Neutral Citation Number: [2026] UKUT 268 (AAC)
Appeal No. UA-2025-001267-HS

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

LONDON BOROUGH OF ENFIELD

Appellant

- v -

(1) TEEGAN EDWARDS
(2) LONDON BOROUGH OF HARINGEY

Respondents

Before: Upper Tribunal Judge Stout
Hearing date: 3 July 2026
Mode of hearing: In person

Representation:
Appellant: Charlotte Hadfield and Alice de Coverley (counsel)
1st Respondent: Christopher Coyle and Rehana Popal (counsel)
2nd Respondent: Paul Greatorex (counsel)

On appeal from:
Tribunal: First-tier Tribunal (Special Educational Needs and Disability)
Judge: Judge Lom
Tribunal Case No: EH320/24/00047
Decision Date: 8 April 2025

SUMMARY OF DECISION

SPECIAL EDUCATIONAL NEEDS (85)

The Court of Appeal in *Hampshire County Council v GC and anor* [2026] EWCA Civ 20 held that the question of whether a child or young person is ‘in’ a local authority’s area for the purposes of section 24 of the Children and Families Act 2014 (CFA 2014), and thus the responsibility of that local authority for the purposes of Part 3 of that Act, is to be determined by reference to the child or young person’s ‘ordinary residence’.

In this case, the Upper Tribunal holds that the ‘ordinary residence’ test to be applied is that set out by the House of Lords in *R v Barnet LBC, ex p Shah* [1983] 2 AC 309, as further explained by the Supreme Court in *R (Worcestershire County Council) v Secretary of State for Health and Social Care* [2023] UKSC 31, [2023] 1 WLR 2790.

The approach to ‘ordinary residence’ for the purposes of a local authority’s social services functions (as set out by the Supreme Court in *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46, [2016] AC 137) does not apply in the special educational needs context.

Accordingly, a child or young person’s ‘ordinary residence’ for the purposes of the CFA 2014 may be different to their ‘ordinary residence’ for the purposes of the social care functions of the local authority. In particular, placement of a child or young person in accommodation arranged by a local authority may result in a change of ordinary residence for the purposes of the CFA 2014, even though responsibility for social care services remains with the placing authority. This is consistent with government policy that the local authority where the child lives knows their local schools and educational provision better, so they are better able to assess whether the child needs special educational provision on top of what is ordinarily available. Further guidance on the application of the ‘ordinary residence’ test for the purposes of section 24 of the CFA 2014 is set out in paragraph 106 of the Upper Tribunal’s judgment.

The Upper Tribunal further holds that when dealing with an appeal under section 51 of the CFA 2014, the First-tier Tribunal has jurisdiction as part of its case management powers under rule 9 of the *Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008* (SI 2008/2699) to determine which local authority is responsible for a child or young person’s special educational needs, and must do so if there is a dispute, so as to ensure that the responsible local authority is the respondent to the proceedings at all material times.

Please note the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and Reasons of the judge follow.

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal is principally concerned with:

    a. the interpretation and application of the ‘ordinary residence’ test that the Court of Appeal in *Hampshire County Council v GC and anor* [2026] EWCA Civ 20 (***Hampshire***) held applies when determining which local authority is responsible for an Education Health and Care Plan (**EHC plan**) for the purposes of section 24 of the Children and Families Act 2014 (**CFA 2014**); and,
    b. the jurisdiction of the First-tier Tribunal to make such a determination.

2. The appeal arises out of proceedings before the First-tier Tribunal in an appeal brought under section 51(2)(c)(ii) and (iii) of the CFA 2014 by the first respondent

young person (**TE**) in respect of his special educational provision and placement to be specified in his EHC Plan.

3. TE's circumstances are complex and there have to date been four local authorities who have at various times been named as respondents to the proceedings before the First-tier Tribunal. This appeal to the Upper Tribunal is brought against the First-tier Tribunal's decision of 8 April 2025 which determined that the appellant, the London Borough of Enfield (**Enfield**), was the appropriate respondent as at that date, and accordingly removed the second respondent, the London Borough of Haringey (**Haringey**) as respondent.

4. The appeal to the Upper Tribunal was stayed pending the decision of the Court of Appeal in *Hampshire*.

5. The structure of this decision is as follows:-

<u>TE's capacity and refusal of anonymity</u>

6. When the proceedings before the First-tier Tribunal decision commenced, and at all times since that are relevant to this Upper Tribunal appeal, there has been no

doubt about TE's capacity to litigate and the appeal to both tribunals has accordingly been brought in his own name. As will be seen, he has during the course of the proceedings spent some time as both a voluntary and involuntary in-patient under the Mental Health Act 1983 (**MHA 1983**). It has not been necessary to consider for the purposes of this appeal whether an alternative person should have been appointed to conduct these proceedings for him during those periods.

7. TE attended the Upper Tribunal hearing with his mother and a supporter. He asked that his name should not be anonymised in connection with this appeal.

Background

The position prior to the First-tier Tribunal's decision

8. TE was aged 19 at the time of the First-tier Tribunal decision under appeal. He has complex social, emotional and mental health needs. He has had an EHC Plan for some time.

9. TE's mother lives in Haringey and he used to live with her. However, according to his EHC plan, from about 2020/2021 TE began to have significant difficulties both in and out of school and as a result he has moved through a number of schools and social care placements. By September 2024, TE was living with other young people in supported living accommodation in the London Borough of Waltham Forest (**Waltham Forest**).

10. TE appealed to the First-tier Tribunal under section 51(2)(c)(ii) and (iii) of the CFA 2014 against the special educational provision specified in Section F of his EHC plan and the institution named Section I. The EHC plan against which he appealed had been issued by Waltham Forest and so Waltham Forest was named as the first respondent to the appeal.

11. In December 2024 the First-tier Tribunal ordered that the London Borough of Barking and Dagenham (**Barking and Dagenham**) be substituted as respondent. The reason given in the direction was that the First-tier Tribunal was "satisfied that the London Borough of Waltham Forest is no longer the appropriate respondent to the appeal as [TE] no longer resides in its area."

12. In January 2025 the First-tier Tribunal substituted Enfield as the respondent because "the documents provided by the parties confirm that the London Borough of Barking and Dagenham is no longer responsible for maintaining [TE's] EHCP and that responsibility has been transferred to the London Borough of Enfield".

13. In February 2025, the First-tier Tribunal added Haringey as a second respondent to the appeal and directed a hearing for the purposes of determining who was the proper respondent to the appeal. The parties prepared submissions for that hearing. At that stage, Enfield argued that Haringey was the proper respondent, while Haringey made a pragmatic proposal, to avoid duplication of costs, that

Enfield should be sole formal respondent to the proceedings, but Haringey would co-operate and assist and the local authorities would seek to resolve between themselves who was responsible.

The First-tier Tribunal's decision

14. The First-tier Tribunal (Judge Lom) on 8 April 2025 decided that that TE was ordinarily resident in Enfield, so that Enfield was the appropriate respondent to the appeal and Haringey was removed as respondent. The First-tier Tribunal's reasons for so concluding included the following:

> TE's mother lives in [Haringey]. TE is provided with supported accommodation by [Haringey] under the Care Act 2014 in [Enfield]. Originally TE brought his appeal against [Waltham Forest] where he was then residing. In December 2024 TE was placed at his current address by the London Borough of Haringey. Since that time TE has returned on occasions to his mother's home sometimes as a condition of bail, but he continues to have accommodation provided for him in Enfield.
>
> The London Borough of Enfield has most recently engaged with this appeal as the Respondent. The law currently as to the responsibility of LAs in respect of the [EHC] plans of young people lacks clarity. An appeal is pending in respect of the decision of the Upper Tribunal in the case of *Hampshire CC v GC* [2024] UKUT 128 (AAC)…
>
> The Tribunal is obliged to identify just one LA I accept. I am satisfied that as an adult TE can maintain his own residence and this is in Enfield and not at his mother's address. Like many young people he spends a lot of time with his family, but so long as supported accommodation is available to him in Enfield this is his home, there is no suggestion that this is temporary or transitory. I am satisfied that TE's address in the London Borough of Enfield is where he should be considered ordinarily resident.

What has happened since the First-tier Tribunal's decision

15. On 6 May 2025, Enfield applied for permission to appeal against the decision. On 10 July 2025, the First-tier Tribunal (Judge Eden) granted permission to appeal to the Upper Tribunal, nominally solely on the ground that the First-tier Tribunal's reasons were arguably inadequate. However, Judge Eden also invited the Upper Tribunal to provide guidance on:
    a. whether it is appropriate for the First-tier Tribunal to substitute the respondent to an appeal when a child or young person moves from one authority to another and the EHC plan transfers under regulation 15 of the *Special Educational Needs and Disability Regulations 2014* (SI 2014/1530) (**the SEND Regulations**),
    b. whether the First-tier Tribunal has jurisdiction to determine disputes between local authority as to the application of regulation 15 and
    c. how regulation 15 interacts with section 39 of the Care Act 2014 (**the CA 2014**) and section 24 of the CFA 2014.

16. On 8 August 2025, Haringey wrote to the First-tier Tribunal stating that it would agree to take responsibility for TE's EHC plan and to name an agreed placement in Section I, without prejudice to the question of which local authority was legally responsible.

17. In September 2025, TE started at the new placement, but it broke down before the end of the month.

18. By order of 10 September 2025 Upper Tribunal Judge Jacobs joined Haringey as a respondent to the Upper Tribunal appeal and directed an oral hearing.

19. By letter of 26 September 2025 Haringey again agreed to take responsibility for TE's EHC plan pending formal determination of the issue of legal responsibility.

20. On 1 October 2025, TE was detained under section 2 of the Mental Health Act 1983 (**MHA 1983**). From then until March 2026, TE was detained (possibly not continuously, but for periods) under either section 2 or section 3 of the MHA 1983 at hospitals in Haringey, Enfield and Camden.

21. By order of 19 November 2025, the First-tier Tribunal substituted Haringey for Enfield as the respondent to the appeal and directed a case management hearing for 2 December 2025.

22. The First-tier Tribunal proceedings were then stayed in view of TE's detention under the MHA 1983, while the Upper Tribunal proceedings were stayed pending the outcome of the appeal to the Court of Appeal in *Hampshire.*

23. On 31 December 2025 Enfield wrote to Haringey confirming that it would accept responsibility for the YP's aftercare following discharge under section 117 of the MHA 1983.

24. On 23 January 2026 the Court of Appeal handed down judgment in the *Hampshire* case.

25. Care Act assessments have been completed by Enfield upon TE's discharge from care under the MHA 1983. These concluded that TE did not have a continuing need for aftercare under section 117 of the MHA 1983 as his needs can be met under the CA 2014.

The issues on this appeal

26. As noted above, the First-tier Tribunal only granted permission on Enfield's challenge to the adequacy of the First-tier Tribunal's reasons, but simultaneously invited the Upper Tribunal to give guidance on the two issues that I have identified in paragraph 1 of this judgment as being the principal concerns of this appeal. The question of whether Enfield should be given permission to argue these additional grounds was deferred for consideration at this hearing. At the start of the hearing, I asked the parties whether there was any objection to dealing with all the issues. There was none, so I indicated that I was content to grant

permission on all issues that the parties had dealt with in their skeleton arguments.

27. The issues for consideration were therefore threefold:

    (1) Does the First-tier Tribunal have jurisdiction to determine which local authority is responsible for a child or young person in the context of an appeal under section 51 of the CFA 2014?
    (2) What approach is to be taken to 'ordinary residence' under section 24 of the CFA 2014?
    (3) Adequacy of the First-tier Tribunal's reasons.

Legal framework

Relevant provisions of the CFA 2014 and SEND Regulations

28. Provision in relation to children and young people in England with special educational needs or disabilities is made in Part 3 of the CFA 2014. Part 3 of the CFA 2014 superseded Part IV of the Education Act 1996 (**EA 1996**). Section 24 of the CFA 2014 is in Part 3 of that Act and provides:

> **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.

29. Section 36 of the CFA 2014 imposes an obligation on a local authority, where a request is made to it, or it otherwise becomes responsible for a child or young person, to consider whether it may be necessary to make an EHC plan for that child or young person and, if so, to carry out an EHC needs assessment. The material provisions are:

> **36 Assessment of education, health and care needs**
> (1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.
> (2) An "EHC needs assessment" is an assessment of the educational, health care and social care needs of a child or young person.
> (3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for

special educational provision to be made for the child or young person in accordance with an EHC plan.

…

(8) The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan. …

30. The reference in section 36(3) to a local authority "otherwise" becoming responsible for a child or young person allows for the possibility of the child or young person's needs being brought to the local authority's attention by someone other than a parent, the young person or a school or other institution, as envisaged in section 24(1).

31. Section 37(1) then places a duty on the local authority, where it is necessary in the light of the EHC needs assessment, to make and maintain an EHC plan:

37 Education, health and care plans

(1) Where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a child or young person in accordance with an EHC plan—

(a) the local authority must secure that an EHC plan is prepared for the child or young person, and

(b) once an EHC plan has been prepared, it must maintain the plan.

32. Section 42(1) and (2) place a duty on the local authority that maintains the EHC plan for a child or young person to secure that the specified educational provision for the child or young person is made, unless (see section 42(5)) the child's parent or the young person has made suitable alternative arrangements.

33. Section 47 of the CFA 2014 makes provision in relation to the transfer of EHC plans as follows:

47 Transfer of EHC plans

(1) Regulations may make provision for an EHC plan maintained for a child or young person by one local authority to be transferred to another local authority in England, where the other authority becomes responsible for the child or young person.

(2) The regulations may in particular—

(a) impose a duty on the other authority to maintain the plan;

(b) treat the plan as if originally prepared by the other authority;

(c) treat things done by the transferring authority in relation to the plan as done by the other authority.

34. Regulation 15 of the SEND Regulations is made under that section and provides as follows:

> **15.— Transfer of EHC plans**
>
> (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.

35. It is also convenient to set out here the legislative provisions dealing with the circumstances in which a local authority may cease to maintain an EHC plan for a child or young person, as those provisions were the focus of the Court of Appeal decision in the *Hampshire* case, behind which this appeal was stayed. Section 45 of the CFA 2014 provides as follows:

> **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.
>
> (2) The circumstances in which it is no longer necessary for an EHC plan to be maintained for a child or young person include where the child or young person no longer requires the special educational provision specified in the plan.
>
> (3) When determining whether a young person aged over 18 no longer requires the special educational provision specified in his or her EHC

plan, a local authority must have regard to whether the educational or training outcomes specified in the plan have been achieved.

(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.

36. Regulations 29 to 31 of the SEND Regulations make provision as permitted by section 42(5):

Circumstances in which a local authority may not cease to maintain an EHC plan where the person is under the age of 18

29.—(1) A local authority may not cease to maintain an EHC plan for a child or young person under the age of 18 unless it determines that it is no longer necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(2) Where a child or young person under the age of 18 is not receiving education or training, the local authority must review the EHC plan in accordance with regulations 18 and 19 and amend it in accordance with regulation 22 where appropriate, to ensure that the young person continues to receive education or training.

Circumstances in which a local authority may not cease to maintain an EHC plan where the person is aged 18 or over

30.—(1) When a young person aged 18 or over ceases to attend the educational institution specified in his or her EHC plan, so is no longer receiving education or training, a local authority may not cease to maintain that EHC plan, unless it has reviewed that EHC plan in accordance with regulations 18 and 19 and ascertained that the young person does not wish to return to education or training, either at the educational institution specified in the EHC plan, or otherwise, or determined that returning to education or training would not be appropriate for the young person.

(2) Where following the review, the local authority ascertains that the young person wishes to return to education or training either at the educational institution specified in the EHC plan, or at another educational institution, and determines that it is appropriate for the young person to do so, it must amend the young person's EHC plan as it thinks necessary in accordance with regulation 22.

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.

37. The provisions of the CFA 2014 and SEND Regulations that I have set out above are drafted somewhat differently to their predecessor provisions in the EA 1996, and the *Education (Special Educational Needs) (England) (Consolidation) Regulations 2001* (SI 2001/3455) (**the 2001 Regulations**), but not in any respect that the parties or I have identified to be material in the context of the issues that arise on this appeal.

Some preliminary observations about the operation of those provisions

38. Under section 24, a local authority will be responsible for a child for the purposes of Part 3 of the CFA 2014, if two conditions are fulfilled: (i) the child or young person is “in the authority’s area”; and (ii) the local authority is aware that they have, or may have, special educational needs.

39. It might be thought that the remainder of Part 3 should be read as if it only placed obligations on a local authority in respect of a child or young person if they are the local authority's responsibility as defined in section 24, but that is not quite how the legislation works.

40. The duty on the local authority under section 42 to secure the provision specified in the EHC plan is tied to the duty to maintain the EHC plan in section 37(1)(b), which is in turn tied to the duty to assess in section 36. None of those sections refer to the local authority having 'responsibility' for the child or young person. On the face of the legislation, the obligation to prepare and maintain a plan, and secure the provision specified in it, fall on the local authority who has assessed the child or young person. Further, section 36 itself could be read as placing a duty on a local authority to consider making an assessment just because a person identified in section 36(1) makes a request, even if they are not the local authority 'responsible' within the meaning of section 24. Whether it does have that surprising effect does not arise for determination on this appeal, and I proceed on the assumption that it is implicit in section 36 that a request to a local authority to make an EHC needs assessment will only have legal effect if it is a request made to the local authority that is responsible for the child or young person as defined in section 24.

41. What is important for this appeal, though, is that, once an assessment is complete, a local authority's duties in respect of making and maintaining an EHC plan for a child or young person are not tied to the notion of 'responsibility' in section 24, but to the fact that the local authority carried out the assessment and prepared the EHC plan. Moreover, it is to be noted that section 45(1)(a) only gives a local authority a *discretion* and not a duty to cease to maintain an EHC plan when it ceases to be responsible for a child or young person. Further, the process by which a local authority may cease to maintain a plan are circumscribed by regulation 31 of the SEN Regulations, as set out above.

42. Once a local authority has come under a duty to maintain an EHC plan, and thus to secure the provision specified in it, it remains under that duty even if it ceases to be 'responsible' for the child or young person unless: (i) it lawfully ceases to maintain the EHC plan under section 45; or (ii) the duty is transferred to a new authority under regulation 15 of the SEND Regulations. This was also the position under the predecessor legislation, as is apparent from the quotation from Auld J's judgment in *R v Dorset County Council and Further Education Funding Council ex parte Goddard* [1995] ELR 109 at [123] of the judgment of Nicol J in *JG and MG v Kent County Council and ors* [2016] EWHC 1102 (Admin), [2016] ELR 396 (***Kent***), to which I return below.

43. As already noted, regulation 31 provides a process to be followed before a local authority may cease to maintain an EHC plan under section 45(1)(a), and the EHC plan must be maintained pending the outcome of an appeal to the First-tier Tribunal. A transfer under regulation 15 of the SEND Regulations is not automatic either. The fact that the child or young person has 'moved' from one local authority's area to another local authority's area needs to have come to the attention of the 'old' local authority, and that local authority then comes under a

duty to take action and notify the 'new' local authority in order for the transfer to occur.

44. Regulation 15 of the SEND Regulations does not on its face use the concept of 'responsibility' from section 24 of the CFA 2014. However, in order to be *intra vires*, it must be read consistently with the enabling power in section 47, which only permits regulations to make provision for the transfer of an EHC plan "where [an]other authority becomes responsible for the child or young person", and that means 'responsible' as defined in section 24.

45. There is a degree of circularity in the operation of these legislative provisions, but (as can be seen) the mere fact that a child or young person has 'moved' into a local authority's area is not sufficient to make that local authority 'responsible' for them as defined by section 24. They must also have come to the 'new' authority's attention. The effect of regulation 15(2) is to place an obligation on the 'old authority', once it becomes aware of 'the move', to bring the child or young person to the attention of the new authority by actively transferring the EHC plan to them within 15 days. That act of bringing the child or young person to the attention of the new authority is what in turn means that the new authority becomes 'responsible' for them as defined in section 24.

46. Once that has been done, then regulation 15(3)(a) comes into effect, so that, from the date of the transfer under regulation 15(2), "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".

<u>Previous case law on local authority responsibility</u>

47. The legislation provides no further assistance as to what it means for a child or young person to be 'in' a local authority's area for the purposes of section 24 of the CFA 2014 or regulation 15 of the SEND Regulations, or what it means for a child or young person to have 'moved' between two local authority areas for the purposes of regulation 15(2).

The Kent case

48. The *Kent* case was the first to consider what these terms mean. So far as material to the present appeal, the *Kent* case concerned a child with a statement of special educational needs under the EA 1996. The child and his family lived in Kent but, in response to escalating behaviour by the child and a family crisis, his father took him on what is described as an "extended holiday" to stay with grandparents in Sunderland. Kent County Council took the view that he had 'moved' to Sunderland within the terms of regulation 23 of the 2001 Regulations (the predecessor to regulation 15 of the SEND Regulations) and transferred his statement of special educational needs to Sunderland County Council. On a claim for judicial review (raising a number of issues as regards the local authority's exercise of its social care functions as well as educational issues), Nicol J held as follows, so far as is material to this appeal:

a. There can be only one local authority which is responsible for a child's special educational needs (see [133]);

b. In deciding whether a child or young person has 'moved' for the purposes of what is now regulation 15(2) of the SEND Regulations, it is necessary to distinguish a situation where there has been a permanent move from one which is temporary or transitory (see [133]);

c. The concepts of 'ordinary residence' or 'habitual residence', as used in other contexts, may be helpful in deciding whether a child or young person has 'moved', but there are limits to the extent to which those concepts are relevant because those are not the terms used in this legislation and a person may have more than one 'ordinary residence' (Nicol J referred to *R (Cornwall County Council) v Secretary of State for Health* [2015] UKSC 46, [2016] AC 137 (***Cornwall***) at [42])), but only one local authority may be responsible for a child's EHC plan (see [133]-[134]);

d. A challenge to a decision by a local authority that a child or young person with an EHC plan has 'moved' to another authority cannot be the subject of "a merits appeal" to the First-tier Tribunal ([143]);

e. Nor was it a question of precedent fact. A local authority's decision that a child or young person had 'moved' could be challenged by way of judicial review in the High Court on ordinary public law principles (*Wednesbury* rationality) (see [135], [139]-[143]);

f. It is possible that a dispute between local authorities about the issue could also be the subject of referral to the Secretary of State under section 495(3) of the EA 1996 (see [140]-[141] and [145]).

The Hampshire case

49. The *Kent* case was considered in detail by Upper Tribunal Judge West in the *Hampshire* case ([2024] UKUT 128 (AAC)). Although apparently referred to in argument by the parties, it was not referred to in the judgment of Bean LJ in the Court of Appeal ([2026] EWCA Civ 20) (with which King LJ and Stuart-Smith LJ agreed).

50. The *Hampshire* case concerned a child with an EHC plan whose father was a member of the armed forces. Hampshire County Council decided to cease to maintain his EHC plan upon the family relocating to Dubai for a period of what was expected to be three years as a result of the father's service (but which was in the end two years). The Council took the decision without following any of the requirements as to notice and consultation required by regulation 31 of the SEND Regulations.

51. The parents appealed to the First-tier Tribunal under section 51(2)(f) of the CFA 2014 against the decision to cease to maintain the EHC plan. The First-tier

Tribunal upheld their appeal on the basis that the local authority had failed to comply with what it described as the mandatory procedural requirements of regulation 31 of the SEND Regulations.

52. The first issue considered in the *Hampshire* case was the local authority's argument that the First-tier Tribunal had erred in upholding the appeal on the basis of a failure to comply with procedural requirements in regulation 31 rather than confining itself to considering whether the legislative criteria for ceasing to maintain a plan were met. Upper Tribunal Judge West rejected that argument and the Court of Appeal agreed with him. The Court of Appeal held (at [63]) that a decision to cease to maintain an EHC plan would be "liable to be held invalid and set aside" by the First-tier Tribunal if it was taken in breach of the mandatory requirements of regulation 31 of the SEND Regulations. (Since the First-tier Tribunal has no power to declare an act "invalid" or "set aside" a decision of a local authority, what the Court of Appeal said here must be understood as a decision that a failure to comply with regulation 31 could provide the First-tier Tribunal with a basis for upholding an appeal and ordering the local authority to "continue to maintain" the EHC plan in the exercise of the First-tier Tribunal's powers in regulation 43(2)(e) or (f) of the SEND Regulations.)

53. In reaching that conclusion, the Court of Appeal made some observations about the nature of the First-tier Tribunal's jurisdiction that are relevant to the jurisdictional issue that is raised on this appeal:

> 60. Hampshire did not argue before us, as they appear to have done before the Upper Tribunal, that T's parents had to bring proceedings for judicial review in the Administrative Court to quash the Council's decision to cease to maintain their son's EHCP before appealing to the FTT. I agree with the Judge that no such requirement exists and Mr Line was in my view correct not to pursue the point in oral argument in this court. A requirement that a challenge based on reg. 31 could only be brought and determined in the High Court would entail precisely the duplication of proceedings which Lord Bridge deprecated in *Foster*. It would be impractical, disproportionate and time-consuming for a parent or young person to have to bring High Court proceedings in parallel to or even before embarking on an appeal to the FTT. Parliament established the FTT in order to give appellants ready access to a specialist tribunal in a field where, in the words of Collins-Rice J in *R (Kumar) v Hillingdon LBC* [2021] PTSR 686 at [31], "there is a fundamental and frightening inequality of power".

54. In the *Hampshire* case, the local authority also argued that the question of whether the child was in Hampshire's area for the purposes of section 24(1) was a question of fact for the local authority, challengeable only on judicial review. The local authority's argument reflected the law as it had been held to be by Nicol J in the *Kent* case. In the Upper Tribunal, Judge West rejected that argument, holding at [175] that the decision as to whether the child had ceased to be Hampshire's responsibility was a matter for the First-tier Tribunal to determine on the merits as part of the parents' appeal under section 51(2)(f) of the CFA 2014.

The Court of Appeal in its judgment noted the local authority's submission at [67] but did not address it in detail. At [68], the Court of Appeal held that: "In the present case, the determination of whether he was in the authority's area is a question of mixed fact and law." The Court of Appeal then went on to determine the question for itself.

55. The principal issue in the *Hampshire* case concerned the test to apply when determining whether a child or young person is 'in' the authority's area for the purposes of section 24 of the CFA 2014 and, in particular, whether it was physical presence or ordinary or habitual residence. The issue arose because it was argued by the local authority that it was entitled to cease to maintain the EHC plan because it was no longer responsible for the child as a result of his departure to Dubai with his family. As noted, cessation of responsibility is a ground on which a local authority *may* (but is not obliged) to cease to maintain an EHC plan under section 45(1)(a) of the CFA 2014.

56. In the Upper Tribunal, Judge West concluded that section 24 of the CFA 2014 "imports an ordinary or habitual residence test … rather than a presence test" ([199]). I discuss below at paragraph 74 and following the implications of Judge West's references to the 'habitual residence' test. For present purposes, I focus on his conclusion as regards the 'ordinary residence' test. His reasons for reaching that conclusion, and/or the matters he considered supported that conclusion, may be summarised as follows:

    a. The purpose of the 2014 legislation is the welfare of children (*R (D and ors) v Hackney LBC* [2019] PTSR 1947 at [54]), so a protective approach to section 24 should be taken: see [200];
    b. The statute itself envisages a permissible degree of absence from the local authority area because section 83(6) provides that a reference 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: see [201]-[202];
    c. The fact that the CFA 2014 does not use the term 'ordinary residence' does not mean that is not the test. In this regard, Judge West considered in detail the potential significance of the history of *The Education (Areas to which Pupils and Students Belong) Regulations 1996* ("the Belonging Regulations"). The Belonging Regulations make provision as to the areas to which pupils and students belong for the purposes of inter-authority recoupment of education costs. They use the concept of 'ordinary residence'. In *R (L) v (1) Waltham Forest LBC and (2) Staffordshire CC* [2007] EWHC 2060 (Admin), Rabinder Singh QC (as he then was) had held that the Belonging Regulations should be applied to deciding whether a child or young person was the responsibility of a local authority for the purposes of section 321 of the EA 1996. Subsequently, regulation 2(4) was added to the Belonging Regulations to make clear that the Belonging Regulations "do not apply for the purposes of determining which authority's area a child is in for the purposes of section 321(2) of [the EA 1996]". Judge West held (at [193]-[196]) that this history did not assist with interpretation of section 24.

d. Judge West did, however, consider it relevant that the concept of 'move' in regulation 15 of the SEND Regulations, as interpreted by Nicol J in the *Kent* case, established that a temporary or transitory move does not relieve a local authority from its responsibility to a child or young person ([203]-[204]);
e. Judge West also considered it relevant that Nicol J had considered it helpful to consider 'ordinary residence' when deciding whether a child or young person had 'moved', although he did not agree with Nicol J that the 'ordinary residence' case law was only "helpful", he considered that the 'ordinary residence' test in fact applies ([205]-[207]);
f. Judge West further noted, having decided as a matter of legislative construction that an 'ordinary residence' test applied, that this was consistent with government policy, in particular the Guidance on *Looked After Children* and the SEND Code of Practice (as to which see further below paragraph 82 and following).

57. The Court of Appeal upheld Judge West's decision that 'ordinary residence' was the test, but for somewhat different reasons. The Court of Appeal did not refer to the Belonging Regulations, or regulation 15 of the SEND Regulations, or Nicol J's decision in *Kent*. Instead, it held that the test could not simply be physical presence because that could "not withstand scrutiny" given that there were all sorts of reasons why a child or young person might be temporarily out of the geographical area of the local authority (see [68]-[69]). The Court of Appeal noted that a physical presence test would cause particular difficulties for looked-after children. At [70] the Court quotes in its judgment an example given by counsel for the parents in that case about how 'ordinary residence' works for looked-after children as regards a local authority's social care functions:

> "A child with SEN is looked after by a local authority (A) who is the child's corporate parent. There is a shortage of available care placements in Local Authority A's area. The local authority has to place the child in several different placements over the course of a six month period, all outside Local Authority A's area. The child is placed in Local Authority [B then C, then D]. At the end of that six month period a longer-term foster placement becomes available in local authority A and the child moves back to Local Authority A's area. In this scenario the child is deemed ordinarily resident in Local Authority A, who has responsibility to look after the child."

58. The purpose of this example appears to have been to illustrate that a mere physical presence test would result in the responsibility for the child's EHC plan moving with the child between authorities A, B, C and D, notwithstanding that the child's 'ordinary residence' did not move from local authority A. It may have been assumed by the Court that the result of deciding that 'ordinary residence' was the test would mean that responsibility for special educational needs would then be the same as for social services. However, as will be seen below, application of an 'ordinary residence' test may also result in responsibility for a child's EHC plan moving between authorities in the circumstances described in the example. As Mr Greatorex observed in his submissions in this case, this point does not appear

to have been drawn to the Court of Appeal's attention. Bean LJ reasoned as follows:

> 72. Given the inadequacies of the physical presence test, the obvious alternative is to use the test of "ordinary or habitual residence", as it was described in the judgment of the Upper Tribunal. Mr Line is right to point out that the two terms are not quite interchangeable, but I do not think it is necessary in this case to explore the distinctions between them. Ordinary residence, the more usual term in the law relating to children, is sufficient for present purposes.
>
> 73. As Lord Carnwath JSC said in *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46; [2016] AC 137, the ordinary residence test has proved resilient. The Supreme Court held in that case that the policy of the Children Act 1989 and the National Assistance Act 1948 was to leave the ordinary residence of a person provided with accommodation by a local authority unaffected by the location of the particular placement, in order to prevent authorities from exporting their responsibilities. In the context of children or vulnerable adults to whom a local authority has statutory duties it was common ground in the *Cornwall* case that the subject could be ordinarily resident in the area of only one local authority. Otherwise the test would not be an effective tool for allocating responsibility for services or their cost.
>
> 74. The applicability and utility of the ordinary residence test in SEN cases is confirmed by the guidance provided by the Department for Education and its predecessors over many years. As long ago as 2009 the Department set out in its Guidance on Looked After Children with Special Educational Needs placed out-of-authority 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’. This means that an SEN assessment must be carried out by the authority where the child is ordinarily resident.”
>
> The 2015 statutory guidance promulgated under the CFA 2014, the Special educational needs and disability code of practice: 0 to 25 years, also continues to adopt a test of ordinary residence. Neither of these guidance documents is binding on the court, but Mr Line did not persuade me that they were legally erroneous or that the test was too difficult to apply in practice, at least in the great majority of cases.
>
> 75. Use of the ordinary residence test is also in my view consistent with public policy and in particular with the Armed Forces Covenant to which Hampshire has subscribed for some years. On the Appellant's construction, Hampshire might cease to maintain the EHCP whenever T accompanies his father abroad on deployment. Upon T's return to this country there would be no SEN provision in place and the process to

> obtain a new EHCP would have to begin from scratch. Assurances that the case would be expedited do not take the matter much further and might prove impossible to enforce. Far better that on T's return to the UK, with the EHCP still in place, he can continue to have SEN support without any gaps and without the family having to grapple with a new assessment process.
>
> 76. I accept also that the Respondents' case is supported by the wording of s.83(6) of the 2014 Act which states that references to a child "in the area" of a local authority in England do not include a child or young person who is wholly or mainly resident in the area of a local authority in Wales. The inclusion of "or mainly" is significant. If a child is mainly resident in Wales but sometimes resident in England, s.83(6) states that he will be the responsibility of the Welsh local authority. He will therefore be "in the area of the authority" in Wales for the purposes of the equivalent of s.24 set out in the Additional Learning Needs and Education Tribunal (Wales) Act 2018, despite being temporarily absent in England from time to time. It would be surprising and inconsistent, as Mr Gillie submits, if in the opposite scenario the statutory scheme had the result that a child mainly resident in England but sometimes resident in Wales was not in the English local authority's area for the purposes of s.24 of the 2014 Act. However, this point is hardly central to the Respondents' case.

59. As to the application of the 'ordinary residence' test to the facts of the *Hampshire* case, the Court of Appeal agreed with Upper Tribunal Judge West that:

> 77. … the important features of the present case are that:
> a) the deployment of T's father to Dubai was for a strictly limited period (set at 3 years though in the event he and the family returned after 2 years) and the intention was clearly that they would then return to Hampshire;
> b) the parents retained ownership of their home in Fareham, Hampshire, although they rented it out;
> c) the Royal Navy paid for an annual return flight for GC and his family from Dubai to England to help them maintain contact with relatives in England.

60. On those facts, the Court of Appeal concluded that Judge West had been right that the child T remained ordinarily resident in Hampshire notwithstanding the family's relocation to Dubai. The Court of Appeal added:

> 78. Not every move of a family abroad will have a factual background pointing to a child's ordinary residence remaining in an English local authority. If a family relinquish ownership or the tenancy of their home in England and move abroad together because one of the parents has obtained a permanent job abroad, it may be very difficult to argue successfully that the child remains ordinarily resident in England for s.24 purposes. Less straightforward may be a situation where the family move

> for what is intended to be a trial period. As time then passes, it will be increasingly difficult to argue that the child remains ordinarily resident in the area. Such cases will have to be considered on the facts as and when they arise.

61. The Court of Appeal also went on at [79] to hold that there was in any event no need for the local authority to have ceased to maintain the EHC plan. As suitable arrangements had been made for the child to receive educational provision abroad, the local authority could have treated the case as one to which section 45(5) of the CFA 2014 applied so that the local authority was relieved of its duty to make the provision specified in the EHC plan while the child was abroad.

'Ordinary residence'

The Shah test

62. The classic statement of the law on 'ordinary residence' is that in *R v Barnet LBC, ex p Shah* [1983] 2 AC 309 (***Shah***). That case concerned students who were refused grants for tertiary education by their local education authorities. Each student sought judicial review of their respective local authority's decision that they did not fulfil the legislative condition of being "ordinarily resident in the United Kingdom" for three years prior to the course within the meaning of the relevant legislation. Lord Scarman, with whom the other members of the House of Lords agreed, held at 343G-H that:

> Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.

63. There are thus two key elements to Lord Scarman's definition: (a) that the residence should be "voluntary"; and (b) that it should be for a "settled purpose". What it means for residence to be "voluntary" has been further explored in subsequent case law, which I consider below. In *Shah* itself, Lord Scarman at 344D to 345B elucidated what he meant by "settled purpose", emphasising that "purpose" may relate to any number of factors (including education, business, employment, health, family or love of the place). He held the residence may be "settled" even if it is only "for a limited period". He considered that "Education in adolescence or early adulthood can be as settled a purpose as a profession or business in later years". He held that the assessment should be as objective as possible, and did not require a deep enquiry into the mind of the individual concerned. It was not a question of ascertaining someone's "real home". Lord Scarman's only significant caveats were: (i) that temporary absences did not affect a person's ordinary residence; and (ii) unlawful residence could not be 'ordinary'.

64. In order to answer the question that arises in the current appeal, it is necessary to consider two subsequent decisions of the Supreme Court on the meaning of 'ordinary residence' in different statutory contexts: (i) *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46, [2016] AC 137 (***Cornwall***); and (ii) *R (Worcestershire County Council) v Secretary of State for Health and Social Care* [2023] UKSC 31, [2023] 1 WLR 2790 (***Worcestershire***).

The *Cornwall* case

65. *Cornwall* was concerned with the meaning of 'ordinary residence' for the purposes of section 24(1) of the National Assistance Act 1948 (**NAA 1948**). The case involved a young person (P) who had been born with multiple disabilities and who at all times lacked mental capacity. He was cared for in Wiltshire by his parents until about the age of 5, and then placed by Wiltshire Council with long-term foster carers in South Gloucestershire. P's parents moved to Cornwall but P continued to live with his carers in South Gloucestershire until he reached the age of 18. They remained involved in decisions affecting him, and they visited him, and he visited them. After P reached the age of 18 a placement was found for him in a care home in Somerset. Wiltshire, South Gloucestershire and Cornwall asked the Secretary of State to determine who was responsible for providing him with support and accommodation pursuant to section 21(1)(a) of the NAA 1948.

66. The majority of the Supreme Court (Baroness Hale giving the judgment with whom other members of the majority agreed) concluded that P had remained 'ordinarily resident' in Wiltshire throughout. However, as the Supreme Court explained it in the subsequent *Worcestershire* case (see below), this conclusion was not based on an application of *Shah*, but on the basis of considering the particular statutory context of the CA 1989 and the NAA 1948 and adopting a purposive approach to the interpretation of 'ordinary residence' for the purposes of section 24(1) of the NAA 1948.

67. The Supreme Court in *Cornwall* considered previous case law on 'ordinary residence' as regards children and persons who lack mental capacity to decide where they will live, in particular *In re P (GE) (An Infant)* [1965] Ch 568 and *R v Waltham Forest London Borough Council, ex p Vale* (Times, 25 February 1985): see [44]-[48]. The Supreme Court considered that the notion used in those cases of such children and persons having a 'base' with their parents that remained their 'ordinary residence' was unhelpful: it was necessary to consider where the child or incapacitated person had actually lived. Accordingly, in general, where a person is unable through mental incapacity to decide his place of ordinary residence for himself, the Supreme Court held the proper approach is to assess the duration and quality of his actual residence in the places which he had lived. In that case, as P had not lived with his parents, Cornwall was not his place of 'ordinary residence' just because that was where his parents lived. The Supreme Court observed that, for an adult who lacks capacity, "the seat of the decision-making power … is the authority making the placement, not the parents" ([51]). On an objective view, applying *Shah* properly for a person who lacked capacity, the Supreme Court noted that it might be thought that P had been, prior to his

18th birthday, ordinarily resident in South Gloucestershire with his foster carers ([52]).

68. However, at [53]-[55] and [58]-[60], the Supreme Court held that P could not be regarded for the purposes of the NAA 1948 as ordinarily resident in South Gloucestershire because both the CA 1989 (section 105(6)) and the NAA 1948 (section 24(5)) expressly provide that placements by the local authority should not change a child's or adult's place of ordinary residence. The 'export' by local authorities of care responsibilities was thus prevented both under the children's services regime in the CA 1989, and in the adult social care regime under the NAA 1948. The Supreme Court considered it would run counter to the policy of both Acts if there was a hiatus at the moment that a child moved to adult care services, so that, on a child's 18th birthday, responsibility for the (now) adult would be 'exported' to the local authority in whose geographical area they had been placed as a child. The Supreme Court considered that section 24(1) of the NAA 1948 had to be interpreted to avoid that consequence and maintain the policy of both Acts. Wiltshire Council's placement of P in South Gloucestershire under the CA 1989 had not therefore effected any change in his ordinary residence for the purposes of section 24 of the NAA 1948. Wiltshire therefore remained responsible for him as an adult.

69. It is important to note that the Supreme Court in the *Cornwall* case recognised that the test for 'ordinary residence' is different in different statutory contexts. Thus, although it was agreed between the parties in that case that, for the purposes of the social care functions under the CA 1989 and NAA 1948, a person could be 'ordinarily resident' only in the area of one local authority at any one time (see [36]), the Supreme Court observed that is not the case in some other contexts, such as tax: see [39]-[40]. At [56], the Supreme Court also noted that the position was different as regards after care services under section 117 of the Mental Health Act 1983 (**MHA 1983**). The position as regards the MHA 1983 was considered further by the Supreme Court in the *Worcestershire* case.

The *Worcestershire* case

70. The *Worcestershire* case concerned responsibility for the provision of after-care services under section 117 of the MHA 1983. Section 117 of the MHA 1983 makes provision for after-care services in respect of persons who are compulsorily detained in hospital under section 3 of the MHA 1983 or certain other statutory provisions. Section 117(2) of the MHA 1983 places a duty on (among others) the local authority to provide or arrange for the provision of after-care services on release from detention. Section 117(3) provides that the responsible local authority is the local authority:

> (a) if, immediately before being detained, the person concerned was ordinarily resident in England, for the area in England in which he was ordinarily resident;
> (b) if, immediately before being detained, the person concerned was ordinarily resident in Wales, for the area in Wales in which he was ordinarily resident; or

> (c) in any other case for the area in which the person concerned is resident or to which he is sent on discharge by the hospital in which he was detained.

71. The patient in the *Worcestershire* case was compulsorily detained for treatment under section 3 of the MHA 1983 twice. There was no dispute that, prior to the first detention, she was ordinarily resident in Worcestershire and so Worcestershire was responsible for her after-care services by virtue of section 117(3)(a). It was decided that it was in the patient's best interests for her to be provided with after-care services closer to her daughter in Swindon and she was placed by Worcestershire in a care home in Swindon. She was then detained again under section 3 of the MHA 1983 at a hospital in Swindon. The dispute in the *Worcestershire* case was as to responsibility for her after-care services following her second discharge. The Supreme Court held that Worcestershire's responsibility for the patient had ended on her second detention. Section 117(3) then had to be applied afresh on her second discharge. Unlike in section 24(5) of the NAA 1948, section 117 of the MHA 1983 contained no deeming provision that had the effect of requiring a placement by a local authority pursuant to its functions under that section to be ignored for the purposes of determining 'ordinary residence'. Accordingly, the Supreme Court held 'ordinary residence' fell to be given its ordinary meaning, applying the *Shah* test. Once Worcestershire had placed her in the care home in Swindon, acting on her behalf in her best interests, Swindon became her 'ordinary residence'. It followed that, on release from the second period of detention, Swindon was the local authority responsible for her after-care services.

72. The Supreme Court specifically rejected the argument that the result in the *Cornwall* case should be applied to section 117 of the MHA 1983. The Supreme Court noted that section 39(1) of the CA 2014 had re-enacted the deeming provision in section 24(5) of the NAA 1948, but the Supreme Court noted that both statutory provisions were specifically limited in effect by being "for the purposes of this Act" in the NAA 1948, and "for the purposes of this Part" in the CA 2014. The Supreme Court further noted that section 39(4) of the CA 2014 specifically envisaged that 'ordinary residence' for the purposes of section 117 of the MHA 1983 might be different. The Supreme Court concluded as follows:

> 70. In agreement with the courts below, we would reject this attempt to extend the *Cornwall* decision beyond the specific context of the statutes under consideration in that case and their "parallel statutory context" (per Lord Carnwath JSC [2016] AC 137, para 58). Both those statutes contained provisions which shared the same "underlying purpose" (para 54) and the particular problem which arose was what was to happen on the transition of care responsibility from one statutory regime to the other when PH turned 18. The 1983 Act does not contain a deeming provision or other similar provision; nor does it sit in a "parallel statutory context" to those statutes. As Linden J observed 24 CCL Rep 273, para 87, "it serves a different category of person, with different needs, to those who are served by the care and support legislation."

> 71. We do not accept that section 117(3) of the 1983 Act is functionally equivalent to the deeming or disregarding provisions in the other statutes. Unlike those provisions, section 117(3) does not manifest any intention that the term "ordinarily resident" should be given anything other than its usual meaning. Section 117(3) does not state or imply that providing residential accommodation for an individual in the area of another local authority will not, or is not to be taken to, change the individual's place of ordinary residence. All it does is to specify the time at which the person's ordinary residence is to be determined for the purpose of allocating responsibility to provide and pay for their care. This carries no implication that, at the point in time at which the person's ordinary residence is required to be determined for the purpose of section 117, any special rule or test of ordinary residence different from the normal test should be applied.

73. The Supreme Court also gave guidance about the application of the *Shah* test of 'ordinary residence' in the context of legislation that does not contain deeming provisions of the sort found in section 105(6) of the CA 1989 and section 24(5) of the NAA 1948. The Supreme Court held that, in general, in the absence of such deeming provisions, a person provided with accommodation by a local authority otherwise than on a temporary basis will generally become 'ordinarily resident' in that accommodation, even if they had no effective choice as to where they live or lack the capacity to choose. Referring to Lord Scarman's judgment in *Shah*, the Supreme Court held:

> 56. … Lord Scarman went on to say, at p 344, that there are two respects in which the mind of the person concerned is relevant in determining ordinary residence. First, residence must be voluntarily adopted, so that enforced presence by reason of kidnapping or imprisonment, for example, would not generally give rise to ordinary residence. And second, there must be a degree of settled purpose: this requires that "the purpose of living where one does has a sufficient degree of continuity to be properly described as settled".
>
> 57. We think it clear in principle and from the examples given by Lord Scarman that the circumstances in which a person will not be regarded as ordinarily resident in a place because the person's presence there is involuntary are narrow and are limited to situations where the person is forcibly detained. Along with kidnapping and imprisonment, compulsory detention under the 1983 Act would fall into this category. On the other hand, the fact that someone has no other accommodation (or suitable accommodation) available to her in which to live does not prevent it from being said that she is ordinarily resident where she is living. The occupation of that accommodation is still adopted voluntarily in the requisite sense and the absence of any practical alternative only tends to confirm that her situation has the necessary degree of settled purpose to amount to ordinary residence. This situation may arise where, for example, a person dependent on a local authority for accommodation is

> only offered accommodation by the local authority in one particular place, as happened here on the first discharge.
>
> 58. The test articulated in *Ex p Shah* requires adaptation where the person concerned is someone such as JG who lacks the mental capacity to decide where to live for herself. It seems to us that in principle in such a case the mental aspects of the test must be supplied by considering the state of mind of whoever has the power to make relevant decisions on behalf of the person concerned. Under the Mental Capacity Act 2005 that power will lie with any person who has a lasting power of attorney or with a deputy appointed by the Court of Protection or with the court itself. Applying this approach, JG's residence in the area of Swindon was adopted voluntarily in the relevant sense, as it was the result of a choice made on her behalf to live in the accommodation that Worcestershire provided for her following the first discharge. Manifestly, her residence in that place was also adopted for settled purposes as part of the regular order of her life for the time being. Thus, if the term "ordinarily resident" is given its usual meaning, it is clear that immediately before the second detention JG was ordinarily resident in the area of Swindon. Indeed in these proceedings the Secretary of State has not sought to argue otherwise.

<u>'Ordinary' versus 'habitual' residence</u>

74. In the previous section of this judgment, I have set out the principal relevant authorities on 'ordinary residence'. However, there was also reference in both the Upper Tribunal and Court of Appeal decisions in *Hampshire* to 'habitual residence'. Judge West in the Upper Tribunal framed his decision by reference to both the concepts of 'ordinary residence' and 'habitual residence', although at [208] he held that, to the extent there was a difference between the two, the approach to 'habitual residence' taken by the Supreme Court in *A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening)* [2013] UKSC 60, [2014] AC 1 (***A v A***) was to be preferred. In contrast, the Court of Appeal in *Hampshire* at [72] held:

> 72. Given the inadequacies of the physical presence test, the obvious alternative is to use the test of "ordinary or habitual residence", as it was described in the judgment of the Upper Tribunal. Mr Line is right to point out that the two terms are not quite interchangeable, but I do not think it is necessary in this case to explore the distinctions between them. Ordinary residence, the more usual term in the law relating to children, is sufficient for present purposes.

75. The Court of Appeal thus based its decision on 'ordinary residence', and the parties in this appeal have accordingly framed their arguments by reference to 'ordinary residence'. I consider that to be the appropriate approach, not just because it has the endorsement of the Court of Appeal, but also because 'ordinary residence' is a domestic law concept, whereas 'habitual residence', at least in the context that it was addressed in *A v A*, is an international law concept.

'Habitual residence' is the test that applies for deciding which court has jurisdiction, and what should happen, in cases of international child abduction/removal. The Supreme Court in *A v A* held that 'habitual residence' was to be given the same interpretation in the Family Law Act 1986 as in Council Regulation (EC) No 2201/2003 (the Brussels II revised Regulation) and the Hague Child Abduction Convention.

76. It seems to me that it is important in this case, and may be important in future cases in which this issue arises, to recognise that the 'ordinary residence' and 'habitual residence' are, as the Court of Appeal put it, "not quite interchangeable", and what the differences are between the two.

77. The Supreme Court in *A v A* held that the *Shah* 'ordinary residence' test of residence "voluntarily and for settled purposes" does not apply when considering 'habitual residence': see *per* Baroness Hale DPSC at [37]-[38] and [54(v)]. The Supreme Court considered that it was inappropriate to apply a "voluntarily and for settled purposes" test in relation to cases of children because (at [38]):

> "the reference to adopting an abode "voluntarily and for settled purposes" is not readily applicable to a child, who usually has little choice about where he lives and no settled purpose, other than survival, in living there. If this test is adopted, the focus inevitably shifts from the actual situation of the child to the intentions of his parents"

78. The Supreme Court in *A v A* went on to set out the approach that should be taken to the 'habitual residence' test. The key passages from the judgments of Baroness Hale DPSC and Lord Hughes JSC were set out by Judge West at [222] and [223] of his judgment in *Hampshire*. As can be seen from those passages, the essence of the 'habitual residence' test involves considering the degree of integration by the child in a social and family environment in the country concerned. The focus is on the links between the child and the country concerned, taking account of the family's reasons for being there.

79. While it is easy to understand why the 'habitual residence' test appeared relevant to the *Hampshire* case, which was concerned with a child whose family had temporarily relocated outside of the United Kingdom, the Supreme Court's guidance in that case seems less relevant to the question that arises in this case as to division of responsibility between local authorities for children and young people who are in the United Kingdom.

80. At [224] of his judgment, Judge West drew the following conclusions as to the approach to be taken to 'habitual residence':

> 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* [(Case C-497/10 PPU) [2012] Fam 22], 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.

81. It seems to me that there is arguably some tension between Judge West's conclusions in that paragraph and the approach taken to 'ordinary residence' in the *Shah*, *Cornwall* and *Worcestershire* cases. In particular, the emphasis on what is in the mind of the parents, rather than on objective assessment, and the suggestion that there needs to be an intention "of a lasting character" to establish the residence as "the permanent or habitual centre of his interests" is arguably at odds with what Lord Scarman said in *Shah* about the 'ordinary residence' test not being a quest to identify a person's 'real home', there being no need for a deep enquiry into the mind of the individual, and it sufficing if there was a settled intention to reside in the place as part of the "regular order of his life *for the time being*". I return to this point below when dealing with Issue (2) in this case (see paragraph 100 and following).

<u>Government policy</u>

82. As the Court of Appeal noted in the *Hampshire* case, government education policy has for some time stated that, as the special educational needs legislation does not define what it means for a child or young person to be 'in' a local authority's area, the concept of 'ordinary residence' should apply.

83. The 2009 *Guidance on Looked After Children with Special Educational Needs placed out-of-authority* stated at page 4:

> 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'.

84. However, as Mr Greatorex has observed in this case, what does not appear to have been drawn to the Court of Appeal's attention in *Hampshire* is that government policy has assumed that 'ordinary residence' may be different for the purposes of a local authority's special educational needs and social services functions.

85. Thus, the 2009 consultation paper in relation to the amendment to the Belonging Regulations following the decision in the *Waltham Forest* case (see above paragraph 56(c)) explained the government's policy as follows:

> The judgement [i.e. *Waltham Forest*] 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.

86. Paragraph 10.8 of the Special Educational Needs and Disability Code of Practice 2015 (**the Code of Practice**) provides:

> 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.

87. The current guidance on *High needs funding: 2026 to 2027 operational guide* (updated 5 June 2026) (***the High needs funding guidance***) shows that it remains government policy and understanding that 'ordinary residence' is the test for the purposes of section 24 of the CFA 2014, but that this does not mean that the same local authority is responsible for a child or young person for both their social services needs and special educational needs. Section 17 / Annex 5 deals with "responsibility for children and young people who move between local authorities". The relevant part of the guidance is set out below. It will in particular be noted that for looked-after children provided with accommodation by a local authority in another local authority's area, the 'parent' local authority will remain responsible for the child's social services needs, but it is envisaged the local authority in which the child is living will be responsible for their special educational needs. The guidance explains that this is because it is preferable for the local authority with the relationship with the local schools to be responsible for determining and making the provision for children with special educational needs:

> Under the Children and Families Act 2014 local authorities are responsible for children and young people with SEN who are ordinarily or habitually resident in their area. These duties are based on where the child or young person lives and not on where they are educated. Where a child or young person is educated outside the local authority area where they usually live, it is the local authority where the child normally

lives that is responsible for conducting the EHC needs assessment and issuing an EHC plan, where necessary and for securing and funding that provision.

Some children and young people may require residential educational placements (particularly those with the most complex needs). In such cases, it is our view that the child or young person continues to be considered as living in the local authority area that placed them in the residential provision. A residential school or college placement, even for 52 weeks of the year, is educational provision and not a place where a child or young person lives, meaning the child or young person will remain resident at their family home. Therefore, they would continue to have the duty to maintain any EHC plan.

The high needs allocations include an import/export adjustment so that local authorities are compensated for the high needs place funding for schools and colleges. Place funding is paid directly to the schools and colleges either by the local authority that maintains the school or by DfE in the case of academies, NMSS and colleges.

Where a child or young person moves from the area of one local authority into the area of another (for example, changes where they usually live), the new local authority becomes responsible for meeting the statutory SEN duties (as detailed in the SEND code of practice sections 9.157 to 9.162). This may happen where a child's family moves, or if a young person decides to remain living where they have been educated. If the child or young person already has an EHC plan, the old local authority is required to transfer the EHC plan to the new local authority on the day of the move, or within 15 working days of becoming aware of the move. The new local authority then becomes completely responsible for maintaining the plan and funding the specified educational provision. The new local authority must review the EHC plan within 12 months of the plan being made or being reviewed by the old local authority, or within 3 months of the plan being transferred (whichever is later). The new local authority may conduct a new EHC needs assessment, regardless of when the previous EHC needs assessment took place, since local variations may mean that arrangements in the original EHC plan are no longer appropriate.

17.1 Looked-after children (LAC)

Looked-after children (LAC) are those who have been taken into care or who are being provided with accommodation by a local authority in its statutory role under the Children Act 1989. More than half of looked- after children have some form of SEN, and it is likely that a significant proportion of them will have an EHC plan. A significant proportion of looked-after children live with foster parents or in a children's home and attend schools in a different local authority to the local authority that looks after them. *The Care Planning, Placement and Case Review Regulations*

> *2010* distinguish between the responsible authority (the local authority that looks after the child) and the area authority (the local authority in which the child is placed). Local authorities placing looked-after children in another local authority's area (for example, with foster parents) need to be aware of that other local authority's SEND local offer if the children have SEN. Where an EHC plan assessment has been started, it must be carried out by the local authority where the child lives (is ordinarily or habitually resident) which may not be the same as the local authority that looks after the child, as set out in section 10.8 of the SEND code of practice.
>
> If a disagreement arises, the local authority that looks after the child acts as the corporate parent in any disagreement resolution.
>
> When a local authority places a looked-after child with an EHC plan in another local authority's area (for example, with foster parents), the local authority where the looked-after child lives (is wholly or mainly resident) becomes responsible for maintaining their EHC plan, in the same way as any child or young person who moves from one local authority's area to another. The policy intention behind this is that the local authority where the child lives knows their local schools and educational provision better, so they are better able to assess whether the child needs special educational provision on top of what is ordinarily available.

88. The guidance continues by referring to arrangements currently in place for requiring the ‘parent’ local authority to reimburse the authority in which the child is placed for the costs of their special educational provision, and a plan to extend that for young people aged 16 and 17:

> The Inter-authority Recoupment (England) Regulations 2013 permit the local authority where a looked-after child with an EHC plan lives to recoup the cost of primary or secondary education, which includes additional special educational provision (for example, the costs of top-up funding), from the local authority responsible for looking after the child. Having consulted on changes to these regulations over the summer of 2025, we are currently planning work to revise or replace the regulations. We plan to include the following key changes:
>
> - require the cost of the education of a looked-after child with an EHC plan or in a special school to be met by the local authority that looks after the child and that has made the out-of-area placement.
>
> The per pupil costs recouped should exclude the mainstream school NFF funding received by the local authority for pupils attending their mainstream schools ensure that home to school transport costs can also be recouped, and allow for inter-authority recoupment for eligible care leavers, defined as those young people aged 16 to 17 who are still in care (that is, remain legally looked-after and under the formal responsibility of a local authority) and preparing to leave by virtue of turning 18.

The changes recognise that certain local authorities attract a disproportionate number of looked-after children from other local authorities because of the number of children's or foster homes operating in their area. We will provide more guidance on the detail of the new requirements to accompany the revised or new regulations. Until we can make the intended changes to regulations, which will in any case be subject to Parliamentary approval, local authorities are encouraged to come to an agreement on how the costs of educating looked-after children are funded, based on the threefold approach outlined above.

89. Finally, the guidance recognises that the position may be different for young people aged 19-25, whose 'ordinary residence' for all purposes is likely to be the local authority in which they are living, even when they are placed in that accommodation by a different local authority:

17.2 Post-19 provision for young people accommodated under the Care Act 2014

For a young person aged 19 to 25, the local authority where they live is responsible for conducting any EHC needs assessment, issuing an EHC plan where necessary, and for securing and funding that provision. Children cease to be looked after when they are over the age of 18 (some children will cease to be looked after at 16 or 17 years old and others will continue to be looked after until their 18th birthday). The Inter-authority Recoupment (England) Regulations 2013, and so do not apply to young people aged 19 or over. Once they are no longer looked after, the recoupment regulations no longer apply.

This should not matter as the local authority where the young person lives will have been funded through the high needs funding formula to meet the costs, in the same way as for any other young person who lives in their area.

Some care leavers will remain living with their former foster parents past their 18th birthday in staying put arrangements, but they are no longer looked after. The local authority which looked after a child remains responsible for meeting their leaving care duties regardless of where the young person may now be living in England or Wales (section 23A (4) of the Children Act 1989). This includes providing the young person with support for the expenses associated with living near where they are seeking work, working, or receiving education or training.

Decisions on adult social care placements may change the local authority responsible for making SEN provision. It is our view that, where a young adult is accommodated under the Care Act 2014 in a residential adult social care placement (as opposed to residential education) made on a long-term basis (for example, with the intention that it is to be permanent for the foreseeable future), it is likely to be considered to be a change in the adult's residence. Therefore, if a young person aged 19 to 25 has been accommodated under the Care Act 2014, in a permanent residential care placement in a different local authority area, it is likely they will have moved into the area of the new local authority, unless there are factors indicating otherwise. Therefore, for the purposes of the Children and Families Act 2014, the new local authority would be responsible for securing and maintaining any EHC plan.

Discussion and analysis of the issues that arise in this case

<u>Issue (1): Does the First-tier Tribunal have jurisdiction to determine which local authority is responsible for a child or young person in the context of an appeal under section 51 of the CFA 2014?</u>

The parties' positions

90. Before the First-tier Tribunal, the parties were in agreement that the First-tier Tribunal had jurisdiction to determine which local authority was responsible for TE, as part of its case management powers. Prior to the decision of Judge Lom that has been appealed in this case, the First-tier Tribunal had already thrice exercised its power under rule 9(1) of the *Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008* (SI 2008/2699) (**the FTT Rules**) to substitute Barking and Dagenham for Waltham Forest, then Enfield for Barking and Dagenham and then exercised its power under rule 9(2) to add Haringey as a second respondent for the purposes of a hearing at which to consider which authority was the proper respondent to the appeal.

91. On this appeal, Enfield has sought to argue that the First-tier Tribunal does not have jurisdiction to determine that question, on the basis of what was said by Nicol J in the *Kent* case at [143] (see above paragraph 48). It has done so because Judge Eden, when granting permission to appeal, identified this as an issue on which the Upper Tribunal's guidance was required.

92. Counsel for TE have argued that Enfield is 'estopped' from running this argument on appeal. However, a party may be permitted on appeal to withdraw a concession made below if it is in the interests of justice to allow them to do so. In this case, it was helpful to the Upper Tribunal that Enfield presented the arguments against the First-tier Tribunal having jurisdiction to determine this issue as it has enabled me to consider the issue on which the First-tier Tribunal sought guidance with the benefit of full argument. There is no prejudice to TE because I have decided that the parties and the First-tier Tribunal were correct in their initial view that the First-tier Tribunal does have jurisdiction to determine this issue.

My decision

93. Nicol J in *Kent* was correct that there is no right of appeal to the First-tier Tribunal against the merits of a decision by a local authority that it is, or is not, responsible for a child or young person. Nor is there any right of appeal to the First-tier Tribunal against a decision by a local authority under regulation 15 of the SEND

Regulations to transfer, or not to transfer, or not to accept a transfer of, an EHC plan from one authority to another. However, as the *Hampshire* case shows, the First-tier Tribunal may need, as part of considering an appeal under section 51(2)(f) against a decision to cease to maintain an EHC plan, to deal with the question of whether the local authority is lawfully able to do so on the basis that it is no longer responsible for the child or young person under section 45(1)(a) of the CFA 2014.

94. In my judgment it is also clear that the First-tier Tribunal has jurisdiction to decide who is the appropriate respondent to any appeal brought under section 51 of the CFA 2014. The right of appeal under that section lies against the decisions and actions of "a" local authority in relation to the assessment of a child or young person's EHC needs or their EHC plan, and the First-tier Tribunal's powers on such an appeal (set out in regulation 43 of the SEND Regulations) are powers to order "the" local authority to take various steps in relation to the child or young person or their EHC plan. The First-tier Tribunal can only do justice in the particular case if it has as respondent to the appeal the local authority that is responsible for that aspect of the child's or young person's needs or provision that is engaged by the appeal, i.e. for the assessment of that child's or young person's EHC needs, or for the maintenance of their EHC plan. I put it like that, rather than simply saying that the respondent to the appeal must be the local authority who is 'responsible' for the child or young person for the purposes of section 24 of the CFA 2014 because, as I have explained at paragraphs 38-46 above, the fact that a local authority is 'responsible' under that section 24 does not necessarily mean that they are the local authority upon whom the various duties in the Act fall.

95. If the First-tier Tribunal were to proceed with an appeal with a local authority named as respondent who was not actually responsible for the child or young person (in the relevant sense), any decision taken would be liable to be set aside as unfair on the basis that a person affected by it did not have a fair opportunity to participate in the proceedings. Moreover, this may not be a simple formality: a change in responsible authority will often change the factual picture so far as the appeal is concerned. Services available to a child or young person as part of the Local Offer in one local authority may not be available in another, or the costs of a placement or transport may be different. It is therefore very important that the 'right' local authority is at all times named as the respondent to the appeal, and able to participate in it.

96. That is not to say, of course, that a local authority who is, or becomes, responsible for a child or young person during the course of an appeal, or shortly after an appeal is decided, is able to 'unpick' decisions taken earlier in the proceedings on the basis that they were not then named as respondent. That is inherent in the notion that the First-tier Tribunal's power under regulation 9(1)(a) is to "substitute" a respondent, i.e. replace one with another so that the new respondent stands in the previous authority's shoes. It is also consistent with the scheme under the CFA 2014 and the SEND Regulations that a local authority that acquires responsibility for a child or young person is generally bound by what was done by the previous local authority. In particular, that is the effect of regulation 15(3)(a)

of the SEND Regulations (albeit that regulation 15(3)(b) also recognises that there may be a need for re-assessment of need or amendment of the EHC plan on transfer because of the different circumstances of the new local authority). However, a decision taken by the First-tier Tribunal at a time when the 'wrong' local authority was named as respondent would be liable to be set aside if not 'adopted' or accepted by the 'right' local authority, unless on the facts there was no material unfairness (compare *UW v Cheam Academies Trust (SEN)* [2026] UKUT 53 (AAC) at [29]).

97. It is thus clear that the First-tier Tribunal does have power to determine which local authority is the proper respondent to the proceedings as a necessarily implicit element of its jurisdiction under section 51 of the CFA 2014, regulation 43 of the SEND Regulations, and rule 9 of the FTT Rules. The jurisdiction is implicit because the First-tier Tribunal must conduct proceedings fairly, giving the relevant parties an opportunity to be heard and making orders at the end of the proceedings against the local authority that has the responsibility to carry them out.

98. I am also satisfied that the First-tier Tribunal must decide for itself who is the proper respondent to the appeal at any particular time. The First-tier Tribunal is not merely reviewing the decision of the local authority. I reach that conclusion because that seems to me to be a necessary consequence of my foregoing analysis of the First-tier Tribunal's powers and duties. My conclusion is also consistent with what the Court of Appeal said in the *Hampshire* case about the First-tier Tribunal necessarily having jurisdiction to determine whether Hampshire had complied with regulation 31 of the SEND Regulations and/or was the responsible authority for the purposes of section 45(1)(a) of the CFA 2014 in the context of that appeal. Such a conclusion also avoids the obviously undesirable alternative result of First-tier Tribunal proceedings needing to be further delayed while parties seek judicial review in the High Court on such issues.

99. In cases such as the present where what is in issue is whether responsibility for the maintenance of a child or young person's EHC plan has transferred from one local authority to another, the specific task for the First-tier Tribunal will be to decide, by reference to regulation 15 of the SEND Regulations, read together with section 24 of the CFA 2014, whether the 'old' local authority has properly (or properly should have) transferred responsibility to the 'new' local authority under that regulation. That will depend on whether the child or young person has 'moved' within the meaning of regulation 15, which in turn depends on whether their 'ordinary residence' has changed. That is because: (i) as explained at paragraph 44 above, to be *intra vires* the enabling Act, regulation 15 only provides for a transfer between local authorities where responsibility under section 24 has changed; and (ii) the Court of Appeal's decision in *Hampshire* is binding authority that whether or not a child or young person is 'in' a local authority's area for the purposes of section 24 is to be determined by reference to an 'ordinary residence' test.

Issue (2): What approach is to be taken to 'ordinary residence' under section 24 of the CFA 2014?

The parties' submissions

100. Although the parties agree, in the light of the Court of Appeal's decision in *Hampshire*, that 'ordinary residence' is the test, they are not agreed as to what that test is or whether the judge erred in her application of it in this case.

101. Ms Hadfield, on behalf of Enfield, argues that 'ordinary residence' must be given essentially the same meaning for the purposes of section 24 of the CFA 2014 as it is for the purposes of the local authority's social services functions under the CA 2014, the NAA 1948 and the CA 1989. She argues that it cannot have been intended that a child or young person's education file should change hands as often as TE's has in this case. She submits that if 'ordinary residence' means different things for social services and education functions, this is a recipe for confusion that leads to inconsistent decision-making and gaps in provision for children and young people as they are passed between authorities. She points out that it means that local authorities can 'export' their responsibility for a child or young person's special educational needs, which is contrary to policy as the Supreme Court held in *Cornwall*. She submits that, in line with the Supreme Court's decision in *Cornwall*, in general any accommodation provided by a local authority in the exercise of its social care functions should be ignored when it comes to determining a child's 'ordinary residence' for the purposes of the CFA 2014. She submits that the First-tier Tribunal accordingly erred in deciding that Enfield was responsible for TE's EHC plan when it is Haringey who has always been responsible for his social care needs and who has taken all the decisions about where he should live since he ceased living with his mother.

102. Mr Greatorex for Haringey (with whom Mr Coyle for TE broadly agrees) submits that 'ordinary residence' does not mean the same thing under the CFA 2014 as it does under the social care legislation. He submits that it is clear from the *Cornwall* and *Worcestershire* cases that 'ordinary residence' can have different meanings in different statutory contexts. The decision in *Cornwall* was policy-driven and did not establish a general rule. In the absence of those policy factors, the *Worcestershire* case shows that the 'ordinary residence' of an adult may change from one local authority to another if they are provided with accommodation in a different authority. Although government policy cannot determine the meaning of legislation, government policy in relation to special educational needs has been clear that 'ordinary residence' for the purposes of education and social care functions may be different and that, in general, a child or young person's 'ordinary residence' will correspond to the geographical area in which they are living, even if they were placed in that area by a different local authority which is their 'ordinary resident' for the purposes of the local authority's social care functions. Accordingly, Mr Greatorex submits that there was no material error in the First-tier Tribunal's decision. At the time that the decision under appeal was made, the First-tier Tribunal was right that Enfield was the responsible authority.

My decision

103. I agree with the parties that the Court of Appeal's decision in *Hampshire* means that 'ordinary residence' is the test that applies under section 24 of the CFA 2014. Although the parties have not suggested it does, I have considered carefully whether the Court of Appeal's decision could be said also to have determined the issue that I need to decide about *what* the 'ordinary residence' test is in this context. I noted at paragraph 58 above that it is possible that the Court of Appeal assumed that adopting an 'ordinary residence' test would result in responsibility for special educational needs being the same as for social services. However, the Court's judgment does not actually say that and the issue that arises on this appeal was not raised in the Court of Appeal. There also does not appear to have been any reference, either in the Upper Tribunal or the Court of Appeal, to the *Worcestershire* case. This means in my judgment that, not only has the Court of Appeal not determined the issue that arises in these proceedings, but also little weight can be given to what was said about the *Cornwall* case in the Court of Appeal's judgment. That is because the *Cornwall* case takes on a very different complexion when read together with the Supreme Court's judgment in *Worcestershire*.

104. I have set out my analysis of the Supreme Court decisions in *Shah, Cornwall* and *Worcestershire* above at paragraphs 62-73 above. It seems to me that, once those decisions are properly understood, the answer to the question that arises in this case is clear. In short, 'ordinary residence' for the purposes of section 24 of the CFA 2014 is to be determined by reference to the *Shah* test, as further developed and explained in the *Worcestershire* case.

105. I reach this conclusion for the following reasons:-

    a. According to the Supreme Court in *Worcestershire*, unless explicit or implicit provision is made in the relevant legislation to the effect that time spent in accommodation provided by a local authority is to be ignored when determining a person's 'ordinary residence', that time must be considered in the same way as periods of residence in other accommodation. In other words, the *Worcestershire* case is determinative of the 'ordinary meaning' of 'ordinary residence'. For the reasons explained by the Supreme Court in *Worcestershire*, the approach taken by the Supreme Court in *Cornwall* was a purposive interpretation, driven by policy concerns and the particular statutory context of the CA 1989 and the NAA 1948.

    b. There is no explicit provision in the CFA 2014 along the lines of the deeming provisions in section 105(6) of the CA 1989, section 24(5) of the NAA 1948 or section 39(5) of the CA 2014.

    c. Nor is there any basis for implying such provision:

        i. Parliament did not choose to use the term 'ordinary residence' in the CFA 2014, whereas it did use it in the CA 2014 passed the same year. That tends to suggest that there was no Parliamentary intention for the approach to 'ordinary residence' that applies in the social services context also to apply in the special educational needs context.

ii. On the face of section 24, Parliament determined that a 'mere presence' test should apply in the special educational needs context. In my judgment, the fact that the Court of Appeal regarded that as unworkable and in need of 'watering down' to an 'ordinary residence' test is not a basis for moving yet further away from a 'mere presence' test by implying deeming provisions akin to those in the social services' legislation.

iii. There is nothing in the statute itself (or any other materials that might legitimately be prayed in aid when construing a statutory provision). This is unsurprising given that it is clear from paragraphs 82-89 above that it has for many years been government policy that the local authority responsible for a child or young person's special educational needs should be the local authority of the area in which they are living, even if they were placed in that area by a different local authority. The current *High needs funding guidance* explains the rationale for this as being "that the local authority where the child lives knows their local schools and educational provision better, so they are better able to assess whether the child needs special educational provision on top of what is ordinarily available".

106. It follows that the question of whether a child or young person is "in" a local authority's area for the purposes of section 24 of the CFA 2014 is to be determined by reference to what I shall term the 'ordinary' 'ordinary residence' test from *Shah*, as further developed and explained in the *Worcestershire* case. In summary, translating that approach to the special educational needs context, that means the following principles apply:

a. If the child or young person is in England, then one local authority will be responsible for their special educational needs for the purposes of Part 3 of the CFA 2014. This may not be the same authority as is responsible for providing them with social care or accommodation.

b. A person is ordinarily resident in a place for the purposes of Part 3 of the CFA 2014 if they have adopted that place voluntarily and for settled purposes as part of the regular order of their life for the time being, whether of short or of long duration (the *Shah* test).

c. In the case of a child or young person who lacks capacity to decide where they live, the mental aspects of the *Shah* test must be supplied by considering the state of mind of whoever has the power to make relevant decisions on behalf of the person concerned, i.e. the parent(s) if the child or young person is living with their family, the local authority if the child is a looked after child or the Court of Protection or a Deputy if the young person is an adult without capacity (*Worcestershire* at [58]).

d. A child or young person who has capacity to decide where they live is to be regarded as having adopted accommodation voluntarily even if they have in practice no choice but to accept accommodation provided by the local authority (or their family or another person – the same principle would apply regardless of who was offering the accommodation) (see *Worcestershire* at [57]).

e. The only cases in which it is likely a child or young person would not be regarded as adopting a residence 'voluntarily' are those where the child or young person is involuntarily kidnapped or detained (as happened in TE's case when he was detained under section 3 of the MHA 1983). Cases where the child or young person is placed in secure accommodation or is subject to living or care arrangements that constitute a deprivation of liberty might also fall in this category (see *Worcestershire* at [57]).

f. Residence may be settled even if it is only for a limited period and regardless of whether the purpose of the residence is education, business, employment, health, family or love of the place. The assessment should be as objective as possible, and does not require a deep enquiry into the mind of the relevant individual who has made the decision to move. Nor is it a question of ascertaining someone's "real home" (see *Shah* at 344D-345B).

g. The point does not arise for decision in this case, but I add that it is important to remember that although a person's purpose in moving to an area may be in order to undertake education, that does not mean that the 'ordinary residence' of a child or young person attending a residential school or educational institution changes from their home to the school/institution. The current High Needs Funding Guidance (above paragraph 87) reflects the *Shah* approach to ordinary residence in stating that 'ordinary residence' is "based on where the child or young person lives and not on where they are educated". The Guidance goes on to state that this will also be true for a child or young person placed in a 52-week residential educational placement. It seems to me that whether or not that is correct in a particular case may depend on the particular facts: a child or young person placed jointly by education and social care may in fact be 'living' at the placement and not just being educated there.

h. Another point that does not arise for decision in this case, but should be noted for completeness, is that in *Shah* it was held that residence could not be ordinary if it was unlawful. However, it is possible that principle may not apply under the CFA 2014 given the purpose of the Act and the general protective approach taken to children: compare *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98, where the House of Lords held that the fact that residence was unlawful did not prevent it being 'habitual', though see paragraphs 74-81 above for the differences between the 'habitual' and 'ordinary residence' tests.

i. Finally, temporary absences do not affect a person's ordinary residence as the *Hampshire* case shows. Emergency placements, temporary moves as a result of family crisis or to follow a parent's job for a short period are all types of case where ordinary residence is unlikely to change. However, I would caution that, in the ordinary run of cases, it will be rare that a relocation intended from the outset to last more than a whole school year will be regarded as a temporary arrangement rather than as a period of ordinary residence in the new place. It is clear from *Shah* itself (above, paragraphs 62-63) that a person may be 'ordinarily resident' in a place where it is their 'settled' purpose to adopt that new place as their abode as part of the regular order of their life 'for the time being' or for a limited period. While I do not doubt the correctness of the decision in *Hampshire* on the facts of that particular case (involving as it did consideration of the Armed Forces covenant and a period of time abroad), the same result for the child could have been obtained by holding that it was wrong for the local authority to cease to maintain the EHC plan just because the child's family had moved abroad in circumstances where: (i) it was known that the family would be returning; (ii) maintaining the EHC plan was lawful; and (iii) would cost the local authority nothing; but (iv) would be in the child's interests so as to avoid the need on his return to re-start the statutory assessment process. If the facts of the *Hampshire* case were transposed to a relocation by a family for that sort of duration between local authorities in England, it is likely that the child's 'ordinary residence' will move to the new authority, and then back again when the child returns. The child would then be able to benefit (in line with government policy) from the fact that the new local authority would be more familiar with the schools in the area and thus better able to fulfil their responsibilities under the EHC plan, including organising the Annual Review.

107. It follows in my judgment that the First-tier Tribunal in this case did not materially err in law. In particular, Judge Lom was right not to assume that TE's ordinary residence for the purposes of the CFA 2014 was the same as it was for the CA 2014, and she was right that his ordinary residence could be the supported accommodation provided for him in Enfield. There has been no challenge to the judge's finding of fact that it was not the intention that TE's accommodation in Enfield should be temporary or transitory. I must therefore proceed on the basis that finding of fact was correct and, if it was, then Judge Lom was right to find that TE was 'ordinarily resident' in Enfield. There was no material error of law in her approach.

108. I add this: I acknowledge that in TE's case a series of placement breakdowns has apparently resulted in repeated changes of 'ordinary residence' and thus repeated moves of his education file. Such rapid changes are unlikely to be in the interests of any child or young person, but the fact that the law as I find it to be results in what may be perceived by some as an undesirable outcome in this case

and other cases like it is an issue for the legislature to address if it wishes. Likewise, any funding implications are not matters for the Upper Tribunal.

Issue (3): Adequacy of the First-tier Tribunal's reasons

109. In the light of my conclusion on Issue (2), I add only these further, brief, observations about the First-tier Tribunal's reasons. As I have indicated, despite not having had the benefit of the Court of Appeal's decision in *Hampshire*, the First-tier Tribunal in substance properly directed itself as to the relevant legal principles and applied those correctly to the facts before it. The appellant is right to point out that the First-tier Tribunal's reasons also mention the irrelevant consideration that Enfield had "most recently engaged with the appeal as the respondent". This is irrelevant to the question of 'ordinary residence' because that is a question of law and fact to be determined in accordance with the principles set out in this judgment. Administrative convenience and pragmatism cannot change the legal position, although that is not to say that in an appropriate case it might be permissible for two local authorities to agree that one will act as respondent to an appeal and the other will be bound by the result regardless of who is responsible in law. In such an event, it would be a matter for the First-tier Tribunal to decide whether it considered it appropriate to proceed on that basis. In the event of a dispute, however, as there was in this case, the First-tier Tribunal must determine the question itself.

110. In this case, as I read the decision, Judge Lom referred to Enfield's recent role by way of a recital of the history of the matter and did not give it any weight in her assessment of 'ordinary residence'. As such, there was no error of law. Even if I am wrong and she did give the factor weight, it is plain the outcome would have been the same in any event. Any error was not therefore material.

Disposal

111. It follows that I must dismiss the appeal against Judge Lom's decision, which was correct when she made it. The position may now be different. If so, if the parties are unable to agree what the current position is, applying the principles set out at paragraph 106 above, then the First-tier Tribunal will need to determine the issue at the next case management hearing.

Holly Stout
Judge of the Upper Tribunal

Authorised by the Judge for issue on 14 July 2026