraphs 9.131-9.136.

Tribunal made no finding that T was in the Council's area whilst he was abroad in Dubai. It was not now open to the Upper Tribunal on an appeal against that decision to find otherwise.

136. The Council submitted that the new points raised by the Upper Tribunal did not change the general position taken by it in the appeal. The Council continued to invite the Upper Tribunal to uphold the appeal for the reasons given and those previously stated.

## **The Parents' Submissions**

### **Summary of additional submissions**

137. The Tribunal's directions went to the question of how s.24(1) of the 2014 Act should be interpreted, and, in particular, the meaning to be ascribed to the words "in the authority's area".

138. The parents submitted that:

(1) s.24(1) of the 2014 Act should be interpreted as denoting a test of ordinary residence

(2) the judgment in *R(L)* was no longer good law. The legal effect of regulation 2(4) of the Belonging Regulations was simply that they did not dictate the meaning of s.24 of the 2014 Act. Thus, mere disapplication of the Belonging Regulations to s.24 did not mean that s.24 could not be interpreted as denoting an ordinary residence test

(3) The Department's guidance was a persuasive external aide to the construction of s.24 of the 2014 Act. Both the 2009 Guidance and the SEND Code of Practice set out a test of ordinary residence. The statutory scheme should be interpreted in a coherent way. The Belonging Regulations were not drafted in conflicting terms to the 2014 Act. There was no reason why s.24 should not be read concordantly with the definitions in the Belonging Regulations and the guidance, all of which specified an ordinary residence test.

### **Submissions**

139. The parents accepted that regulation 2(4) of the Belonging Regulations meant that those Regulations did not apply for the purpose of determining the education authority responsible for identifying, making and maintaining statements pursuant to the 2014 Act. That was the

clear intention of regulation 2(4) as set out in the *Explanatory Memorandum* to the 2009 Regulations:

“Regulation 2(3) amends regulation 2 of the Principal Regulations to provide that those Regulations do not apply for the purpose of determining the education authority responsible for identifying, assessing, making and maintaining statements and performance of other functions under Part 4 of the Education Act 1996 relating to children with special educational needs”.

140. Regulation 2(4) therefore had the effect of nullifying the earlier legal conclusion of the High Court in **R(L)** that the Belonging Regulations

“are relevant for the purpose of section 579(4) which begins with the words "for the purposes of this Act". Those are general words and are not confined to the question of recoupment”.

141. The legal effect of regulation 2(4) was no wider than that nullification. It simply meant that the provision of an ordinary residence test in regulation 5 did not apply to s.24 of the 2014 Act. To put it another way, the Belonging Regulations did not dictate the meaning of s.24 of the 2014 Act.

142. The 2009 consultation paper appeared to be the consultation related to the 2009 Regulations. The consultation paper might be an admissible aid to the construction of the 2009 Regulations which introduced regulation 2(4) of the Belonging Regulations (see **R (Maughan) v Her Majesty's Senior Coroner for Oxfordshire** [2020] UKSC 46 at [27]). The mischief at which the 2009 Regulations was aimed was that:

“The policy intent of amending regulation 7 of the Belonging Regulations and regulation 2 is to re-establish the Department's position that the Regulations do not apply for the purposes of determining which local authority is responsible for identifying children's SEN and, where necessary, assessing, drawing up and maintaining a statement for a child, and performing other functions under Part IV of the Education Act 1996. The judgement in the *Waltham Forest/Staffordshire* case means that the placing/home authority would be responsible for performing these functions in every case of LAC with statements placed out of authority”.

143. Crucially, however, none of this meant that s.24 of the 2014 Act did not entail an ordinary residence test. Quite the opposite, in the parents' submission:

(1) had Parliament or the relevant Minister wished the interpretation of s.24 of the 2014 Act or its antecedent legislation to preclude an ordinary residence test, they would have set that out in terms in the Education (Areas to which Pupils and Students Belong) (Amendment) (England) Regulations 2009/1301, or in the 2014 Act itself, or the Special Educational Needs (Consequential Amendments to Subordinate Legislation) Order 2014/2103 (which amended regulation 2(4) of the Belonging Regulations to make reference to the s.24 after the passage of the 2014 Act).

(2) the consultation paper was not an admissible aid to the construction of s.24 and its antecedent legislative provisions in the Education Act 1996. That must be so on normal principles of statutory interpretation, but in addition the consultation paper itself stated that it was not relevant to the meaning of the phrase "in their area" in s.24's antecedent legislative provisions; the meaning of those words would instead be left to different legislation: "The forthcoming Children, Skills and Learning Bill will address the meaning of the term "in their area".

(3) guidance from a public authority about the interpretation to be given to a statutory term might be persuasive authority: ***Hyman and another v Revenue and Customs Commissioners*** [2022] EWCA Civ 185, [2022] STC 358 at [31]. The Guidance produced by the Department repeatedly provided for an ordinary residence test. Thus, the 2009 *Guidance on Looked After Children with Special Educational Needs placed out-of-authority* at p.4 set out that "The term 'in their area' is not defined in the legislation. In line with established practice, the Department construes this phrase to mean 'ordinarily resident in their area". That was repeated in *The SEND Code of Practice*: "the authority that carries out the assessment is determined by Section 24 of the Children and Families Act 2014. This means that the assessment must be carried out by the authority where the child lives (i.e. is ordinarily resident)".

(4) s.24 of the 2014 Act should be interpreted coherently with the rest of the statutory scheme. The Belonging Regulations were certainly not in conflict with s.24 of the 2014 Act. The

Belonging Regulations, the 2009 Guidance and the SEND Code of Practice all referred to a test of ordinary residence. It would be right to interpret s.24 of the 2014 Act concordantly with that so that the statutory scheme was coherent overall.

144. The parents submitted that the Council's additional contentions were misguided.

145. First, it is said by the Council that "The wording of s.24 of the CFA 2014 does not support" an ordinary residence test. No authority had been provided to support that submission, nor to explain why s.24 should be construed restrictively in light of its protective purpose.

146. Second, **R(G)** was not authority for the proposition that the question whether a child lived in a local authority's area could only be challenged by judicial review. The Council submitted that "*The High Court stated ... "I agree that it is necessary to distinguish a situation where there has been a permanent move from one which is temporary or transitory". The [Council] does not disagree with this but avers that this is a matter for a local authority to decide on subject only to judicial review*". Once the Council's jurisdictional point fell away, it was left with its submission that s.24(1) involved a distinction between permanence and transience. That was precisely what a test of ordinary residence engendered.

### **The Parents' Further Submissions**

147. On 29 February 2024 the parents made a further supplementary submission following new guidance from the Department of Education on that day entitled '*Guidance for local authorities on the treatment of education, health and care plans when a child or young person moves out of or into their area*' ("the 2024 Guidance").<sup>4</sup> They submitted that the new guidance supported their previous submissions and that counsel was bound to bring it to the attention of the Upper Tribunal. Although I had not made any directions for further supplementary submissions, in the light of the fact that this has taken on the nature of a test case, it seemed to me that it was appropriate to accept the further submissions by both parties.

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<sup>4</sup> <https://www.gov.uk/government/publications/ehc-plans-when-a-child-or-young-person-moves/guidance-for-local-authorities-on-the-treatment-of-education-health-and-care-plans-when-a-child-or-young-person-moves-out-of-or-into-their-area>

148. The parents relied on the following paragraph in the new Guidance

*“A local authority has discretion over whether to cease to maintain an EHC plan when they are no longer responsible for the child or young person – for example, when the child or young person moves out of the local authority’s area. There is no requirement on the local authority to cease an EHC plan in these circumstances. A local authority has the power to maintain the plan.*

*Where a child or young person has moved outside of England and the local authority is determining whether to cease to maintain an EHC plan, local authorities are best placed to decide what factors they need to consider. They must make decisions on a case-by-case basis. Factors that the local authority may wish to consider in making their decision in this scenario are likely to include (but may not be limited to):*

- *whether the move is expected to be permanent or temporary*
- *if the move is expected to be temporary:*
  - *the expected length of time that the child or young person will be outside of England*
  - *where they expect to live on return to England”*

149. They submitted that the 2024 Guidance was entirely concordant with their position:

(1) contrary to the Council’s contention, it was not bound to cease to maintain the plan once a child moved abroad. Instead, it had discretion to maintain it

(2) the relevant legislation should be construed as having a test of ordinary residence with a distinction between temporary and permanent absence

(3) they submitted that the 2024 Guidance supported their contention that the Council ought to have followed the statutory consultation procedures before reaching any decision (which it failed to do) and, further, that it therefore failed to consider material considerations before making its decision. The 2024 Guidance provided that:

*“Where a local authority is considering ceasing to maintain a child or young person’s EHC plan, they must:*



- *inform the child's parent or the young person that they are considering this*
- *consult the child's parent or the young person*
- *consult the headteacher or principal of the school or the equivalent person at any other educational institution that is named in the EHC plan*

*Following this, if the local authority decides to cease to maintain the EHC plan, they must notify:*

- *the child's parent or the young person*
- *the institution named in the EHC plan*
- *the responsible health commissioner*

*The local authority has various duties over notifying the child's parent or the young person of its decision to cease to maintain the EHC plan. These include notifying them of their right to appeal that decision and the time limits for doing so. The local authority must continue to maintain the EHC plan until after:*

- *the end of the period allowed for bringing an appeal against its decision to stop maintaining the plan (where there is no such appeal before the end of that period)*
- *the appeal has been finally determined (where the parent or young person has made an appeal before the end of that period)".*

150. For the reasons set out in their supplementary submissions, they submitted that the 2024 Guidance was a legitimate external aid to the construction of the 2014 Act and they invited the Upper Tribunal to interpret the 2014 Act concordantly with the 2024 Guidance.

### **The Council's Further Submissions**

151. For its part the Council submitted that the new Guidance was not a definitive statement of law. It appeared to be non-statutory guidance (although it purported to summarise what statutory guidance expected). It was not referred to in the proceedings below, the decision from which was the subject of this appeal before the Upper Tribunal. Nor could it have been, because it did not exist at that time. Whilst the parties had provided their views on it, it was at a very late stage in the appeal after detailed submissions had already been made at

a point when the new Guidance did not exist. Therefore the Upper Tribunal should treat it with caution.

152. However, to the extent that the new Guidance was taken into account by the Upper Tribunal, it supported the Council's position in the case in several material ways:

(1) there was no reference to the Belonging Regulations – supporting the Council's position that they were irrelevant

(2) there was no reference to an ordinary/habitual residence test – supporting the Council's position that that was not the correct approach to take in the situation arising in this case. If the Department wanted to affirm a position that an ordinary/habitual residence test applied, the new Guidance would have been an opportune time to state that unequivocally

(3) the Department supported the Council's contention that the decision to cease to maintain was discretionary and could arise in situations where a family moved abroad (page 4 of the Guidance). Consistent with submissions which the Council had previously made, the Department had confirmed that that was a matter of discretion which should be "*taken on a case-by-case basis*" and that "*local authorities are best placed to decide what factors they need to consider*" (ibid)

(4) the new Guidance did not say that s.42(2) could be 'paused' or 'frozen' or 'suspended'. In fact, it suggested, for example, that the duty to carry out annual reviews continued, supporting the Council's position that the s.42(2) duty would continue to apply if a local authority did not cease to maintain (page 5).

153. The new Guidance stated that a local authority might in its discretion exercise a *power* to maintain an EHCP when a child/young person moved abroad. That might be the case, but a local authority was not required to do so. The Council's position remained that, if a local authority decided to exercise that power, the s.42(2) duty, which was to secure the special educational provision set out in any EHCP which it maintained, which was recognised in case law as being *absolute*, would apply.

154. A local authority might therefore properly exercise its discretion to cease to maintain in order to avoid the effect of s.42(2). In this case, the Council properly did so, because T was due to be abroad for a significant period of time, which was not deemed to be sufficiently temporary, and because it would not properly have been possible or practicable to maintain the EHCP in such circumstances. To the extent that the Upper Tribunal found that the new Guidance suggested that that was not a lawful approach for a local authority to take, the Council took issue with it.

155. The parents said that the new Guidance was “*entirely concordant*” with their case. The Council disagreed - the material aspects of the new Guidance which both parties had cited could be shown to support the Council’s position. Furthermore the Council’s position was that the decision to cease to maintain was an entirely lawful exercise of discretion.

156. The new Guidance added nothing to the consultation issue arising in the present appeal. The issue in the appeal was whether the Tribunal was entitled to uphold the appeal before it because of procedural non-compliance arising before the appeal was issued (failure to consult). That had been addressed elsewhere, but in summary the Council contended that the answer to that was straightforwardly “No”. Any failure on which the parents wanted to rely in relation to a failure to consult should have been challenged in the proper forum – through an application for judicial review. The new Guidance did not assist with that point.

## **Analysis**

### **The First Ground of Appeal**

#### **Regulation 31**

157. I am satisfied that the Council committed egregious and manifest breaches of regulation 31 of the 2014 Regulations in that

(1) it did not consult with T’s parents as required by regulation 31(1)(b)

(2) it did not consult with the head teacher of the C Primary School which was named in T’s EHCP as required by regulation 31(1)(b)

(3) neither the letter of 19 November 2021 nor the brief letter to the same effect of 19 January 2022 notified T's parents or the head teacher of the school of

(a) their right to appeal that decision;

(b) the time limits for doing so;

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

(d) the availability of—

(i) disagreement resolution services; and

(ii) advice and information about matters relating to the special educational needs of children and young people; and

(e) the First-tier Tribunal's power to make recommendations under the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017,

all of which were required by regulation 31(3). Indeed the Council conceded at the original appeal that it had failed to comply with the requirements of regulation 31. For the full recitation of the background facts I refer back to paragraphs [5] to [12] of the Tribunal's statement of reasons and paragraphs 18 to 23 of this decision set out above.

158. Although, once the Council had determined to cease to maintain T's EHCP, it was obliged to notify his parents, the school named in the EHCP and the responsible commissioning body of that decision, that notification under regulation 31(2) could only be made following the consultation required by regulation 31(1), which had never happened.

159. It is difficult to conceive of a more obvious and blatant case of a failure to comply with the requirements of regulation 31.

160. The language of regulation 31 is clearly mandatory (emphasis added):

"31(1) Where a local authority is considering ceasing to maintain a child or young person's EHC plan it *must*—

(a) inform ... and

(b) consult;

(c) consult ....

(2) Where, following that consultation the local authority determines to cease to maintain the child or young person's EHC plan, it *must* notify ...

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

the matters set out in (a)–(e).

161. In that respect I therefore accept Mr Gillie's submissions as set out in paragraphs 66 to 74 above as to the mandatory nature of the obligations imposed by regulation 31 and the consequences of a failure to comply with those obligations.

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

163. I am therefore satisfied that the Tribunal was correct to hold as it did in paragraph [24] of its decision that

“As a Tribunal, we note that the wording of s45 of CFA 2014 is that the LA may cease to maintain the EHCP of a child or young person for whom they are no longer responsible. We note also that if they decide to exercise that power to cease to maintain the EHCP, they must follow the procedure set out in reg. 31 of the SEND Regs 2014. The LA conceded in the hearing on 20 March 2023 that they have not correctly followed that procedure. We find, that having made that concession, the LA should also have conceded the appeal, because it is mandatory that they comply with reg.31 and they have not. Having failed to comply with the mandatory requirements of reg. 31, the LA cannot cease to maintain T's EHCP, even at the conclusion of this appeal.”

## **Jurisdiction**

164. Mr Line nevertheless submitted that the Tribunal had no jurisdiction to determine whether or not there had been a breach of regulation 31. To establish that, an affected person in his submission would need to commence judicial review proceedings and obtain a declaration or a quashing order from the High Court. In circumstances where that had not been done (as here), the decision to cease to maintain the EHCP stood as lawful because it had not been overturned by the High Court and instead T's parents had submitted an appeal under s.51 of the 2014 Act. In that context he relied on the decision in **R(G)**.

## **R(G)**

165. This decision formed one of the mainstays of Mr Line's submissions, although as I pointed out to him in argument, and as he accepted, I am not bound by High Court decisions.

166. The background to **R(G)** was that the child, who lived with his parents in Kent, had special educational needs and had become significantly violent towards his parents, siblings, teachers and other pupils, resulting in cautions for battery and common assault. The father decided to take his son with him to stay with his parents who lived near Sunderland. He described this as an "extended holiday" until Kent CC either arranged for a residential school placement for the child or provided some alternative accommodation in Kent for him and his son. On 2 October 2015 Kent CC took the view that the child had now moved to Sunderland, closed its social services file on him and on 19 October 2015 passed the educational file (including his statement of special educational needs) to Sunderland. Sunderland initially agreed to take over responsibility for his education, but subsequently took the view that the child and his father were in their area only temporarily and, in consequence, responsibility in Sunderland's opinion remained with Kent CC.

167. On the child's behalf, the Official Solicitor endorsed the parents' claim (which I do not need to consider further), but also raised what was in reality a second claim for judicial review. In that second claim it was alleged that Kent CC had been in breach of various obligations to the child and his parents in its capacity as the local education authority. These included obligations which it owed to him as a child of compulsory school age and as the beneficiary of a statement of special educational needs. In particular, the Official Solicitor alleged that Kent CC acted unlawfully on 19 October 2015 in treating Sunderland as responsible thereafter for seeing that he received the education which the statement required.

168. The Court held that the decision of Kent CC that the child had moved to Sunderland should be quashed.

169. It is important to note that **R(G)** was in effect two applications for judicial review in the High Court, of which the second is the relevant one for present purposes. Judicial review is not, of course, usually concerned with the resolution of conflicts of fact. Moreover, the case was not an appeal to the First-tier Tribunal under s.51(1), (2) of the 2014 Act or its predecessor. Nothing was said or appears to have been argued about the interrelationship between the judicial review jurisdiction of the High Court and the First-tier Tribunal jurisdiction under the 2014 Act or its predecessor.

170. Nor was the judge's attention drawn to the predecessor provision to s.51(2)(f), in the form of Schedule 27 paragraph 11 of the Education Act 1996 which provided that

“11(1) A local authority may cease to maintain a statement only if it is no longer necessary to maintain it.

(2) Where the local authority determine to cease to maintain a statement—

(a) they shall give notice in writing of that fact to the parent of the child, and

(b) the parent of the child may appeal to the Tribunal against the determination”

(although that is perhaps not surprising since he was concerned with a judicial review in the High Court, not a statutory appeal under the 1996 Act; cf. the reference to paragraph 7(2) in paragraph [117] of the decision).

171. It is in that context that one must understand what Nicol J said in paragraph [143] to the effect that

“ ... this is a statutory scheme which entrusts to local authorities the power to make judgments and assessments on a great many issues. There is no indication that in respect of this one, Parliament or the drafter of the regulation expected the Court to conduct the unusual exercise of an investigation of the facts.”

172. It was also in that context that counsel for the applicant was constrained to submit that at paragraph [138] that

“While judicial review is not usually concerned with resolving disputes of fact, Ms Hannett argued, it would be wrong to allow this to dictate the issue for the court to decide”,

but the judge was not faced with a dispute under s.51(1), (2) of the 2014 Act – and in particular an appeal brought against a decision under s.51(2)(f) of the Act in relation to a decision to cease to maintain an EHCP. Nor was he considering the width of the jurisdiction thereby conferred on the First-tier Tribunal as explained, for example, in ***DH and GH v Staffordshire CC***, namely whether the local authority came to the correct conclusions on matters of fact, law and judgment, as to which the Tribunal is free to form its own view on any matters covered by the decision.

173. By contrast, what was argued in ***R(G)*** was that

“135. Ms Hannett submits that it is for the Court to decide whether TG had moved to Sunderland by 19<sup>th</sup> October 2015. She argues that it is only if this precedent fact exists that KCC will have ceased to be responsible for providing TG's special educational needs. It is, she argues equivalent to the issue of whether a person is a 'child' for the purposes of Children Act 1989 s.20 and which the Supreme Court said was likewise an issue of precedent fact – see *R (A) v Croydon LBC* [2009] 1 WLR 2557. Whether a child had 'moved' was not a question of judgment or discretion, still less one which called for professional assessment. It was a straightforward question of fact which the Court was as well equipped to answer as the Defendant.

...

138. While judicial review is not usually concerned with resolving disputes of fact, Ms Hannett argued, it would be wrong to allow this to dictate the issue for the court to decide. Besides, the better the quality of the initial decision-making the less likely there will be a dispute for the court to resolve, or come to any different conclusion if there is litigation – see *R (A) v Croydon LBC* at [33].

139. Mr Harrop-Griffiths argued that the Court should adopt the conventional public law methods of review and not treat the issue of whether TG had moved as a question of precedent fact. He noted that



in *Shah* Lord Scarman had taken this course with the very question of whether a student was 'ordinarily resident' - see p.341, although in the *Croydon* case Lady Hale said at [24] that it was not necessary for the Supreme Court to decide whether the same decision would be made today.”

174. It was against that background that Nicol J decided that

“141. In my judgment, Mr Harrop-Griffiths's position is to be preferred on this issue.

142. It is clear that ultimately the nature of the Defendant's duty (and the consequential character of the Court's function when the Defendant is alleged to have breached that duty) is a matter of statutory construction and deciding Parliamentary intention, so far as the statute is concerned, and, so far as the regulation is concerned, the intention of the drafter of the regulation – see the *Croydon* case at [26] and [31].

143. While it is true that neither the statute nor the regulation (in this context) uses an expression such as 'if the authority considers...', this is a statutory scheme which entrusts to local authorities the power to make judgments and assessments on a great many issues. There is no indication that in respect of this one, Parliament or the drafter of the regulation expected the Court to conduct the unusual exercise of an investigation of the facts. Many other decisions relating to special educational needs can be the subject of a merits appeal to the First-tier Tribunal, but a decision that a child with a statement has moved to another authority is not one of them.

144. I have said that the interpretation of 'ordinary residence' in other contexts may provide helpful indirect pointers in the present one. For what it is worth, therefore, Mr Harrop-Griffiths can take some support from the views of Lord Scarman in the *Shah* case that a decision as to ordinary residence in the context of student grants was reviewable only in accordance with conventional public law principles.”

175. It follows from this that I do not agree with Nicol J at paragraph [143] that the question of whether a child who has been ordinarily resident with a local authority remains so ordinarily resident (notwithstanding a temporary absence abroad) *cannot* be the subject of a merits appeal to the First-tier Tribunal under s.51(2)(f) of the 2014 Act in the event of the local authority purporting to cease to maintain his EHCP under s.45 of the Act. If Mr Line were correct, it would involve a parent who was faced with a decision to cease to maintain an EHCP under s.45 *not* invoking the obvious statutory appeal under s.51(2)(f), but instead having to resort to a judicial review, notwithstanding the clear words of s.51(2)(f).

176. The actual decision in **R(G)** may nevertheless be justifiable in that the Court went on to find that, although the decision that the applicant had moved to Sunderland was challengeable only on traditional public law principles, it was nevertheless unlawful and the local authority's decision did not survive scrutiny [at 146].

177. It is also worthy of note that the departure of the applicant for Sunderland could not be isolated from earlier breaches of duty on the part of the authority. As Nicol J went on to explain

“159. In my judgment, Ms Hannett's submissions are to be preferred on this issue. KCC's decision that TG had 'moved' to Sunderland for the purposes of Regulation 23 was unlawful.

160. The decision itself simply states the conclusion that TG had moved to Sunderland. I agree that Ms Flanagan's reliance on the 'Belonging' Regulations was misplaced. So far as KCC took them into account, it misdirected itself.

161. From the contemporary documentation, it is clear that MG saw his departure from Kent as temporary. Since it involved separation from his wife and other children, it is understandable that he would have wished it to be as short as possible. It was plainly prompted by a fear that, unless TG was removed from the family home, WG or TwinG would suffer further violence. MG took with him TG's medicine to last for 3 months and said that he expected to be away for at least that period. However, in context that could only have meant that MG predicted it would take at least that period to resolve either alternative housing in Kent for himself and TG or a residential placement for TG. Any other conclusion would have been irrational.

162. The departure of MG and TG for Sunderland cannot be isolated from the earlier breaches of duty by KCC. I have in mind in particular the following:

i) KCC did not inform the Claimants in writing and within 7 days of its decision on 5<sup>th</sup> May 2015 to refuse to amend TG's statement of special educational needs in line with the parents' request. This was contrary to s.328A(6). Furthermore, in breach of s.328A(5), the parents were not told of their right to appeal against that decision to the First-tier Tribunal. There was not, therefore, the opportunity, for the Tribunal to review the merits of the decision.

ii) At the time when KCC considered the matter on 5<sup>th</sup> May 2015, it was unaware of the events which were taking place on that same day. Those events led Goldwyn to decide that TG could no longer attend the

school (whether for health and safety reasons or because of his own health). That was plainly a significant development and, in accordance with the statutory Code of Practice, ought to have led to an emergency review taking place. It is far from clear as to whether KCC ever confronted the issue of whether such a review should take place. Certainly no reason is apparent from the documentation as to why it was not.

iii) Until TG's statement of special educational needs was amended, KCC was obliged to see that he received education in accordance with the statement. After 5<sup>th</sup> May, TG was not educated at the school identified in the statement and the statement was not amended.

iv) If it was the case that TG was unable to attend Goldwyn because of illness, s.19(1) of the Education Act required it to provide him with suitable education. That meant full-time education (see s.19(3A)) unless (see s.19(3AA)) there were reasons which related to TG's physical or mental health which meant that KCC considered full-time education would not be in TG's best interests. There was no evidence that TG's physical or mental health precluded him receiving full time education, nor, for that matter, does there appear to have been any decision by KCC that his best interests precluded him from receiving full time education. Nonetheless arrangements were only made for TG to receive part time tutoring and that only for a few weeks at the end of July 2015 and at the beginning of September 2015.

v) Because of KCC's internal procedures, the decision of Ms Coombs on 17<sup>th</sup> June 2015 that Social Services would not jointly fund a residential placement operated as an effective veto. Thereafter JRAP would not agree to such a placement. Yet, as Mr Harrop-Griffiths accepted, JG and MG were led to believe that residential placement was still under active consideration by KCC. MG's decision to take TG to Sunderland was made on that false basis.

vi) There were also the breaches of the Children Act 1989 to which I have already referred.

For all of these reasons, I also agree that it would be conspicuously unfair for KCC now to rely on MG and TG's departure for Sunderland.

163. It follows that I agree the decision of KCC that TG had 'moved' to Sunderland for the purposes of Regulation 23 should be quashed."

### **The Belonging Regulations**

178. It is common ground that the decision in *R(L)* is no longer good law and that the effect of the amendment to regulation 2(4) of the Belonging Regulations has the effect that those Regulations do not apply to s. 24 of the 2014 Act, but it is important to understand what it

was that **R(L)** actually decided and how the legislation actually effected the reversal of that decision.

179. The dispute in **R(L)** was as to which local authority was responsible for maintaining the child's statement of special educational needs. Rabinder Singh QC (as he then was) explained that

"9. The main dispute before me focused upon the words in subsection (3) of section 321 "responsible for a child if he is in their area". There was some debate at the hearing about whether JL fell within any of the paragraphs in subsection (3) but there was not, as I understood it, any serious dispute that a statement of special educational needs does have to be maintained in respect of JL by some Local Education Authority. The only dispute between the defendants relates to which of them is responsible. Waltham Forest is entitled to point out that in a physical sense JL is no longer in their area. But, submits counsel for Staffordshire, that is not the end of the matter.

180. He went on to say

"11. I turn next to section 569 of the 1996 Act. Subsection (1) provides that any power of the Secretary of State to make regulations under that Act shall be exercised by statutory instrument. Subsection (2) provides that such an instrument is to be subject to the annulment procedure in either House of Parliament. Subsection (4) provides:

"Regulations under this Act may make different provision for different cases, circumstances or areas and may contain such incidental, supplemental, saving or transitional provisions as the Secretary of State thinks fit."

Before I leave this provision, it should be noted that this is a very broadly drafted power to make regulations.

12. Finally in the context of the 1996 Act, I should turn to section 579, which is the general interpretation provision in the Act. Subsection (4) reads:

"(4) For the purposes of this Act a person shall be treated as belonging, or as not belonging, to the area of a particular local education authority in accordance with regulations; and any question under the regulations shall, in the case of a dispute, be determined by the Secretary of State."

The regulations which are there referred to are The Education (Areas

to which Pupils and Students Belong) Regulations 1996. These have conveniently been referred to at the hearing as "the Belonging Regulations" and I will refer to them as such."

181. He set out the relevant parts of regulation 3 and 4 and went on

"Regulation 7 is critical to the submission in particular of counsel for Staffordshire and provides:

"(1) This regulation shall apply to the exclusion of any other regulation which would otherwise apply to such a person.

(2) This regulation shall apply in the case of a child who is looked after by a local authority..."

[I interpose there that it is common ground before me that JL is a child who is looked after by the London Borough of Waltham Forest for this purpose.]

"(a) for whom a statement of special educational needs is maintained under Part III of the Education Act 1993, [I interpose, as I have mentioned, that has been superseded by subsequent legislation and the reference today would be to Part IV of the 1996 Act] or

(b) who is registered as a pupil at a special school, or

(c) who is a patient in hospital, and receives education either in a special school established in a hospital or education referred to in section 298(1) of the Education Act 1993 otherwise than at school, or

(d) who is a further education student.

(3) Such a person shall be treated as belonging to the education authority area which coincides with or includes the area of the local authority which looks after him."

It is clear that, if regulation 7 is applicable in the present case, then by paragraph (3) it would follow that JL is to be treated as belonging to the education authority area of the London Borough of Waltham Forest which "looks after him".

182. After that statutory excursus he concluded that

"16. Counsel for Waltham Forest submitted that regulation 23 of the 2001 Regulations was applicable in this case and could not be clearer. He also submitted that the Belonging Regulations, when properly understood in the light of the legislative history to which I

have referred, were concerned solely with determining the question of recoupment as between local education authorities and not wider questions as to which local education authority, for example, bears responsibility for maintaining a statement of special educational needs.

17. I was referred to a number of authorities by counsel on each side but they were concerned with different statutory provisions. As far as counsel can discern, the precise issue which I have to decide has not been the subject of any previous authority directly on point. I therefore approach it in accordance with well established principles of statutory interpretation.

18. In essence, I prefer the submissions of counsel for Staffordshire, which were supported by counsel for JL. My first reason is that the plain words of regulation 7 of the Belonging Regulations apply to this case. Those regulations are relevant for the purpose of section 579(4) which begins with the words "for the purposes of this Act". Those are general words and are not confined to the question of recoupment. In any event, the question of recoupment is now governed by a different Act, the 2002 Act and in particular section 207. Although section 492 of the 1996 Act was repealed, section 579(4) was not. Secondly, as the opening words of regulation 7 make clear in paragraph 1, that regulation applies to the exclusion of any other regulations. If it were necessary to read regulation 23 of the 2001 Regulations as being in some way in conflict with regulation 7, it would follow that regulation 7 takes priority. Thirdly, it is not in truth necessary to read the regulations as being in conflict in that way. It is possible to read the legislation as a coherent whole in the following way. (1) Regulation 7 governs the question of to which area a child belongs and this helps to determine which local education authority is responsible for maintaining a statement of special educational needs and associated duties. (2) If and when that antecedent question has been determined and a child is to be regarded as belonging to a new education authority, he or she will have moved to that new area and so regulation 23 will become applicable. As counsel for Staffordshire submitted, regulation 23 provides the machinery for transferring the documentation to the new local education authority and also for giving notice to the parents. This is why it lays down quite a short timetable for doing these things. (3) The recoupment regulations operate within their own important but limited sphere to govern financial responsibilities as between local education authorities. This does not affect the antecedent question of which local education authority is responsible for maintaining a statement of special educational needs.

19. The fourth reason for arriving at the interpretation which I have is that that interpretation sits well, as it seems to me, with the structure of the 1996 Act, in particular section 579(4) which provides for machinery of settlement of disputes between local education authorities by the Secretary of State. It seems sensible that Parliament should have envisaged that there

should be machinery to avoid the kind of dispute that has arisen in the present case, which can only be detrimental to the interests of children. My fifth reason is that this interpretation will also serve a useful purpose in that the same authority which is responsible for a child's social services needs would be responsible for maintaining the statement of special educational needs, allowing for co-ordination between relevant officials, though no doubt in practice working closely with those who are on the ground in the area where the child is physically present.”

183. In the subsequent DCFS consultation paper dated 19 January 2009 on Amendments to the Belonging Regulations, the Department explained that the purpose of the proposed amendments was inter alia that

“the Regulations will no longer determine which local authority is responsible for identifying children's special educational needs (SEN), assessing them, drawing up SEN statements and maintaining those statements in respect of looked after children placed outside their home local authority areas”.

184. In the Executive Summary it was explained that the proposed amendments

“1.1 ... amend regulation 7 (“Children looked after by a local authority”) to make clear that the regulation applies to the exclusion of other regulations within the Belonging Regulations rather than all other regulations; and, most importantly, amend regulation 2 to provide that the Belonging Regulations do not apply for the purpose of determining the education authority responsible for identifying, assessing, making and maintaining statements and the performance of other functions under Part IV of the Education Act 1996 relating to children with special educational needs (SEN)”.

185. Of the judgment in **R(L)** the Department explained that

“1.2 The decision to amend the Belonging Regulations follows the judgement in the case of a looked after child (LAC) with an SEN statement placed by Waltham Forest in Staffordshire (*R (on the application of L) v the (1) London Borough of Waltham Forest and (2) Staffordshire County Council*). The judgement said that the Belonging Regulations had wider application than just for assigning which authority had financial responsibility in inter-authority recoupment cases and, in particular, were applicable when deciding which authority is responsible for identifying a child's SEN, assessing the child, and drawing up and maintaining an SEN statement. The Department's view has been that the Belonging Regulations do not apply for this purpose and its guidance is that it should be the authority where the LAC is

placed rather than home/placing authority that should carry out these SEN duties, recouping the costs from the home authority”.

186. As to the background the paper stated that

“2.1 The Education (Areas to which Pupils and Students Belong) (England) Regulations 1996 (commonly known as the “Belonging Regulations”) were made under the powers conferred on the Secretary of State by sections 569(2), 569(4) and 579(4) of the Education Act 1996. The then Department for Education and Employment’s guidance Circular 1/96 said that: “The Belonging Regulations 1996 determine to which areas pupils and students belong for the purposes of determining claims relating to inter-authority recoupment and which LEA [local education authority] is responsible for considering an application for a mandatory award”. They work in conjunction with The Education (Inter-authority Recoupment) Regulations 1994 for this purpose.

...

2.3 The case of *R (on the application of L) v (1) the London Borough of Waltham Forest and (2) Staffordshire County Council* concerned a LAC with an SEN statement who was placed by Waltham Forest in Staffordshire in a non 52 week placement. The case was to determine which authority was responsible for maintaining the child’s statement. The judgement said that regulation 7 of the Belonging Regulations, which says that LAC “shall be treated as belonging to the education authority area which coincides with or includes the area of the local authority which looks after him” and that “this regulation shall apply to the exclusion of any other regulation which would otherwise apply to such a person”, did not mean that it should apply to the exclusion of any other regulation in the Belonging Regulations, as the Department had intended, but to all regulations which might apply to a LAC. In effect the judgement said that the Belonging Regulations had a wider remit than just determining which authority is financially responsible in inter-authority recoupment cases and that they also determine which authority is responsible for carrying out the duties to identify a child’s SEN and, where necessary, assess, draw up and maintain the child’s statement. The effect of the judgement was that it should be the placing authority in all cases of LAC placed out of authority which should carry out these SEN functions and not just in 52 week placement cases.

2.4 Section 321 of the Education Act 1996 says that a local education authority is responsible for a child “for the purposes of this Part” [Part IV, Special Educational Needs] “if he is in their area” but does not



define this. Section 207 of the Education Act 2002, construed as if it was contained in the Education Act 1996, says that:

*Regulations may provide, in relation to cases where any provision for education to which this section applies is made by a local education authority (in this section referred to as the 'providing authority') in respect of a person who belongs to the area of another local education authority [emphasis added], for requiring or authorising the other authority (in this section referred to as the 'home authority') to pay the providing authority [agreed amounts].*

The Department's view is that 'belonging' is a separate recoupment concept. The forthcoming Children, Skills and Learning Bill will address the meaning of the term "in their area".

187. The DFCS therefore explained that the mischief at which the proposed amendment was aimed was that

"3.2 The policy intent of amending regulation 7 of the Belonging Regulations and regulation 2 is to re-establish the Department's position that the Regulations do not apply for the purposes of determining which local authority is responsible for identifying children's SEN and, where necessary, assessing, drawing up and maintaining a statement for a child, and performing other functions under Part IV of the Education Act 1996. The judgement in the *Waltham Forest/Staffordshire* case means that the placing/home authority would be responsible for performing these functions in every case of LAC with statements placed out of authority. The Department's view is that its guidance that in non 52 week placements it should be the authority where the child is placed which should carry out these functions and in the case of 52 week placements it should be the placing/home authority is in the best interests of LAC. Some LAC are placed out of authority at an early age before their SEN are identified. Some LAC are placed hundreds of miles from their home/placing authority making, for instance, identification or attendance at annual reviews of statements difficult for the home authority. The Department's view is that it is better, in non-52 week placement cases, for the authority where the child is placed to identify and assess the child and decide, with its knowledge of provision in the local area, at which school the child might have their needs met, or which 'education otherwise' provision might be suitable, rather than the placing authority which may be far distant from where the child is. Where a child with a statement is placed in residential independent or non-maintained schools for 52 weeks a year the Department's view is that the SEN functions are best carried out by the placing authority as the authority where the child is placed is likely to have very little or no contact with the child."

188. The proposed amendment to the Belonging Regulations to give effect to that purpose was the insertion in regulation 2, after paragraph (3) of the words

“(4) These Regulations do not apply for the purpose of determining which authority’s area a child is in for the purposes of section 321(3) of the Education Act 1996”.

189. The proposed amendment to regulation 7 to prevent it from having the overarching effect which **R(L)** had found was to insert in regulation 7(1) after the words “other regulation” the words “in these Regulations”, so that regulation 7(1) now reads

“(1) This regulation shall apply to the exclusion of any other regulation *in these Regulations* which would otherwise apply to such a person”.

190. In my judgment Mr Gillie is right to contend (as set out in paragraphs 139 to 141 above) that the effect of regulation 2(4) of the Belonging Regulations means that those Regulations did not apply for the purpose of determining the education authority responsible for identifying, making and maintaining statements pursuant to the 2014 Act.

191. That is clear from the *Explanatory Memorandum* to the 2009 Regulations which explains that:

“Regulation 2(3) amends regulation 2 of the Principal Regulations to provide that those Regulations do not apply for the purpose of determining the education authority responsible for identifying, assessing, making and maintaining statements and performance of other functions under Part 4 of the Education Act 1996 relating to children with special educational needs”.

192. Thus, regulation 2(4) therefore has the effect of nullifying the earlier conclusion in **R(L)** that the Belonging Regulations

“are relevant for the purpose of section 579(4) which begins with the words “for the purposes of this Act”. Those are general words and are not confined to the question of recoument”.

193. However, I also accept his submission that the legal effect of regulation 2(4) is no wider than that nullification. It simply has the effect that the provisions of the Belonging Regulations do not apply to s.24 of the 2014 Act, or to put it another way, the Belonging Regulations do not dictate the meaning of s.24 of the 2014 Act.

194. Crucially in my judgment, however, the provision in regulation 2(4), whether in its original 2009 form or its amended 2013 version, does *not* say that a presence test applies nor does it say that an ordinary residence test does *not* apply. Indeed, it does not in terms say what test is to apply at all because it was envisaged that the meaning of the term “in their area” was to be addressed in the forthcoming Children, Skills and Learning Bill, which was never enacted.

195. The concept of “belonging” is a separate recoupment concept and the Belonging Regulations therefore concern inter-authority recoupment and have no wider function or remit (see **R(G)** at [124]).

196. As Mr Line put it, the Belonging Regulations are therefore not relevant to the meaning of s.24 of the 2014 Act, but that still leaves open the question of how s.24 should be interpreted.

197. The highwater mark of Mr Line’s submission was as I have set out in paragraph 125 above, namely that in the Council’s submission it would be inappropriate to apply an ordinary/habitual residence principles to the s.24 “area issue” because:

(1) the wording of s.24 of the 2014 Act did not support that approach.

(2) the case law (**R(G)**) did not support that approach.

(3) the intention, but in any event certainly *the form*, of the amendment to the Belonging Regulations implemented through regulation 2(4) was completely at odds with that approach.

198. I have already dealt with the decision in **R(G)** in paragraphs 165 to 177 above. I deal with the construction of s.24 immediately below. It will be seen from what I have said in

paragraphs 178 to 196 above that I do not consider that either the intention or the form of the wording of regulation 2(4) of the Belonging Regulations has the effect for which Mr Line contends. As I have found in paragraph 193 above, the legal effect of regulation 2(4) is no wider than the nullification which it effects. It simply has the effect that the provisions of the Belonging Regulations do not apply to s.24 of the 2014 Act, or to put it another way, the Belonging Regulations do not dictate the meaning of s.24 of the 2014 Act.

### **A Child “in the Authority’s Area”**

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

200. I accept the submissions of Mr Gillie as set out in paragraphs 82 to 84 and 86 above. The purpose of the 2014 legislation is the welfare of children: (*R(D and others) v Hackney LBC* [2019] PTSR 1947 at [54]). That purpose tends towards a protective approach to s.24.

201. Moreover, the statute itself envisages a permissible degree of absence from the local authority area. That must mean that mere presence is not the correct test to apply. S.83(6) (“interpretation”) provides that:

“a reference in this Part to a child or young person who is “in the area” of a local authority in England does not include a child or young person who is wholly or *mainly* resident in the area of a local authority in Wales”.

202. The inclusion of the word “mainly” in that section demonstrates that a person might be partly resident in Wales and nevertheless be “in the area” of a local English authority. That is consistent with the test under s.24 being one of ordinary (or habitual) residence and not presence.

203. A related concept is whether a child has “moved” from a local authority’s area (under what is now regulation 15(1) of the 2014 Regulations – which was previously regulation 23 of the Education (Special Educational Needs) (England) (Consolidation Regulations 2001). A temporary or transitory move does not relieve a local authority from its responsibility to the child, see **R(G)** at [133]. To that extent I agree with Nicol J that

“133. I agree that it is necessary to distinguish a situation where there has been a permanent move from one which is temporary or transitory. As Ms Hannett and Mr Harrop-Griffiths agreed, there can only be one local authority which is responsible for a child's special educational needs. I also agree with Ms Hannett, that the procedures envisaged in regulation 23 [now regulation 15 of the 2014 Regulations] would be excessively cumbersome to cater for a purely temporary, short-term absence of the child from the original authority's area ...”.

204. That also supports the submission that ordinary residence is the test for whether a child was in a local authority’s area pursuant to s.24.

205. Nicol J went on to say in that paragraph that

“I agree as well that it is of assistance to see whether there has been an alteration of the child's ordinary residence to reach a decision as to whether the child has 'moved' for the purposes of regulation 23. The features which have been identified in other contexts for deciding a person (and especially a child's) ordinary residence may be helpful.”

206. I would go further. In my judgment, on the correct interpretation of the statute, ordinary (or habitual) residence is the test for whether a child is in a local authority’s area pursuant to s.24 of the 2014 Act. To that extent I do not agree with Nicol J in what he went on to say in paragraph [134] of **R(G)**.

207. However, *if* Nicol J was right at the end of paragraph [134] that

“The features identified in the ordinary residence cases are therefore no more than indirect pointers in deciding whether in this case TG had 'moved' to Sunderland at the time that KCC took its decision which the OS challenges on 19<sup>th</sup> October 2015”,

nevertheless those indirect pointers all lead to the conclusion that T had not moved for the purposes of regulation 15 and that he was still in the local authority's area for the purposes of s.24 of the 2014 Act (as to which see paragraphs 221 to 228 below as to the application of the principles of ordinary/habitual residence to the facts of this case).

208. I reach the conclusion above as a matter of the construction of the statutory provisions without regard to the departmental Guidance on *Looked After Children with Special Educational Needs placed out of authority* (on pages 3 and 4 thereof, subject to the caveat that the test in **A v A** – as to which see below - should be preferred to that in **ex p. Shah** to the extent that there is any conflict between them) or the SEND Code of Practice, but I note that the conclusion which I have reached accords with both that Guidance and the Code of Practice (at paragraph 10.8). In my judgment, the Department was therefore correct to say in the Guidance on *Looked After Children* that

“The term ‘in their area’ is not defined in the legislation. In line with established practice, the Department construes this phrase to mean ‘ordinarily resident in their area’.”

It is also the case therefore that there is no conflict between the Belonging Regulations and the SEND Code of Practice such as Judge Ozen had feared in her remarks in granting permission to appeal.

209. I accept Mr Line's point that the both the departmental Guidance and the Code of Practice are but guidance and cannot create or override the law which otherwise exists, but that does not militate against the decision which I have reached.

***R(Stewart)***

210. I should add that I derived no assistance in this context from the decision of Beatson J in ***R (on the application of Stewart) v Wandsworth LBC & anor*** [2001] EWHC 709 (Admin), on which Mr Line sought to rely.

211. In that case the court was concerned with the duty under s.17(1) of the Children Act 1989 which provided that

“It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)–

(a) to safeguard and promote the welfare of children within their area who are in need . . .”.

212. The background to the case, which concerned the duty of a housing authority to provide accommodation for homeless persons, in circumstances where her children were in need, but had some connection to several local authorities, was that

“4. The claimant, Ms Sandra Stewart, and her two children currently reside at Unit 15, Stewart Lodge Hostel, 201 Stewart Road, a hostel owned and managed by Hammersmith and Fulham (hereafter “Hammersmith”), but located in Lambeth. The children both go to school in Wandsworth. The issue before me is within which local authority area or areas are the children for the purposes of s 17. The three possibilities are Hammersmith, Lambeth and Wandsworth. Mr Knafler, on behalf of the claimant, argues that all three are *prima facie* under the general duty in s 17. The claimant, who left her home in Hammersmith in March 2000 and then stayed at a number of temporary addresses in Hammersmith and outside the borough, sought housing assistance from Hammersmith on 7 June 2000. Because she appeared homeless and to have a priority need, pending inquiries pursuant to its duty under s188 of the Housing Act 1996, Hammersmith accommodated her and the children at Stewart Lodge Hostel. The second possibility is Lambeth because Stewart Lodge is located in Lambeth. The third possibility is Wandsworth where, as I have noted, the children go to school.

5. Following its inquiries, Hammersmith concluded that, although homeless, Ms Stewart was intentionally homeless. It informed her of this in a letter dated 13 October 2000. On this basis it owed her only the limited duty under s 190 of the Housing Act, and it permitted the family to remain in the hostel for a further seven days from 13 October 2000 to give Ms Stewart the opportunity to secure accommodation. She did not leave and, on 17 January 2001, Hammersmith obtained a court order for possession of the premises against Ms Stewart (with effect from 31 January 2001).”

213. In the context of s.17 of the 1989 Act, Beatson J held that the phrase “within their area” had a geographical meaning, but it is important to note that the statutory context in which

reached that conclusion was altogether different from the circumstances of T and his family and that it arose in the context of an altogether different statutory code. As he explained

“16. It is convenient to deal with the authority first. The duty under the previous s 24(2) of the Children Act was to “advise and befriend” young persons formerly in care. This duty applied to persons “within the area” of the local authority. *R v Lambeth LBC, ex p Caddell* and *R v Kent CC, ex p Salisbury & Pierre* concerned London boroughs which had arranged foster placements in Kent and the disputes were whether, when the foster placement came to an end on the young person's 18th birthday it was Kent or the London borough which became responsible under s 24(2). It was held that at that time the young persons were within the area of Kent not that of the London borough which had placed them in Kent, and that the responsibility lay on Kent. In *ex p Caddell* Connell J stated (at page 259) that the words of the statute are clear and rejected the argument that the phrase “within the area” of the authority in s 24(2) should be read as referring back to the period when the qualifying person was still a child. This case was followed by Latham J in *ex p Salisbury & Pierre*.”

214. It was in that context that he went on to hold at [22] that the clear meaning of the words “within their area” in s.17 was that physical presence was required. It was for that reason that he explained of the contrary argument at [25] that

“Moreover, this argument does not recognise that such housing services may be given under different statutory provisions, that the nature and extent of the duties under these varies, and that the social services authority may be different from the housing authority. In the present case the limited nature of Hammersmith's duty is important. It was providing accommodation pursuant to its interim duty under s 188 of the Housing Act to do so in cases of apparent priority need pending a decision as to its duty (if any) to accommodate. When Hammersmith notified Ms Stewart that it had determined she was intentionally homeless its interim duty under s 188 of the Housing Act ceased (see s 188(3)) and was replaced by the even more limited and temporary duty under s 190 to provide advice and assistance and to accommodate for such period as they consider will give a reasonable opportunity of securing accommodation. Hammersmith has only been shown to have come under a short-term and limited duty. Until Hammersmith determined that Ms Stewart was intentionally homeless it is accepted that there was no question of a s 17 duty because there was no need for accommodation. At that time it ceased to be under a duty to accommodate save for the very limited period under s 190. So by the time that the question of the s 17 duty arose, save for what might be called “packing up time”, Hammersmith's Housing Act duty had ceased and (leaving aside the question of any s 17 duty) it was under no other



duty in respect of Ms Stewart's children. In this sense, as in *ex p Caddell* and *ex p Salisbury & Pierre*, the prior duty had ceased and to interpret “within their area” as referring to an earlier time when Hammersmith was under some duty would be to do what Connell J held should not be done in *ex p Caddell* [1998] 1 FLR 253, [1998] Fam Law 20.

...

27. ... The criticism that there would be a mismatch between Hammersmith's obligations under the Housing Act and those under the Children Act overlooks the safeguard afforded by s 208 of the Housing Act, the temporary nature of the Housing Act obligations in the present case and the fact that the obligations of a housing authority differ from those of a social security authority (see in the context of s 27, Lord Templeman in *R v Northavon DC, ex p Smith* [1994] 2 AC 402, [1994] 3 All ER 313-9 of the former report).

28. Requiring physical presence is a clearer test than a purposive approach under which the nature and duration of the presence, or the responsibilities of the different authorities in the frame are taken into account. While physical presence may, as in the present case, involve more than one authority being subject to the duty, I do not consider that an objection. There are, for example, children who are accommodated for part of the week with one parent and partly with the other parent who lives in a different local authority. As Mr Knafler submitted in reply, the absence of a dispute resolution procedure such as that in s 30 in respect of the “ordinary residence” of a child supports the view that a s 17 duty may lie on more than one authority. In a case where more than one authority is under a duty to assess the needs of a child, there is clearly no reason for more than one authority to in fact assess a child's needs and there is a manifest case for co-operation under s 27 of the Children Act and a sharing of the burden by the authorities.

29. ... The duty under s 17 is to assess the needs of the child and “need” in s 17(10)(a) includes situations in which the child is unlikely to maintain a reasonable standard of health or development without the provision of services by “a” local authority. The provision is not restricted to services that would be provided by the authority making the assessment.

30. For these reasons, in my judgment Lambeth and Wandsworth came under a duty under s 17 to assess Ms Stewart's children's needs but Hammersmith did not ...”.

215. In my judgement it is not legitimate to seek to read across the definition of “within their area” from the altogether different factual context and the different statutory code in **R(Stewart)** relating to the duty of a housing authority to provide accommodation for homeless

persons to the very different circumstances of the treatment of T's EHCP when his parents were living with him overseas as part of his father's service deployment.

### **The Armed Forces Act 2006**

216. Mr Gillie sought to rely on the principles underlying the Armed Forces Covenant, which are now enshrined in law by s.343AA of the Armed Forces Act 2006. I note, however, that s.343AA did not come into force until 22 November 2022 and that the decision of the local authority under appeal in this case was made on 19 November 2021 and/or 19 January 2022. (By way of explanation, ss. 343AA-343AF were inserted by s.8(3) of the Armed Forces Act 2021. They came into force on 1 May 2022 for limited specified purposes: regulation 3 of The Armed Forces Act 2021 (Commencement No. 1) Regulations 2022, SI 2022/471, namely "for the purpose only of conferring power to make subordinate legislation or issue guidance"; and on 22 November 2022, insofar as not already in force: regulation 3 of The Armed Forces Act 2021 (Commencement No. 4) Regulations 2022, SI 2022/1161.) (And see generally *The Armed Forces Covenant and status in law*, House of Commons Library, 24 November 2022 which can be found at:

<https://researchbriefings.files.parliament.uk/documents/CBP-9072/CBP-9072.pdf>.)

217. Were the facts of this case to arise now, it would be incumbent on the local authority (s.343AA(3)(a)), in exercising a relevant education function (s.343AA(2)(c)), which means any provision in Part 3 of the 2014 Act (which encompasses ss.19 to 83 thereof) so far as it deals with special educational provisions, to have due regard to

“(a) the unique obligations of, and sacrifices made by, the armed forces,

(b) the principle that it is desirable to remove disadvantages arising for service people from membership, or former membership, of the armed forces, and

(c) the principle that special provision for service people may be justified by the effects on such people of membership, or former membership, of the armed forces”.

218. Although the obligation is to have regard to the unique obligations and sacrifices made by the armed forces and the principles that (i) it is desirable to remove disadvantages arising for service people (ii) special provision for service people may be justified by the effects on them of membership of the armed forces, I am satisfied that the obligation to have such

regard must encompass the effect of those unique obligations and sacrifices on members of their immediate families as well as on the service personnel themselves.

219. The fact that the relevant provisions of s.343AA of the 2006 Act were not yet in force at the time of the decision does not, however, assist the Council which had already signed up to the Armed Forces Covenant in June 2011 (see paragraph 17 above), which the Council explained on its website to the effect that

“The County Council’s approach is based on the following principles:

- No disadvantage - this ensures members of the armed forces community experience no disadvantage as a result of their service in the armed forces

...

The Armed Forces Covenant is based upon two key principles:

- The Armed Forces community should not face disadvantage compared to other citizens in the provision of public and commercial services
- Special consideration is appropriate in some cases, especially for those who have given most such as the injured and the bereaved”.

220. The obligations imposed on the Council at the material time on 19 November 2021 and/or 19 January 2022 were not therefore materially different from those imposed now by s.343AA of the 2006 Act (as amended) with effect from 22 November 2022.

### **Application of the Ordinary/Habitual Residence Test**

221. On the basis that the correct test is that of ordinary or habitual residence, the speeches of Lady Hale DPSC and Lord Hughes JSC in **A v A** are of signal relevance in the present context, particularly that of the latter at paragraph [80] and the principles set out at (iv)-(vii), with particular reference to the decision in the case of **Mercredi v Chaffe**, although it is useful to set out the relevant extracts from both judgments.

222. Lady Hale DPSC said that

“54. Drawing the threads together, therefore:

i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.

ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.

iii) The test adopted by the European Court is “the place which reflects some degree of integration by the child in a social and family environment” in the country concerned. This depends upon numerous factors, including the reasons for the family’s stay in the country in question.

iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

v) In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council, ex p Shah* should be abandoned when deciding the habitual residence of a child.

vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.

vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.

viii) As the Advocate General pointed out in para 45 and the court confirmed in para 43 of *Proceedings brought by A*, it is possible that a child may have no country of habitual residence at a particular point in time.”

223. For his part Lord Hughes JSC stated that

“80. In accordance with its usual practice when dealing with the same issue in successive cases, the court used substantially the same

language in each. The following principal propositions can be extracted from the decisions.

i) The meaning of 'habitual residence' is autonomous, that is to say not governed by differing national laws on the topic: *A's case* at para 34.

ii) One of the great values of habitual residence as a base for jurisdiction is proximity: *A's case* at para 35; by this the court clearly meant the practical connection between the child and the country concerned.

iii) The question is one of fact. At para 37 in *A's case*, repeated at para 47 in *Mercredi v Chaffe* the court said:

"The "habitual residence" of a child, within the meaning of article 8(1) of the Regulation, must be established on the basis of all the circumstances specific to each individual case."

iv) Simple physical presence is not by itself sufficient. At para 38 in *A's case* the court said:

"In addition to the physical presence of the child in a member state, other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment."

Those words were substantially repeated in *Mercredi v Chaffe* at para 49.

v) Those other factors will mainly be, in the case of a child, those which show 'some degree of integration in a social and family environment': see paras 38 and 44 in *A's case* and identical language at para 47 in *Mercredi v Chaffe*. Thus, for example, on the facts of *A's case* where the issue was whether the stay was enduring or intermittent, they are likely to include, as the court said at paras 39 and 44:

"the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state must be taken into consideration."

This formulation was preferred by the court to that suggested by the Advocate General in *A's case*, namely the 'actual centre of interests' (see at para 38).

vi) Similarly, in the case of a child, the intention of the parent or parents will normally be a relevant factor. At para 40 in *A's case*, repeated at para 50 in *Mercredi v Chaffe*, the court said:

“the intention of the person with parental responsibility to settle permanently with the child in another member state, manifested by certain tangible steps such as the purchase or rental of accommodation in the host member state, may constitute an indicator of the transfer of the habitual residence”

On the facts of *Mercredi v Chaffe* where the child was a babe in arms and the issue was less whether the presence was intermittent than whether there was sufficient endurance to amount to habitual residence, this factor was of greater significance.

vii) The duration of the stay is a relevant factor but is not determinative. In *Mercredi v Chaffe* at para 51 the court said:

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

The use of the word ‘permanence’ (which did not appear in *A's case*) must, for the reasons explained by Lady Hale at para 51, be read together with the careful analysis of Sir Peter Singer in *DL v EL* [2013] EWHC 49 (Fam), [2013] 2 FLR 163, endorsed by the Court of Appeal at [2013] EWCA Civ 865.

viii) Generally speaking, an infant will share the habitual residence of the parent(s) with whom he or she lives. In *Mercredi v Chaffe* at paras 54 – 55 the court said:

“54. As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment.”

ix) In exceptional circumstances a person may have no habitual residence: *A's case* at para 43.”

224. As a general rule, a child will share the habitual residence of his parents with whom he lives and there is no reason why that general rule should not apply in the present case. In particular, I note to what Lord Hughes said at (vii) in relation to paragraph [51] of ***Mercredi v Chaffe***, namely that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence, although the law does not lay down any minimum duration. However, before habitual residence can be transferred to the host state, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case.

225. In this case it is clear from what T's father has said in his witness statement that the family lived in Fareham and that T went to school in Fareham until the family moved to Dubai consequent upon his father's deployment by the Royal Navy, which was anticipated to be for a term of 3 years. It is also clear from paragraph [18] of that statement that the family did not intend to settle permanently in Dubai, that they kept their house in Fareham, albeit that it was rented out (so Judge Ozen's statement to the contrary was materially incorrect on that point) and that they were offered a return flight to the UK each year to keep in touch with their family during the deployment overseas.

226. Although T and his family were physically present in Dubai, the other relevant factors which require to be taken into account to determine his ordinary or habitual residence demonstrate on the contrary that that presence was only temporary or intermittent and of a strictly limited and circumscribed duration and that T's residence with his family in Dubai did

not mean that he was not ordinarily or habitually resident in Hampshire. The duration, conditions and reasons for the stay in Dubai and for the family's move there on service deployment all demonstrate that he remained ordinarily or habitually resident in Hampshire, and thus with the Council's area. The Royal Navy provided housing and education for the family, his father remained a UK taxpayer and T himself continued to be paid UK benefits and disability living allowance.

227. I therefore agree with the analysis set out in Mr Gillie's skeleton argument which is set out in paragraphs 91 to 92 of this judgment.

228. The consequence therefore is that, although under s.45(1) of the 2014 Act, there is a discretionary power to cease to maintain an EHCP, in the circumstances of this case there was no lawful exercise of that discretion because T was still in the local authority's area because he was still ordinarily resident in that area (and in any event the decision to cease to maintain was unlawful because it was carried out in manifest and egregious breach of the mandatory requirements of regulation 31 of the 2014 Regulations).

### **The Second Ground of Appeal**

229. I do not accept that the Tribunal was approaching its task as if it were subjecting the Council's decision to a review as opposed to a *de novo* appeal. What it was plainly doing was deciding an appeal which had been brought before it as the appropriate statutory tribunal pursuant to s.51 of the 2014 Act against one of the matters listed in subsection (2), namely (f) a decision by a local authority under s.45 to cease to maintain an EHCP for a child or young person.

230. It is apparent from paragraph [23] of the decision that the Tribunal considered all of the written material put before it. It is also apparent that the Tribunal in performing that task was entitled to assess whether the Council came to the correct conclusions of matters of fact and law, see ***DH and GH v Staffordshire CC*** [2018] UKUT 49 (AAC) at [19] where Upper Tribunal Judge Jacobs said that

“The appeal to the First-tier Tribunal is against the local authority's decision. In this case, that was the decision that an EHC plan was not necessary. This appeal is sometimes called a general appeal. This means that the issue for the tribunal is whether, on the evidence and



submissions before it, the local authority came to the correct conclusions on matters of fact, law and judgment. The tribunal is free to form its own view on any matters covered by the decision.”

231. The argument that the fact that the Tribunal relied on procedural irregularity as the basis for upholding the appeal does not mean that it was illegitimately performing a quasi-judicial review outside the scope of its jurisdiction. On the contrary, the short point was that, if a case fails on a preliminary point in any event (as the Tribunal decided), there is no need to have to go on to consider the substantive merits. As the Tribunal shortly found in paragraph [24]

“As a Tribunal, we note that the wording of s45 of CFA 2014 is that the LA *may* cease to maintain the EHCP of a child or young person for whom they are no longer responsible. We note also that if they decide to exercise that power to cease to maintain the EHCP, they *must* follow the procedure set out in reg. 31 of the SEND Regs 2014. The LA conceded in the hearing on 20 March 2023 that they have not correctly followed that procedure. We find, that having made that concession, the LA should also have conceded the appeal, because it is mandatory that they comply with reg.31 and they have not. Having failed to comply with the mandatory requirements of reg. 31, the LA cannot cease to maintain T’s EHCP, even at the conclusion of this appeal.”

232. As to the argument that the Tribunal failed to give clear or adequate reasons for its conclusion, I am satisfied that paragraph [24] of the decision perfectly adequately set out its conclusions and the reasons for its decision.

233. The reliance on the remarks of Judge Ozen in granting permission to appeal (as set out in paragraph 52 above) about the Tribunal’s alleged inadequacy of reasons was misplaced. As I explained in paragraph 10 above, the appeal is against the decision of the Tribunal on 30 March 2023 and the remarks of Judge Ozen on 14 June 2023 do not form part of that decision.

234. Moreover, it is important in this context to remember what Upper Tribunal Judge Wikeley said in ***Basildon DC v. AM*** [2009] UKUT 113 (AAC)

“27. There is ample authority in the case law about the standards of reasoning expected of fact-finding tribunals in explaining their decisions. There is, for example, a helpful and realistic discussion by Mr Commissioner (now Judge) Rowland in *CIB/4497/1998* (at paragraph 5):

'5. It cannot be overemphasised that there is no simple formula for writing reasons for a decision. The minimum requirements are that the unsuccessful party must know why his or her principal submissions have been rejected and that the process of the tribunal's reasoning must be sufficiently clearly outlined to avoid any reasonable suggestion that the tribunal have made an error of law. Obviously, the more clearly the reasons are expressed in the decision itself the better, but lack of clarity will not render a decision erroneous in point of law if the reasons can nevertheless be discerned with reasonable diligence from the decision and surrounding documents. A statement of reasons may be adequate even though it could have been improved ... Those who assert that a tribunal's reasoning is inadequate must themselves explain clearly both the respect in which it is inadequate and why the inadequacy is of significance. It must be borne in mind that there are limits to the extent to which a tribunal is obliged to give reasons for reasons and to the extent to which they can be expected to give reasons for matters of value judgement. Furthermore, it is clear from *R(A) 1/72* that it is not obligatory to deal with every piece of evidence and that, while "a decision based, and only based, on a conclusion that the total effect of the evidence fails to satisfy, without reasons given for reaching that conclusion, will in many cases be no adequate decision at all", that will not always be the case. What is required by way of reasoning depends very much on the circumstances of the particular case before the tribunal.'

28. It is also well established that when explaining how it has exercised its judgment, a first instance tribunal is not bound to deal with every matter raised in the case. As Tucker L.J. explained in *Redman v Redman* [1948] 1 All E.R. 333 at 334:

'I desire to emphasise as strongly as I can that the fact that judge or commissioner does not set out every one of the reasons which actuate him in coming to his decision will not be sufficient to support an argument in this court that he has not applied his mind to the relevant considerations ... The mere fact that, in his judgment, the commissioner may not have mentioned some fact or other or that he emphasised some other fact is quite insufficient to persuade me that he did not, in fact, apply his mind properly to the relevant matters which he does not in terms mention.'

29. Similarly, in a more recent decision in the matrimonial and family jurisdiction, Holman J. in *B v B (Residence Order: Reasons for Decision)* [1997] 2 F.L.R. 602 (at 606) stated that:

'I cannot emphasise strongly enough that a judgment is not to be approached like a summing-up. It is not an assault course. Judges work under enormous time and other pressures, and it would be

quite wrong for this court to interfere simply because an ex tempore judgment given at the end of a long day is not as polished or thorough as it might otherwise be.’

30. A tribunal’s Statement of Reasons is not usually an ex tempore (unreserved) judgment, but the observations of Holman J. are just as applicable to decisions of fact-finding tribunals as they are to decisions of courts of first instance.

31. This tribunal made a clear and categorical credibility finding in favour of the claimant which in my judgment is unimpeachable and central to its decision. The credibility finding underpinned the tribunal’s conclusions on the nature of the relationship between the claimant and her landlord and its acceptance of her evidence about e.g. the rental agreement and the payment of rent. That amounted to “clear and overwhelming evidence” which was not undermined by the “unusual” features of the case. The tribunal evaluated the evidence and explained why those factors did not alter its conclusion.

32. My conclusion therefore is that the tribunal’s decision discloses no error of law in this respect. It is important to read the decision as a whole. I am satisfied that this tribunal applied the correct legal tests, found facts that it was entitled to do on the evidence before it and provided adequate reasoning.”

235. As Mr Commissioner Temple said in ***R(A) 1/72*** at paragraph 8

“It is not, of course, obligatory thus to deal with every piece of evidence or to over-elaborate, but in an administrative quasi-judicial decision the minimum requirement must at least be that the claimant, looking at the decision, should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority”.

236. To that I would add what Lord Hope said in ***Shamoon v. Chief Constable for the Royal Ulster Constabulary*** [2003] UKHL 11, [2003] ICR 337 at [59]:

“It has also been recognised that a generous interpretation ought to be given to a tribunal’s reasoning. It is to be expected, of course, that the decision will set out the facts. That is the raw material on which any review of its decision must be based. But the quality which is to be expected of its reasoning is not that to be expected of a High Court judge. Its reasoning ought to be explained, but the circumstances in which a tribunal works should be respected. The reasoning ought not to be subjected to an unduly critical analysis.”

237. As he also said in ***R (Jones) v. First-tier Tribunal (Social Entitlement Chamber) & Criminal Injuries Compensation Authority*** [2013] 2 AC 48 at [25]:

“It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.”

### **The Third Ground of Appeal**

238. The short point is that what is said in the third ground of appeal does not vitiate the decision of the Tribunal because what was said in paragraphs [25-27] of its decision was obiter and not part of the ratio of the case, the Tribunal having made it clear at the outset of paragraph [25] that, given its conclusions in paragraph [24] of the decision, it need go no further in deciding the merits of the appeal.

239. However, in the event that those paragraphs do form an additional part of the ratio of the case, I am nevertheless satisfied that the challenge of the third ground of appeal fails for the following reasons:

(a) for the reasons stated above in relation to the first ground of appeal, the Tribunal was not wrong to determine that failure to comply with the mandatory provisions of regulation 31 of the 2014 Regulations was fatal to the Council’s decision

(b) there was no finding of “unfairness” on the part of the Tribunal in paragraphs [25] and [26] nor was the Tribunal suggesting that “fairness” or “equity” was a relevant consideration. What the Tribunal was doing in paragraph [25] of the decision was accurately illustrating the potential difference in treatment between a family moving to a different local authority in the country (when the EHCP would be transferred to another local authority) and one being posted overseas with the armed forces (when, on the Council’s argument, the EHCP would cease to be maintained). That would run counter to paragraph 10.55 of the Code of Practice which stated that

“In having regard to this Code of Practice and in meeting the aspirations of the Armed Forces Covenant [which the Council had signed in June 2011, see paragraph 17 above], which attempts to eliminate or mitigate

some of the potential disadvantages faced by Service families, all those with statutory responsibilities towards Service children with SEN should ensure that the impact of their policies, administrative processes and patterns of provision do not disadvantage such children because of their Service-related lifestyle”.

240. It was not therefore inappropriate for the Tribunal to flag up the difference in treatment as it thus did. What it said was that

“26. For the LA to cease to maintain [T]’s EHCP, in circumstances where he is expected to return to the UK, would be to put him at a significant disadvantage to children or young people who simply move between local authorities within the UK. In order for the LA to act consistently with 10.55 of the Code of Practice, we find that they should not cease to maintain T’s EHCP, but instead should implement a “freezing” or “pausing” of his EHCP. It is self-evident that the LA cannot comply with its duty to secure the provision in Section F of T’s EHCP whilst he attends school in Dubai, but to require [him] to commence the process of applying for an EHCP afresh on the family’s return to the UK, may well result in T being without the provision he requires for a considerable portion of that academic year. A process where all parties are agreed that the EHCP is frozen for a period of time is a proportionate response to mitigate the disadvantage T would otherwise suffer as a Service child.”

(c) the Tribunal did not suggest or assume that transferring an EHCP guaranteed continuity of provision. I accept what is said by Mr Line as set out in paragraph above 53(3) above, namely that the new local authority would retain the power to reassess or review and change the content of the EHCP, but the Tribunal never stated in paragraph [26] that transferring an EHCP guaranteed continuity of provision.

(d) the findings in paragraph [27] were open to the Tribunal to make on the material before it and in the circumstances as at the date of the decision. The Tribunal rightly recorded that the Council had made an offer that it would commit to providing T with the funding previously in place under his EHCP until a new EHCP process could be completed. However, at that time, and before the family’s early return to the UK, that would potentially have placed T at significant disadvantage in the event that his father, as a serviceman, might yet be posted to a different local authority areas within the UK, whereupon T would have had to start the EHCP application process in the new local authority area with no guarantee of funding in the meantime. In the circumstances which happened, the family returned to the same area and

the Council completed the assessment for his new EHCP expeditiously, so that the problem did not in fact arise, but that situation was only resolved after the family's return to the UK some time after the decision of the Tribunal on 30 March 2023.

(e) I will deal with this point under Ground 4 below (though as will be seen I also reject the fourth ground as a ground of challenge).

241. The submission that the Tribunal's decision should be struck down for perversity I regard as hopeless. The decision comes nowhere near the threshold for a finding of perversity. As Lewison LJ explained in the Court of Appeal in ***Volpi v Volpi***

"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

3. If authority for all these propositions is needed, it may be found in *Pigłowska v Pigłowski* [1999] 1 WLR 1360; *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477; *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600; *Elliston v Glencore Services (UK) Ltd* [2016] EWCA Civ 407; *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96; *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817, [2019] 3 All ER 429 and *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352.”

(In similar vein see the comments of Carr LJ in *Walter Lilly & Co Ltd v Clin* [2021] 1 WLR 2753 at [83]-[87].)

#### **The Fourth Ground of Appeal**

242. So far as the fourth ground of appeal is concerned, I accept Mr Gillie’s submissions as set out in paragraph 101 above that the conclusions which the Tribunal reached about the significant disadvantage to T in paragraph [26] of its decision were entirely open to it as a matter of fact and law for the reasons which he gave, namely that not maintaining the EHCP while T was abroad, by reason of his father’s naval deployment, put him at a disadvantage compared to children who simply moved between local authorities in the UK. The particular disadvantage which the Tribunal identified (and which it was entitled to identify) was set out in the penultimate sentence of paragraph 34, namely the risk that

“to require T to commence the process of applying for an EHCP afresh on the family’s return to the UK, may well result in T being without the provision he requires for a considerable portion of that academic year”.

243. It is true that the Council had sought to ameliorate that position by virtue of the assurances which it gave as to providing funding equivalent to that catered for in his old EHCP when he returned, pending a fresh EHC needs assessment, but as the Tribunal noted in paragraph [27] that still placed him at a significant disadvantage due to the fact that his father might yet be posted to a different area in the UK and T would have to start the EHCP

application process in that new local authority area with no guarantee of funding in the meantime. By contrast, if the Council simply maintained the status quo, T's EHCP would be transferred to the new local authority pursuant to regulation 15 of the 2014 Regulations. Moreover, there would be no guarantee if similar cases arose with other service families in other local authority areas in the future that another local authority would commit to providing additional support to a returning service child on his return to the UK to mitigate or remove any disadvantage caused by his absence.

244. As to the question of "freezing" or "pausing" the EHCP, I agree with Mr Line that those words do not appear in either the 2014 Act or any of the subordinate Regulations, but that does not assist him. What the Tribunal was plainly saying was that, in the circumstances of T's case, the Council could maintain the EHCP, but that it was not obliged to take steps to secure the provision specified within it.

245. I accept that the s.42(2) duty is an absolute one (in the sense that it is not merely a "best endeavours" duty laid on a local authority) and that the duty is non-delegable, but I am satisfied that the 2014 Act permits a local authority in circumstances such as these to maintain an EHCP without breaching its statutory duty. Mr Line raised the spectre of the local authority being placed in breach of statutory duty by the Tribunal's decision, but it seems to me that the reality is that no action would, or could sensibly, be taken by a child's parents against the local authority in circumstances such as these if it simply maintained the status quo pending the family's return to the UK at the end of the deployment and that the problem which Mr Line sought to raise was in reality something of a chimera.

246. The provisions of s.45(1) bestow a *discretion* on the authority to cease to maintain an EHCP, not an obligation on it to cease to maintain it. As the Department of Education itself observed, rightly in my judgment (see the email of 25 April 2022)

"Regarding section 45 of the Children and Families Act 2014, the Secretary of State's view would be that, under this provision, local authorities have a power but not a duty to cease to maintain an EHC plan and the SEND Code of Practice is consistent with that position".

247. Moreover, by virtue of s.42(5) of the 2014 Act, the Council was not obliged to "secure the specified special educational provision" in the EHCP if "the child's parent has made



suitable alternative arrangements". Mr Line contended, which I accept, that it was for the local authority to satisfy itself that suitable alternative provision had been made and the Council in the present case had not done so (see paragraph 58(7) above).

248. Nor did Mr Gillie dispute that, but I agree with him that that does not assist the Council for the reasons which he gave as set out in paragraph 106 above, not least because the Council had precluded itself from considering and answering the question of suitable alternative arrangements, firstly by contravening regulation 31 of the 1996 Regulations by failing to consult with the parents and secondly by erroneously stopping its analysis prematurely at the mere fact that T had been transferred to Dubai. In those circumstances it would not be permissible or proper for the Council to rely on its own breaches of duty to benefit from its own failure.

249. If therefore there are circumstances in which an EHCP might be maintained, but temporarily not implemented, the Council's argument to the contrary must fall.

250. The question of whether there was suitable alternative provision has now fallen by the wayside in any event, but if it had been a live issue at the time of the hearing, it could either have been determined by the Council on review or assessment of the EHCP or by the Tribunal pursuant to its power to amend the educational provision in the EHCP and to make any other consequential amendments under regulation 43(2)(f) of the 2014 Regulations.

## **Conclusion**

251. For these reasons the appeal is dismissed.

252. Finally, I should not conclude this decision without commending both Mr Line and Mr Gillie for the excellence of their written and oral submissions, which have made my task immeasurably easier.

**Mark West**  
**Judge of the Upper Tribunal**

**Authorised for issue 24 April 2024**