

An important test case concerning children of service personnel with EHCPs

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[Hampshire County Council v \(1\) GC \(2\) GC \(SEND\): \[2024\] UKUT 128 \(AAC\)](#)

1. This was an important test case concerning children of service personnel with EHCPs but which could have wider implications in the field.
2. The UT grapples with a number of important questions:
 - a. What is the effect of military service overseas on a child's EHCP? Can the EHCP be "paused" or "frozen" during the family's deployment?
 - b. What effect does a breach of regulation 31 (SEND Regulations 2014) have in terms of the Tribunal making its decision in relation to a cease to maintain decision?
 - c. What is the test for determining whether a child is "in the authority's area"? Is it that of presence or ordinary (or habitual) residence?

Facts

3. T was 7 years of age and in Year 3 at a school in Dubai. T had diagnoses of ASD and GDD. T was in receipt of an EHCP since October 2019.
4. In August 2021, T and his family moved to Dubai for 3 years due to his father's deployment there with the Royal Navy. The family were told by their case worker that T's EHCP would be "paused" until the family returned to Hampshire in August 2024.
5. On 19 November 2021, the family received a letter that T's plan would cease "from this date". On 19 January 2022, a further letter was sent setting out that "the Local Authority has now ceased to maintain the EHCP for T".

The first instance decision

6. At first instance, the FTT found that the LA must follow the procedure set out in regulation 31. In failing to do this, the LA could not cease to maintain, even at the conclusion of the FTT appeal. The Tribunal went on to state that for local authorities to act consistently with paragraph 10.55 of the Code of Practice, they should implement a "freezing" or "pausing" of T's EHCP. The Tribunal concluded, therefore, that Hampshire may not cease to maintain.

The appeal and subsequent decision

7. The LA appealed. Permission was granted by TJ Ozen. There were 4 grounds of appeal
 - a. The Tribunal erred by concluding that the Council was not entitled to cease to maintain the plan: T was no longer in the Council's area and the decision to cease to maintain was correctly made notwithstanding any procedural failings.
 - b. The Tribunal erred in its approach to the appeal but exercising a quasi-judicial review approach to its decision which was not in accord with its functions in a statutory appeal.
 - c. The Tribunal erred by taking into account irrelevant considerations, namely: past procedural failings; a comparison between children moving abroad and those who moved between LAs; an incorrect assumption that transferring a plan to a different LA 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.
 - d. The Tribunal erred by concluding that the duty to maintain an EHCP could be paused or frozen.
8. The decision of Judge West is detailed and considered, running to 252 paragraphs over 113 pages. In summary, it was held that:
 - The Council committed "egregious and manifest breaches of regulation 31" [paragraph 157]. Regulation 31 imposes mandatory obligations on the LA. *"It follows that a decision to cease to maintain an EHCP under s45(1) of the 2014 Act will be invalid if it is taken in breach of the mandatory requirements of regulation 31 of the 2014 Regulations"* [162]. The Tribunal was therefore correct to hold, as it did, that the LA cannot cease to maintain T's EHCP.

- *"As a general rule, a child will share the habitual residence of his parents with whom he lives..... 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 [para 224].*
 - The consequence of this finding was that T was still ordinarily resident in Hampshire so there could be no lawful exercise of the discretionary power under s45(1), 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 Reg 31.
 - The Judge did not accept that the Tribunal approached its task as if it were conducting a review as opposed to a *de novo* appeal.
 - As to "freezing" or "pausing" the EHCP, the Judge accepts that those words do not appear in the 2014 Act or Regulations. However, the Judge held that *"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. I accept that the s42(2) duty is an absolute one (in the sense that it is not merely a 'best endeavours' duty laid on the 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...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 deployment"* [paragraphs 244-245]
9. The appeal therefore failed. It is unclear whether the LA has sought permission to appeal to the CoA.

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