Case No: C/2002/1130

Neutral Citation Number: [2003] EWCA Civ 09
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
(MR JUSTICE STANLEY BURNTON)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Date: Monday 20th January, 2003

Before :

LORD JUSTICE SCHIEMANN
LADY JUSTICE HALE
and
LORD JUSTICE JONATHAN PARKER

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Between :

"E" — Appellant
- and -
(1) LONDON BOROUGH OF NEWHAM
and
(2) THE SPECIAL EDUCATIONAL NEEDS TRIBUNAL — **Respondents**

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(Transcript of the Handed Down Judgment of
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David Wolfe (instructed by Levenes Solicitors) for the Appellant
Andrew Thompson (instructed by London Borough of Newham Legal Services) and
Nathalie Lieven (instructed by SENT) for the Respondents

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# Judgment

Lord Justice Schiemann :

Introduction

1. This is the judgment of the court. The important issue raised in this appeal concerns the degree of specificity required by law in Statements of Special Educational Needs ("SEN") made under s.324 of the Education Act 1996. More particularly the appeal raises the question of the extent to which a Special Educational Needs Tribunal ("a tribunal") may leave to a special school the quantification of special needs provision to be made for a child.

2. Before the Court is an appeal by R's parents from a decision of Mr Justice Stanley Burnton [2002] EWHC 915 (Admin) who dismissed their appeal from a tribunal. He reviewed a considerable number of cases in which this question has already been considered by the High Court. Only one has so far reached this court : *Bromley LEA v Special Educational Needs Tribunal* [1999] ELR 260.

3. R was born on 17 March 1991. He is severely disabled. He suffers from severe visual impairment, spastic quadriplegia, communication and eating and drinking difficulties, learning difficulties and associated ill-health. He is dependent on a wheelchair for mobility and is fully dependent on others for his personal and self-care needs. His parents have for a long time not been satisfied by the arrangements made by the Local Education Authority ("the LEA") for his education. As a result R's educational provision has been intermittent. He was out of school for almost 18 months between May 1999 and November 2000, when he started at a Dominican Foundation school for children with physical difficulties and associated complex disabilities. In January 2001, R's parents formed the view that he was very unhappy at the school and that they had been misled as to the provision available, and they withdrew him on 26 January 2001 when he was nine. On 10th October 2001, the date of the hearing before the Tribunal, therefore, he had been out of school for almost 9 months, and had been in school for only 3 months between May 1999 and October 2001. Since then he has largely been kept from school although we understand that he was returned a month or so prior to the hearing before us.

4. The dispute between the parents and the LEA is unfortunately typical of a number which come before the courts. The task of caring for a child with such difficulties must be physically and emotionally draining. The parents wish the best for their child and fear that, unless compelled by law, the LEA will not provide the best. It is not that they fear lack of goodwill from the LEA. But they know, as everyone knows, that resources are not unlimited and they fear that scarcity of resources will lead the LEA to devote less money to their child than would be ideal. The LEA say that what they propose for the child is the best that can be done and has not been arrived at for reasons of lack of resources.

5. The legal weapon for which the parents reach in circumstances such as the present is now contained in Part IV of the Education Act 1996 which provides for the formulation of a statement of a child's special educational needs in which those needs are set out, as is the provision to be made for meeting them. The Act, coupled with Regulations and a Code made under it, provides a complex legal framework within which the statement is to be formulated. The parents are much involved, as are various professionals. In due course the LEA formulates the statement. If the parents are unhappy with it they can appeal, as these

parents did, to a tribunal which, as this one did, can amend the statement. There is then the possibility, grasped on this occasion by the parents, of a further appeal to the High Court and thence to this court. In the present case this procedure has taken some years. There is a possibility of amending the statement but, as in the present case, this does not always solve the dispute. It does not require a genius to see that the uncertainty during the appellate process is likely to be harmful to the child and that parents' understandable desire for what they see as the best may result in a failure to achieve the good.

The statement

6. The statement with which we are concerned as amended by the tribunal sets out in part 3 various objectives with none of which the parents take issue. It continues:-

> "R should have access to a broad and balanced curriculum which is carefully differentiated in terms of learning opportunities and resources to meet the needs identified in this statement.
>
> R will need access to a development (sic) and multi-sensory environment. An Individual Education Plan should be developed following assessment by a speech and language therapist, occupational therapist and physiotherapist which will offer a fully integrated teaching and therapy programme. Speech and language therapy, physiotherapy and occupational therapy to be provided by Newham Health Trust and reviewed on a termly basis.
>
> He needs to have access to and the opportunity to socialise with other children of his own age.
>
> A specific review of R's mobility needs should be undertaken as soon as he is placed in a school. (See appendix E, occupational therapist advice). His physical environment needs to accommodate both the people and the equipment needed to support him. To be able to access any environment with maximum potential he needs wheelchair access, space and light. To enable him to participate in curriculum and learning activities he also needs appropriate equipment to maximise his physical and visual potential. Functional mobility also includes how R is to be transferred from one position to another. It is foreseen that R will need:
>
> - a specialised posturally supportive seat, so that he can access the curriculum and socialise with his peers
> - a standing frame
> - switch access equipment for communication and environmental control with necessary accessories and software
> - access to a touch screen for ICT use
> - adapted work surfaces, (i.e. Angled work top, colour contrasts on tables)

- adapted utensils, (i.e. Built up handles for pencils, paintbrushes, etc, cuffs for the back of his hands)

- toileting equipment

- adapted crockery and cutlery-to encourage him to participate during mealtimes

His medical condition should be monitored. Any significant changes should be shared with appropriate professionals with consideration given to how changes could affect his learning.

*Educational provision to meet needs and objectives*

R should have access to a broad and balanced curriculum, including the National Curriculum differentiated to take account of his needs as identified in this statement. Within the National Curriculum, R should be involved in a carefully designed developmental programme that focuses on developing skills in small steps. The allocation of work within the curriculum and its differentiation remains the responsibility of qualified teachers.

R should attend the Authority's provision for pupils with severe learning difficulties where a structured and individual learning programme will be designed and implemented with opportunities for individual work, small group work and whole class teaching. An agreed plan should be drawn up to ensure his successful return to full-time schooling, allowing him time to adjust to the mental and physical demands of the school day.

He should be supported within a ratio of 6 pupils to 3 adults (to include 1 teacher).

Teachers working with R should work to establish links into a mainstream school. During his time within the mainstream school he should receive full time support from a learning support assistant in addition to support normally available from SEN staff in the school.

The school is responsible for the development and implementation of the Individual Education Plan ("IEP") with advice from other professionals. The school should ensure that the IEP is reviewed regularly, as part of an ongoing process and in accordance with the recommendations in the Code of Practice. Targets in the IEP should be measurable and time limited so that progress against the targets can be demonstrated and evaluated.

R should be encouraged to share in the recording process and in monitoring and evaluating his own performance. The school should ensure that R understands the agreed outcome of any intervention and how he can be a partner in working towards the agreed goals. Parents should also be involved with the development of the IEP.

> R will receive teaching and monitoring on at least a weekly basis from the Newham Service for the Visually Impaired from a teacher who is trained and/or experienced in working with pupils with sensory impairment.
>
> *Monitoring*
>
> The statement will be monitored by the authority at Annual Review. Progress should be monitored by the school by regular and ongoing reviews of the Individual Education Plan in accordance with the Code of Practice. An initial review will take place in January 2002.
>
> At each review links into the mainstream should be evaluated and consideration should be given to increasing R's time in the mainstream. Staff at the named school, the mainstream link and R's parents should work closely together to review this progress."

7. The remainder of the statement was not in issue before us. Part 4 deals with the school proposed. Part 5, under the heading of non-educational needs, states

> "R would benefit from regular access to speech and language therapy, occupational therapy and physiotherapy as arranged by Newham Health Trust."

8. Part 6, under the heading of non-educational provision, states

> "Access to speech and language therapy, occupational therapy and physiotherapy as arranged by Newham Health Trust."

9. It can be seen that although broad guidelines are given in the statement much is left to be decided by others in the future. The parents complain of this and submit that there is no point in having a tribunal if it does not decide but instead leaves it to others to decide. The tribunal makes the point it can only act on the material before it and it did not have sufficient material to make a detailed prescription. To this the parents reply that the tribunal should have adjourned in order to obtain any further material which might be required. To this the tribunal ripostes that an adjournment was not asked for, that any further delay would have been harmful to the child and that any assessment was best done on the ground in the school rather than at the end of a long period of absence from school.

The proceedings before the Tribunal

10. The most important of the disputes between R's parents and the LEA until towards the end of the proceedings before the tribunal concerned the school he should attend. There was a further and connected dispute in relation to the therapies he should receive.

<u>The dispute as to the school</u>

11. The LEA considered that R's needs could be met at a named special day school ("the LEA School") maintained by it for pupils aged 3-16 with a variety of needs, including profound and multiple learning difficulties, complex and severe medical needs, sensory needs and severe learning difficulties. R's parents are practising Roman Catholics and wanted R to have the benefit of a Roman Catholic education. They also wanted him to be integrated with his mainstream peers. They wanted him to attend a Roman Catholic mainstream primary school, and consequently for that school to be named in Part 4 of the Statement. However, after a break during the hearing, the solicitor representing R's parents informed the Tribunal that, whilst they remained convinced that a mainstream placement was appropriate for R, they accepted that it might be difficult for him to start there immediately because of the length of time he had been out of school and his need for specialist input. The Tribunal were told that if the LEA School was to be named in the statement, R's parents would want an early review to take place in January 2002. So the school chosen by the LEA remained the one named in the statement and there has been no appeal in relation to that. The issues which remained to be decided had thus to be resolved in the context of a child at a special day school for children with a variety of educational and medical needs.

The therapeutic input

12. R's parents contended before the tribunal that he should receive two one-hour sessions a week of physiotherapy, two two-hour sessions a week of speech and language therapy and one hour weekly of occupational therapy, in addition to two hours a week with a qualified teacher for the visually impaired. Part 3 of the LEA's statement did not quantify the therapy to be provided for R in such terms, and his parents contended that it should do so.

13. As regards specifying the exact amount of therapeutic input which R should receive Mr Hourigan, the LEA's Head of Special Needs Assessment, felt that that would not be helpful. It was the LEA's view that R should attend a special school which could cater for his complex needs and where physiotherapy, occupational therapy and speech and language therapy would be integrated into R's Individual Education Plan ("IEP"). The therapists would assess R's needs and provide a combination of direct contact and supervision for staff who would be trained to carry out the individual programmes. Therapeutic input would be provided by the Newham Primary Care Trust which had an agreement with the school the LEA was proposing. Mr Hourigan also pointed out that the existing provision in the statement for a teacher from the Newham Service for the Visually Impaired to monitor R on a weekly basis would include some direct teaching.

14. The amended statement of special educational needs before the Tribunal stated that advice for it had been collated between March 2000 and May 2000, but that some of the advice submitted (speech therapy, education and occupational therapy) was based on contact with R from up to a year before, because he had been out of school for over a year. The statement mentioned that there appeared to be some contradictions in the descriptions of R's abilities, which it ascribed to the relatively long period during which relevant advice had been produced. While there was before the Tribunal a quantified statement of the therapeutic input that R's parents wished him to receive, as will be seen, the Tribunal considered that there were not available professional assessments on the basis of which an objective quantification of therapeutic input could be made.

15. The Tribunal were satisfied that the LEA School could provide an appropriate environment for R and the integrated multi-disciplinary provision that he needed. With regard to the specification of therapy, they concluded as follows:

> " We have considered whether the amount of therapy which R needs should be specified in terms of the number of hours a week. We have concluded that in view of the complexity of his difficulties, and his need for physiotherapy, occupational therapy and speech and language therapy as part of his daily programme, it would not be in R's interests to limit the input he receives by specifying a number of hours. In addition, we have received no evidence to suggest that the amount of direct therapy which Mr & Mrs E seek to have included in the statement is appropriate or necessary. The amount of therapy R requires, and the most appropriate way of delivering it within the school setting will need to be determined and monitored by the relevant therapists following an assessment of his current needs. Mrs. Venkatesan stated that it would be impossible for the therapists to attend half term reviews, as requested by Mr & Mrs E. The letter from Jo Brook, Senior Physiotherapist from Newham Primary Care Trust, which we accepted as late evidence, states that the frequency of reviews will be based on clinical need. If R continued to require the same frequency of reviews as he had had recently, he would be seen termly. In the absence of current advice from occupational therapy service and the speech and language therapy service we have no grounds on which to decide that more frequent reviews are necessary. d. It is not clear from the wording of the proposed amended statement that monitoring from the Newham Service for the Visually Impaired will also include teaching, as suggested by Mr Hourigan. In view of the severity of R's visual impairment we are satisfied that he will require some direct teaching from a teacher of the visually impaired who has the necessary expertise, either through training or experience or both. This should be in addition to the provision of advice for the staff and monitoring of R's progress and should be specified in Part 3. We are not in a position to decide the amount of direct teaching which he will need, but we accept that as a minimum it should be on a weekly basis."

16. The Tribunal's conclusions and reasons concluded with the following paragraph:

> " We are aware of Mr and Mrs E's high expectations for R and also their concern that he should receive the highest standard of care. On three occasions they have felt that those standards have not been met and they have withdrawn him from school. It is in our view vitally important that he should now be given the opportunity to return to school and to take advantage of the professional advice and support available in order to enable him to develop to his fullest potential. An agreed plan should be drawn up to ensure his successful return to full-time schooling, allowing him time to adjust to the mental and physical demands of the school day. We agree that an initial review

should take place in January to assess the situation and make any necessary adjustments to the provision."

17. It can be seen that the statement did not quantify the therapy to be provided, in terms of hours or otherwise. It provided, in effect, that the Individual Education Plan should be developed and determined by others.

The Judge's Conclusion

18. The judge concluded that the tribunal was correct to state that there was no evidence supporting the parents' quantification of the therapy required for the child. He said this:

> "44. The circumstances were therefore:
>
> (1) There was no evidence enabling the Tribunal to quantify therapy provision for R.
>
> (2) The Tribunal considered that it was "vitally important that he should now be given the opportunity to return to school and to take advantage of the professional advice and support available in order to enable him to develop to his fullest potential." This was clearly a conclusion that they were entitled to arrive at.
>
> (3) No one suggested that an adjournment was necessary or appropriate.
>
> 45. In these circumstances in my judgment the Tribunal was entitled to decide as it did. The statement as ordered by it was sufficiently specific. It sufficiently made it clear what was to be done and by whom. Where a child's education is to be placed in the hands of a special school, with suitable staff and facilities able to assess his needs generally and on a day-to-day basis and to provide for those needs, and particularly where there is insufficient up-to-date professional evidence of appropriate provision, a decision to leave the quantification of the required therapies to the school cannot be criticised as irrational, and indeed it would appear sensible.
>
> 46. In regard to the criticism that the decision of the Tribunal delegated to the school the content of the educational provision to be received by R, this case is indistinguishable from *Bromley*. I reject Ms Mountfield's submission to the contrary. For this reason alone I consider that I am bound to reject the contention that the statement in this case did not comply with the statutory requirements of specificity.
>
> 47. It remains to consider Ms Mountfield's submission that the Tribunal acted irrationally or erred in law in refusing to quantify at least the minimum of R's educational provision on the ground that "it would not be in R's interests to limit the input he receives by specifying a number of hours". A statement that "R will receive *x*

minutes of a particular therapy daily" stipulates a minimum, and could be read as a maximum: in which case the Tribunal's reasoning would be understandable. On the other hand, it is evident that a requirement that, for example, "at least *x* minutes of occupational therapy be provided daily" cannot sensibly be read as limiting occupational therapy to *x* minutes, notwithstanding the tendency for minima to be treated in practice as maxima. On the more natural reading of paragraph c of the Tribunal's conclusions and reasons, they had in mind only an absolute quantification of the provision they had in mind (*sic*), and they did not consider their power to order a minimum provision, or to seek further evidence that would enable them to do so. I do not know whether any submission was made to the Tribunal that they might quantify a minimum provision, but in any event they did not have the evidence before them enabling them to do so.

48. Given in particular the quality of the Tribunal's reasoning, I should seek a logical explanation of their statement, and hold their decision to have been irrational only if it is not possible to do so (*sic*). The passage quoted above follows immediately after the Tribunal's reference to the complexity of R's difficulties and his need for all three specified therapies daily. Ms Lieven and Mr Thompson submitted that the Tribunal had in mind that to specify a series of minima would limit the flexibility it wanted to prescribe, because any stipulated minimum of a particular therapy might prevent the provision of the quantity of another therapy or other input that was thought to be appropriate for R. There are, after all, only a limited number of hours in a school day. I have considerable sympathy with such an approach. In my judgment it involves a less natural but a sympathetic and possible reading of the Tribunal's decision, and one that I propose to assume was intended. On that basis, the Tribunal cannot be criticised for irrationality."

The Act, the Regulations and the Code

19. Before turning to the submissions it is convenient to set out the relevant legislative material.

20. Section 312(1) of the Education Act 1996 provides that a child has "special educational needs" for the purposes of the Act "if he has a learning difficulty which calls for special educational provision to be made for him." By subsection (4), "special education provision" means "educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the Local Education Authority (other than special schools)". Section 323 applies to a child if he has special educational needs and "it is necessary for the Local Education Authority to determine" the special education provision which any learning difficulty he may have calls for. In the circumstances which had arisen in the present case, the authority was required to make an assessment of R's educational needs: see Section 323(3).

21. Section 324 provides:

> "(1) If, in the light of an assessment under section 323 … it is necessary for the LEA to determine the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs.
>
> (2) The statement shall be in such form and contain such information as may be prescribed.
>
> (3) In particular, the statement shall –
>
> (a) give details of the Authority's assessment of the child's special educational needs, and
>
> (b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by subsection (4).
>
> (4) The statement shall –
>
> (a) specify the type of school or other institution which the Local Education Authority consider would be appropriate for the child,
>
> (b) if they are not required under schedule 27 to specify the name of any school in the statement, specify the name or any school or institution (whether in the United Kingdom or elsewhere) which they consider would be appropriate for the child and should be specified in the statement, …
>
> (5) Where a Local Education Authority maintain a statement under this section, then –
>
> (a) unless the child's parent has made suitable arrangements, the authority –
>
> (i) shall arrange that the special educational provision specified in the statement is made for the child,
>
> (ii) may arrange that any non-educational provision specified in the statement is made for him in such manner as they consider appropriate, and
>
> (b) if the name of a maintained school is specified in the statement, the governing body of the school shall admit the child to the school."

22. At the time relevant to these proceedings, the Regulations prescribing the form of and the information to be contained in a statement made and maintained by a Local Education Authority under Section 324 were the Education (Special Educational Needs) Regulations 1994. Those Regulations have been replaced by the Education (Special Educational Needs)

(England) (Consolidation) Regulations 2001, which came into force on 1 January 2002, but there is no difference of substance relevant to these proceedings between the requirements of the 1994 Regulations and those of the 2001 Regulations. Regulation 13 of the 1994 Regulations was as follows:

> " A statement of a child's special educational needs made under Section 324(1) shall be in a form substantially corresponding to that set out in Part B of the Schedule, shall contain the information therein specified, and shall be dated and authenticated by the signature of the duly authorised officer of the authority concerned."

23. The form of statement of special educational needs in Part B of the Schedule to the Regulations is in six parts, apart from the appendices. Part 1, headed Introduction, prescribes the particulars of the child to be set out in the form, and requires the representations, evidence and advice taken into consideration by the authority to be set out in the appendices to the statement. Parts 2 and 3 are as follows:

> "PART 2: SPECIAL EDUCATIONAL NEEDS
> (Here set out the child's special educational needs, in terms of the child's learning difficulties which call for special educational provision, as assessed by the authority.)
>
> PART 3: SPECIAL EDUCATIONAL PROVISION
>
> Objectives
> (Here specify the objectives which the special educational provision for the child should aim to meet.)
> Educational provision to meet needs and objectives
> (Here specify the special educational provision which the authority consider appropriate to meet the needs specified in Part 2 and to meet the objectives specified in this Part, and in particular specify –
>
> (a) any appropriate facilities and equipment, staffing arrangements and curriculum,
>
> (b) any appropriate modifications to the application of the National Curriculum,
>
> (c) any appropriate exclusions from the application of the National Curriculum, in detail, and the provision which it is proposed to substitute for any such exclusions in order to maintain a balanced and broadly based curriculum; and
>
> (d) where residential accommodation is appropriate, that fact.)
>
> Monitoring
> (Here specify the arrangements to be made for –
>
> (a) regularly monitoring progress in meeting the objectives specified in this Part,
>
> (b) establishing targets in furtherance of those objectives,

(c) regularly monitoring the targets referred to in (b),

(d) regularly monitoring the appropriateness of any modifications to the application of the National Curriculum, and

(e) regularly monitoring the appropriateness of any provision substituted for exclusions from the application of the National Curriculum.

Here also specify any special arrangements for reviewing this statement.)"

24. Part 4 is concerned with specifying the type of school which the LEA consider appropriate. In Part 5 non-educational needs are to be specified and in Part 6 the non-educational provision is to be specified. Often no doubt, as in the present case, it will be difficult to separate out educational from non-educational needs and provision. However in the present case the statement and all parties proceed on the basis that the needs are all properly described as educational as well as non-educational.

25. The Code of Practice is the subject of Section 313 of the Act:

"(1) The Secretary of State shall issue, and may from time to time revise, a code of practice giving guidance in respect of the discharge by local education authorities and the governing bodies of [maintained schools] of their functions under this Part.

(2) It shall be the duty of –

(a) local education authorities, and such governing bodies, exercising functions under this Part, and

(b) any other person exercising any function for the purpose of the discharge by local education authorities, and such governing bodies, of functions under this Part,
to have regard to the provisions of the code.

(3) On any appeal under this Part to the (Special Educational Needs) Tribunal, the Tribunal shall have regard to any provision of the code which appears to the Tribunal to be relevant to any question arising on the appeal."

26. Paragraph 4-28 of the 1994 Code of Practice current at the date of the Tribunal's decision included the following:

"Part 3 of the statement is divided into 3 sub-sections:
- in the first sub-section the LEA should set out the main educational and developmental objectives to be achieved by the special educational provision over the expected duration of the statement
- the second sub-section should set out *all* the special educational

> provision that the LEA consider appropriate for *all* the learning difficulties identified in Part 2, even where some of the provision is to be made by direct intervention on the part of the authority and some is to be made by the child's school within its own resources. It may be helpful for the LEA to specify which elements of the provision are to be made by the school, and which elements are to be made by the LEA. The LEA will be responsible for arranging all the special educational provisions specified in the statement.
> …
> The provisions set out in the sub-section should normally be specific, detailed and quantified (in terms, for example, of hours of ancillary or specialist teaching support) although there will be cases where some flexibility should be retained in order to meet the changing special educational needs of the child concerned…"

The Code also gives guidance on the drawing up of individual education plans for pupils.

27. The 1994 Code has been superseded by the 2002 Code of Practice, the relevant provisions of which are identical to those of the 1993 Code.

28. In the present case, the parents of R had appealed against the contents of parts 2-4 of the statement made and maintained by the Local Education Authority. They disagreed with its provisions as to the placement of R and the lack of quantification of therapeutic input he would receive. They also disagreed with the description in the statement of R's special educational needs, but that plays no part in the present appeal.

29. Section 326(1A) authorises an appeal to the Special Educational Needs Tribunal against any of the following:

> "(a) The description in the statement of the Local Education Authority's assessment of the child's special educational needs,
> (b) the special educational provision specified in the statement (including the name of the school so specified),
> (c) if no school is specified in the statement, that fact. "

30. Subsection (3) is as follows:

> "On an appeal under this section, the Tribunal may –
>
> (a) dismiss the appeal,
>
> (b) order the authority to amend the statement, so far as it describes the authorities assessment of the child's special educational needs or specifies the special educational provision, and makes such other consequential amendments to the statement as the Tribunal think fit, or
>
> (c) order the authority to cease to maintain the statement."

The Case law

31. There are only two cases in this court which are of possible relevance : *R v Secretary of State ex parte E* [1992] 1 FLR 377 (which was not cited to or referred to by the Judge) and the *Bromley* case referred to in paragraph 2 above.

32. The first was a case which highlighted the fact that under the relevant statutory provisions (which were in substantially the same terms as those which govern the present case), even in respect of a child with SEN, it was not necessary in all cases for the LEA itself to determine the special educational provision which the child's needs call for : at times it would be appropriate to leave that determination to his local school and in such circumstances there would be no need to maintain a statement. The case decided that where, however, the LEA came to the conclusion that in respect of *some* of his SEN it was necessary for the LEA to determine the provision which should be made, then, the LEA should determine the provision in respect of *all* of his SEN. That case in our judgement is of no assistance in deciding the problems posed in the present case

33. *Bromley* was a case where the child was very severely handicapped and needed physiotherapy, occupational therapy and speech therapy. He was at R School for 38 weeks a year and lived at P Home. The LEA thought this satisfactory. The parents took the view that the three therapies ought to be provided on a 24-hour a day, 51 weeks a year basis for educational reasons and that he therefore ought to be in a residential placement at C school for 51 weeks of the year. The Tribunal agreed with the parents.

34. The parents as recorded by the tribunal in paragraph 5 of its determination had maintained that part 3 of the statement should give detailed and quantified provision as to occupational therapy, speech and language therapy and physiotherapy and that reference to these therapies should be in part 3 and not in part 6. The submissions of the LEA on that point, if any, are not recorded. The tribunal did not give a reasoned decision on this point but did not suggest that the statement should be amended so as to indicate the detailed and quantified provision which the parents had asked for. One suspects that the parents were delighted to have won the substantial argument and that the quantification argument was not regarded as important once the 24 hour a day principle had been approved. Quantification no longer had any point.

35. The LEA appealed to Owen J who dismissed their appeal. There was a further appeal to this court which was also dismissed.

36. Before Owen J the parents did not pursue any point on specificity. They were happy with the decision as it stood. In that case however it was the LEA who argued that (contrary to the attitude adopted by the LEA in the present case) that the number of hours of therapy should be specified so that everyone should know where they stood. This was rejected by Owen J.

37. In the CA the central issue was the meaning of 'special educational provision'. Lack of specificity was again argued on behalf of the LEA.

38. Stanley Burnton J said this about *Bromley*

> "28. Lastly, there is the only judgment of the Court of Appeal on this issue, namely the decision in *Bromley LEA v Special Educational Needs Tribunal* [1999] ELR 260. In that case part 3(b) of the statement of special educational needs, that is the statement of educational provision, was as follows:
> "S will have access to the National Curriculum and religious education. This will be augmented by an individual education programme devised and monitored by the staff at the school in consultation with the assigned educational psychologist, physiotherapist, occupational therapist and speech therapist employed by the R NHS Trust and a representative of the sensory support service. The National Curriculum will be differentiated to take account of his particular needs and modified on an in-house basis to ensure the maximum flexibility and attention to his academic and personal development.
> To meet his particular needs S would benefit from:
>
> - the development and multi-sensory curriculum on offer in special school catering for children with severe learning difficulties and complex learning needs;
>
> - consistent and holistic approaches to all learning both at home and school. This may involve regular planning and review meeting with all relevant adults who work with S;
>
> - opportunities to experience a wide range of therapies particularly music, which is a great motivator for S;
>
> - S needs to be in an environment where daily events are interpreted for him in a way he can understand;
>
> - he should be offered the opportunity to communicate his needs and choices and have access to augmentative communication aids, e.g. touch switches, objects/smells of reference etc;
>
> - access to sessions in a sensory room;
>
> - having the opportunity to be with pupils who are active and vocal;
>
> - continued monitoring by the vision support team who will also provide advice and support to school staff as and when required."
>
> 29. Part 6 of the statement, setting out the non-educational provision, was as follows:
>
> > "Regular medical review at school.
> > Physiotherapy:
> >
> > > - Programmes designed by the physiotherapist to be carried out daily in class by education staff, aimed at minimising further deformity;

- Contact with the physiotherapist on a minimum once-monthly basis to monitor his physical status, model therapy techniques, and update programmes with advice to staff and carers, and on request;

- Access to hydrotherapy;

- Orthotics management;

- Review of equipment needs in school and in residential care;

- Wheelchair management.

Further physiotherapy management will be detailed in subsequent reports for annual review.

Occupational therapy:

Will continue to review S's equipment and splitting needs termly and provide advice and recommendation as appropriate.

Speech and language therapy:

Advice and monitoring."

30. The principal issue before the Court of Appeal was whether the SENT had incorrectly classified physiotherapy, occupational therapy and speech therapy as part of the child's educational provision instead of as non-educational provision. However, the issue of the specificity of part 3(b) of the statement had been argued before Owen J at first instance and was pursued on appeal: see the judgment of Sedley LJ at 290B-C. Indeed, Sedley LJ referred with approval to the judgment of Laws J in *L and Clarke v Somerset County Council*. Sedley LJ, with whom the other members of the Court of Appeal agreed, held that the tribunal had been entitled to classify the therapies as part of the child's educational provision. He continued:
"The second criticism is that the bare requirement [sc. in the tribunal's order] that 'parts 2 and 3 be amended to reflect our decision as to occupational therapy, physiotherapy and speech therapy' is so unspecific as to amount to non-compliance with the duty to maintain the statement. Mr Gordon, consistently with his approach to the main question, does not meet this criticism head-on by contending that the decision simply requires the contents of part 6 to be transposed to part 3. The content of part 6, he submits, is appropriate, since there is therapeutic provision needed by S which is not educational, as well as an element which is educational and justifies his placement at C school.

In my judgment [the LEA's counsel] Mr Straker's critique is right to the extent that the second limb of the order is too imprecise to be reliably translated into an amended statement free from further dispute. As Laws J said in *L and Clarke v Somerset County Council*

> [1998] ELR 129, at p 137:
> 'The real question, as it seems to me, in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case.'
>
> The same must logically apply to SENT decisions. But if one looks again at part 6, one sees that – as Mr Gordon submits – it sets out total strategies for treating S planned by health professionals but to be delivered by S's carers; while part 3(b) describes the delivery of these forms of support in the educational environment. It is, in fact, a very well-drawn statement. In my view the parents' appeal could properly have been allowed, as it was, in relation to the named school placement, without interfering with the allocation of functions between parts 3 and 6. Nobody has been able to suggest in the course of argument how the tribunal's decision could be translated into an amendment of part 2, and for my part I see no need to give it effect by modifying either part 6 or part 3.
> I would therefore allow this appeal to the limited extent of removing from the tribunal's order the direction that parts 2 and 3 of the statement be amended. For the rest, and on the issues which have formed the core of this appeal, I would dismiss it."
>
> 31. It can be seen that the Court of Appeal approved part 3 of the statement, notwithstanding the fact that the individual education programme to which it referred was to be determined not by the Tribunal but by the staff at the proposed school in conjunction with the therapists in question."

39. While, in the light of the way the argument went, it is perhaps arguable that we are not bound by that decision, it is clear from the judgment of Sedley LJ, a judge of particular experience in this field, with which both Mummery LJ and Evans LJ agreed, that the court regarded the statement of the LEA as a "very well drawn statement". The provisions in part B of the schedule to Regulations require, both in relation to educational provision referred to in part 3 and non-educational provision referred to in part 6, that the provisions should be "specified". In part 6 of the statement in *Bromley* one finds just the sort of non-specificity and delegation of which the appellant complains in the present case.

The appellant's submissions

40. Mr David Wolfe on behalf of the appellant presented careful and thoughtful submissions which had two main components.

41. He submits that part 3 of the statement does not comply with the legislative framework in that it delegates to others - the school or the therapist - the task of determining the special educational provision to be made for the child. Sections 323 and 324 dictate that a statement is only to be made if *it is necessary for the LEA to determine* the special educational

provision which the child's learning difficulty calls for. That determination should have been done initially by the LEA and on appeal by the Tribunal. Second he submits that where a tribunal lacks the material which will enable it to specify the special educational provision then the tribunal is obliged, except in cases of overwhelming urgency, to adjourn the hearing to enable such evidence to be obtained on its own initiative if necessary.

The degree of specificity required in part 3 of the statement

42. He submits that the Tribunal were seduced into refraining from making a decision on what was to be provided for R, by leaving that decision to be made by others at a special school (as opposed to a mainstream school) who they may have thought had more expertise than they. All that the statement does is to put in place machinery for the determination of the substantive provision which is to be made for the child. Whatever substantive provision may be regarded as appropriate in the future, there will be no need to alter the statement. But, he submits, this is to ignore the statutory scheme set up by Parliament to ensure that children with statements of SEN, in contrast to most vulnerable groups in society, have access to a legally enforceable regime which ensures that the statements set out the precise provision which is to be made for them and that this is provided.

43. He submits that it is clear from the statutory framework that the relevant decisions as to what special educational provision is to be made for the child are to be made before the type of school is decided upon. So although he accepts that a special school is, by virtue of the definition in section 337(1), a school that is "specially designed to make special educational provision for pupils with SEN", the fact that a special school may ultimately be specified in part 4 of the statement must be disregarded in the formulation of part 3.

44. He submits that the Act provides for a long process of consultation culminating in a statement and then an appeal to an expert tribunal for a parent who is dissatisfied with the statement. In such circumstances, he submits that the tribunal cannot duck out of its responsibilities by leaving crucial matters to be determined by others. If it does not have the relevant information before it then it must adjourn and ensure that it is provided. He accepted that if the statement had said that between two and four hours of speech and language therapy should be provided per week this would be lawful but submitted that a minimum had to be specified. He accepted that any minimum could be specified in relation to any period - such as a month or a year - chosen by the LEA or the tribunal.

45. He points out that section 324(5) places the LEA under a specific duty to "arrange that the special educational provision specified in the statement is made for the child".

46. He stresses that by virtue of Paragraph 2(4) of Schedule 27 to the Act the LEA must draw up parts 1, 2 and 3 of the Statement before deciding which school is appropriate and points out that in the course of consultation prior to the production of the statement the views of the parents are sought on parts 1, 2 and 3 of the statement at a time when part 4 (which indicates the school) is left blank. He submits that it follows that it cannot be legitimate to assume in the course of drafting part 3 that the child will be in a special school. The drafting must be in the same form whatever school is finally chosen.

47. He stresses that by the Education (Maintained Special Schools) Regulations 1999 a child can in general only be admitted to a special school pursuant to a statement. So, he submits, the statutory scheme recognises that children should only be placed in such schools following the proper process through which the LEA (and if necessary the Tribunal) determines the provision to be made for their learning difficulties.

48. He submits that if, following an assessment, the health authority's therapist decides that R requires less than the 2 hours per week for which his parents contend then the parents have no means of challenging that opinion.

49. He submits that even if the therapist confirms that 2 hours is required the parents will not be able to ensure delivery of that because the quantified amount will not appear on R's statement.

The failure to adjourn

50. Mr Wolfe submits that what happened here was that the parents had turned up in front of the tribunal without any experts. They were expecting the tribunal to make all necessary determinations. He points out that the Tribunal had power to adjourn the proceedings.

51. He draws attention to the fact that the judge said in paragraph 8 of his judgment that in deciding whether or not to exercise the power to adjourn the tribunal should "assess and take into account the desirability of an early decision, the likely length of any adjournment and whether an adjournment is likely to produce appropriate evidence." Yet, he submits, there is no evidence that the Tribunal undertook such an assessment or balancing exercise. He accepts that his client did not seek an adjournment but submits that the tribunal has the statutory role of ensuring that a satisfactory statement results from its decision and that this is unaffected by the way the case is prepared or argued in front of it.

52. He submits that, given that the tribunal felt that an urgent decision was required but that the existing material was out of date, the proper course would have been to put in place the regime contended for by the parents but make appropriate arrangements under "monitoring" for a further review after a short period. Alternatively he submits that there was no overwhelming need for an urgent decision.

53. So he asked the court to remit the matter for a fresh decision by the tribunal.

The submissions of the Respondents

54. Although it is unusual for tribunals to be represented in this type of proceeding, Nathalie Lieven appeared for the tribunal because the points raised were ones of general importance. The LEA associated itself with her submissions and had no separate submissions of substance. They supported the decision of the judge and submitted that, while it was necessary to specify in the statement the educational provision required, it was not invariably necessary to quantify it.

The degree of specificity

55. Ms Lieven submitted that the task of the LEA under Part B of the Schedule to the 1994 Regulations quoted in paragraph 23 above was to specify the special education provision "which the authority consider appropriate". Not merely did this imply a discretionary exercise as to what type of provision was appropriate but also as to the degree of detail to be prescribed. The nature of the problem was apparent from the equipment specified in parts of the present statement which were not in dispute but the specification of which which left all sorts of matters for future consideration - the type of posturally supportive seat and all the matters specified thereafter.

56. There were a number of different and potentially overlapping considerations when considering what should be prescribed. The willingness and ability of a child to absorb instruction or therapy might vary from day to day - total rigidity was simply inappropriate. At some periods a child might require 3 carers; at others only one. A phrase such as "speech therapy" was itself a term which embraced within it various more specific therapies. If a wheelchair was prescribed this could be of various different designs. All this was unavoidable.

57. In substance in the present case one was concerned with staffing arrangements. Again the amount of detail which could theoretically be specified was infinitely variable and might, but need not, comprise matters such as specifically naming someone, setting out the minimum paper and experience qualifications of the staff to be employed and so on.

58. She submitted that the degree of flexibility which was appropriate in a statement would depend on the facts of a particular case. The present case was one where the needs of the child were complex, where the child had been out of school for a long time and where by the time that the tribunal came to its decision it was agreed that the LEA school, a special school, should be specified in Part 4. If the Tribunal acted unreasonably in respect of the degree of specificity contained in a statement that would of course be subject to challenge in the courts. Such unreasonableness was not and could not be alleged in the present case. Nothing in the statute required more than had been done by the tribunal in the present case.

59. Neither the Act nor the Regulations made any reference to quantification. By contrast the Code, quoted in paragraph 26 above, does and suggests that "the provisions … should normally be specific, detailed and quantified …" . That was a matter of policy. No more was required of the tribunal than to have regard to that policy. It had not been suggested that no regard was had to it. In any event, the Code itself proceeded on the basis that a degree of flexibility was permissible in law and appropriate in some circumstances.

The failure to adjourn

60. Miss Lieven accepted that the role of the tribunal was not purely adjudicatory and that for many purposes it stands in the LEA's shoes, re-evaluating the available information in order if necessary to recast the statement. However, on the assumption that there was nothing in law to make unlawful a statement in the form adopted in the present case, then the tribunal were entitled, in their discretion, not to adjourn. They had not been asked to adjourn and

there was no legal necessity for them expressly to address the question of an adjournment in their decision letter. It was clear from their decision that they did not consider an adjournment desirable and this court should not interfere.

Discussion

61. The crucial question in the present case is the lawfulness of the statement. If the end result is that, because of its lack of specificity the statement is non-compliant with the legislation then, in our judgment, no issue arises in relation to any failure to adjourn. The appeal would need to be allowed. If, on the other hand, the statement is compliant with the legislation then no sensible legal attack can, in the circumstances of the present case, be launched on the failure of the tribunal to adjourn of its own motion.

62. Turning to the question of lawfulness this case exposes as others have done before it a genuine difficulty of interpretation. There is force in the abstract in the following points made by Mr Wolfe:-

i) if a statement of the kind with which we are concerned is potentially lawful then there will be no need ever to alter the statement even if the child's identified problems get worse or better and this is not easily compatible with the whole statutory regime;

ii) in the drafting process envisaged by the Act parts 1-3 are completed before part 4 and it would be surprising if the type of school could be a relevant consideration when deciding in what degree of detail to specify the provision which it is felt ought to be made;

iii) Parliament has set up a tribunal to determine disputes and it is unlawful for that tribunal to decline to determine a dispute but provide for its determination by others.

63. Nonetheless the countervailing arguments for allowing the degree of particularity to be determined in the context of this case rather than in the abstract are in our judgment overwhelming.

64. The following general considerations have weighed with us:-

i) At one extreme, a tribunal plainly cannot delegate its statutory duty to some other person or body, however well-qualified. Equally, the statutory duty will not be discharged if the description of the special educational provision which is to be made is framed in terms so vague and uncertain that one cannot discern from it what (if anything) the tribunal has decided in that respect.

ii) At the other extreme, the statutory duty plainly cannot extend to requiring a tribunal to 'specify' (in the sense of identify or particularise) every last detail of the special educational provision to be made (indeed, Mr Wolfe accepted that in an appropriate case a tribunal may lay down minimum requirements).

iii) Between those two extremes, the degree of flexibility which is appropriate in 'specifying' the special educational provision to be made in any particular case is essentially a matter for the tribunal, taking into account all relevant factors. In some cases, a high degree of flexibility may be appropriate, in others not.

iv) In the particular circumstances of the instant case the tribunal was, in our judgment, fully entitled to conclude that the individual education plan referred to in part 3 of the statement be determined not by it but by the designated special school in conjunction with the therapists.

65. On the facts of the present case the end result seems eminently sensible – this is a case where the educational and non-educational needs of the child overlapped and were highly complex. The following factors specific to this case have weighed with us:-

i) the tribunal was dealing with a situation where the parents had reconciled themselves to the fact that a special school rather than a mainstream school was, for the time being, appropriate;

ii) the reason for much of the argument on provision before the LEA and the tribunal was the parents' desire that a mainstream school should be specified - in that context greater specificity might well be appropriate because staff had to be brought in, whereas in the context of a special school such staff were in principle available;

iii) R had been out of school for a long time and it was important to get him back, yet the professional advice was out of date for reasons which could not primarily be laid at the door of the LEA;

iv) There was in any event much to be said for flexibility and assessing both needs and provision in the school context;

v) There were no conflicting assessments by experts – the parents had not themselves (probably for reasons with which we can sympathise) engaged any experts.

66. We have no doubt that it was in R's best interest to act as the tribunal did. Neither the statute nor the case law suggests that there was any illegality in the present case. Indeed *Bromley* indicates that there was not.

67. We therefore think that the judge was right and dismiss this appeal.

Order: Appeal dismissed; Appellant do pay respondents' costs; pta to House of Lords refused.

(Order does not form part of the approved judgment)