Case No: C1/2004/2565

Neutral Citation Number: [2005] EWCA Civ 988
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
THE HON. MR JUSTICE MCCOMBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 29th July 2005

Before :

LORD JUSTICE JUDGE
LORD JUSTICE THOMAS
and
LORD JUSTICE WALL

- -

Between :

W	**Appellant**
- v -	
(1) Leeds City Council	
(2) Special Educational Needs and Disability Tribunal	**Respondents**

- -
- -

Mr J. Friel (instructed by Felix Moss) for the Appellant
Mr P. Oldham (instructed by Leeds City Council) for the First Respondent
The Second Respondent was not present nor represented.

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Judgment

Lord Justice Judge:

1. The appellant is the mother of a boy we shall identify as "C". He was born in March 1995. He suffers from severe autism. His mother appeals the decision of Mr Justice McCombe dated 9th November 2004 dismissing her appeal from the decision of the Special Educational Needs and Disability Tribunal ("the Tribunal") dated 11th June 2004, dismissing her appeal under s 326 of the Education Act 1996 ("the Act") against the contents of a Statement of Special Educational Needs ("the Statement") made by Leeds City Council, the Local Education Authority ("the LEA") on 15th July 2003.

2. The litigation has a lengthy history. Its genesis is found in an assessment of C's special educational needs made by the LEA in May 1998. The assessment was carried out pursuant to s 323 of the Act, and in accordance with s 324, the LEA issued a Statement of Special Educational Needs in the format prescribed by the Education (Special Educational Needs) Regulations 1994 ("the 1994 Regulations"). The

diagnosis of autism was set out in Part 1 of the Statement, and in Part 2, C's special educational needs were described in detail. Thereafter the LEA set out the objective to be met in respect of the needs identified in Part 2. In June 1999, an appeal was brought under s 325 of the Act against the content of the Statement, and in July 2002, the Tribunal ordered that Part 2 of the original Statement of Special Needs should be amended. At that stage the short observation, "sleeping difficulties, which lead to him becoming aggressive", was inserted. The Tribunal's decision was then challenged by a statutory appeal to the High Court under s 11 of the and Tribunals and Inquiries Act 1992 on the basis that the Tribunal's amendment of the Statement was deficient because, notwithstanding the amendments made to Part 2 of the Statement, the Tribunal failed to amend Part 3(B). Following an appearance before Newman J, the LEA carried out a review and in June 2003, a number of changes were made, but this led to a further appeal by the appellant against Part 3 and Part 4.

3. In July 2003 the entire Statement was revised, and a fresh Statement was issued by the LEA. This fresh Statement was the subject of a second appeal to the Tribunal by the appellant, and it is the appeal currently before us. The appeal before the Tribunal was first listed for hearing in December 2003. At that stage the appellant's case statement included the following proposal to deal with C's sleeping difficulties. "Professional intervention to approach his problems with sleep and rest to include where appropriate access to a psychologist and if necessary appropriate (health) service officials", the word "health" being added later in manuscript. The first hearing was then adjourned without evidence being heard. It was reinstated in the list in May 2004. On the second day, in the face of the strongest possible objections from Mr Friel, who has appeared on behalf of the appellant throughout, the LEA proposed that the words related to sleeping difficulties should be removed from Part 2 as they did not constitute a special educational need. No specific reasons were advanced by Mr Friel against the proposed amendment save that it was, and indeed it was, very late. No application was made for an adjournment of the hearing, which proceeded to a conclusion. When the decision was promulgated on 11th June 2004, the Tribunal concluded that no educational need in respect of sleep was established. Accordingly the Statement was amended by the removal of the observation "sleeping difficulties, which lead to him becoming aggressive", and the provision suggested by the appellant was refused.

4. The decision to allow the amendment was criticised before McCombe J, a contention repeated before us, which was linked to an application by Mr Friel to adduce fresh evidence, made not to McCombe J himself, but again at a very late stage of the process, to us. I shall return to these issues later in the judgment.

5. The Tribunal further decided that the LEA's obligation in relation to the issue of the supervision of C's activities was limited to providing supervision during school hours, and did not extend to the supply of constant supervision outside the school. This decision, too, was challenged and eventually rejected by McCombe J.

6. The basic facts are conveniently set out by McCombe J in paragraphs 2 and 3 of his judgment. I shall adopt them as part of this judgment.

> "2. It is convenient to set out the basic facts by a simple citation of Part 2 of the Statement. This part summarises the material facts relating to C. Further an important part of the argument centred upon the contents of Part 2. Its recitation here in full will facilitate consideration of that aspect of the case. (The following quotation is from the Statement in the form issued after the Appeal which excludes one sub-paragraph

of paragraph 9 of Part 2. That exclusion also gives rise to an issue here, as it did before the Tribunal, to which I shall return. (The omitted sub-paragraph was as follows: "(b) Sleeping difficulties, which lead him (sic) becoming aggressive".))"

[This is a reference to the deletion suggested by the LEA and accepted by the Tribunal.]

"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.]

1 [C] has a diagnosis of autism which is his primary condition and which should determine his educational management.

2 [C] is able to take himself to the toilet to urinate, but still soils himself. He can dress himself independently, but he needs some help with the laces and buttons. He has considerable trouble with food; unless fed, he will only eat a limited amount of food, if he is allowed to use his hands. He refuses to use cutlery. He communicated by gestures or by use of PECs.

3 [C] responds to some sounds and will turn to musical instruments. He shows some understanding of gestured (sic) and is able to communicate his needs by sounds or by pointing or leading. He is making good progress with motor skills, although he can be unsteady.

4 [C] needs to learn social interaction skills and appropriate behaviour.

5 [C] needs to learn to develop his attention and listening skills in order to apply himself to a particular task and to maintain concentration for increasingly longer periods.

6 Medical reports indicate that [C] is in good general health, although he suffers from respiratory infections. He has otitis media in winter months. There are no medical conditions which would have a bearing on his general educational development.

7 [C] bites people, and also bites and mouths objects which include electric cables.

8 [C] can be physically aggressive to his mother and those around him.

9 [C] needs constant supervision. He has no sense of danger. ABA therapy had modified the severity of [C's] behavioural difficulties. However, the following major issues remain:

(a) Self-stimulatory behaviours, which can rapidly develop into major incidents or regression unless controlled.

(b) If left to himself, [C] can become both angry and/or isolated in his autism.

3. Part 3 of the Statement sets out (in its section A) objectives to be met by the provision for C and (in its section B) the actual provision proposed to be made. Importantly for present purposes section B specified that C should be placed in a school with facilities and resources that would enable C to be part of a small class group receiving provision in 13 separate areas, including "Constant adult supervision during school hours from staff experienced or trained in meeting the needs of autistic children", "A highly structured and consistent environment" and "Continued close liaison between home and school and any other agencies involved with C …". Part 4 of the Statement specified that C should be placed at a named special school, with the opportunity for sessions at another named primary school when these were judged appropriate for C."

7. McCombe J then summarised what he described as the rival contentions before the Tribunal. Again I can conveniently adopt the relevant passages from his judgment:

"4. Before the Tribunal, Mr. Friel of Counsel, who appeared for the mother (as he did in the present appeal) argued that the following provisions should be added to section B of the Statement, as indicated in the following passage from the Tribunal's decision where the Council's requirements and Mr. Friel's counter proposals are set out.

"C requires:

LEA: Constant adult supervision during school hours from staff experienced or trained in meeting the needs of autistic children. *Other:* constant adult supervision during his waking day from staff experienced or trained in meeting the needs of autistic children.

LEA: A behaviour management programme designed to reduce self-stimulatory behaviours. *Other:* A behaviour management programme designed to reduce self-stimulatory behaviours, to occupy C's time. This could be achieved by a physical exercise programme similar to the Higashi methods.

LEA: A programme aimed to develop C's social skills to be contributed to a speech therapist and occupational therapist. Programmes of social interaction and the formation of peer groups. *Other:* A programme aimed to develop C's social skills to include therapist on site. Programmes in social interaction and the formation of peer groups.

LEA: A programme aimed to develop his self help skills, to train C in independence skills. The programmes to be contributed to by speech and language self-help skills, to

train C in independence skills, specialist staff to be available throughout the waking day. The programmes to be contributed to by speech and language therapists who are on site.

LEA: C requires a highly structured and consistent environment in which all staff dealing with C has sufficient training and expertise in meeting the needs of autistic pupils. He requires a consistent approach at home and within school so that he can develop independence skills, become safe. *Other:* C requires a highly structured and consistent environment in which all staff dealing with C has sufficient training and expertise in meeting the needs of autistic pupils. He requires a consistent approach to his waking day within care and within school so that he can develop independence skills, become safe.

LEA: C requires a behavioural programme used both in school and home. *Other:* C requires a behavioural programme used both in school and care setting.

Add: Professional intervention to approach his problems with sleep and rest to include where appropriate access to a psychologist and if necessary appropriate service officials.

Amend paragraph 5 to:- The school should have on the staff both speech and language therapists full time available to work with the children both in class and within the care environment. The school also requires advice from an occupational therapist, and/or a clinical psychologist or behaviour specialist.

Delete Paragraphs (sic) 3

Add: He requires an autistic specific provision within a small community offering a range of activities to develop in a waking day his self-help and independence skills. He needs a safe environment where there is consistent monitoring of his potentially harmful behaviour and of the opportunities to harm himself."

Mr. Oldham of Counsel, who, as here, appeared for the Council, resisted these amendments."

8. The Tribunal approached the appeal on the basis that the parties were agreed that there were two substantive issues for decision. The first arose from the reference to "constant supervision", and the debate was whether the need for "education" extended beyond the school day with a consequential need for residential placement, and if so whether provision should be included for it in Part 3. It was central to the appellant's case that placement at a private residential school followed as a consequence of the Tribunal's reference to C's need for constant supervision. A separate issue arose in relation to possible placements. The second issue arose in the context of the argument about C's sleeping habits (and difficulties) and their possible impact on his educational needs. Mr Oldham for the LEA argued that material about this issue did not evidence a special educational need, a contention opposed by Mr Friel, who

argued in support of the arrangements for C's sleeping problems for professional intervention as advanced by the appellant in her case statement.

9. The Tribunal accepted and adopted a number of agreed amendments to Part 3A and 3B, and for present purposes considered and accepted:

> "1. … Constant adult supervision during school hours from staff experienced or trained in meeting the needs of autistic children is appropriate. Constant supervision at other times is not something which the (Council) should be required to provide.
>
> 2. … A behaviour management programme designed to continue to reduce self-stimulatory behaviours. We consider the version proposed by Mr Friel to be unnecessarily specific to a placement in the school sought by (C's mother).
>
> 3. … A programme aimed to develop C's social skills to be contributed to by a speech therapist and occupational therapist. Programmes in social interaction and the formation of peer groups. Mr Friel's proposals included removing reference to an occupational therapist for reasons that were not immediately apparent and were, we believe, to be placement specific.
>
> 4. … A programme aimed to develop his self-help skills and train C in independence skills. The programme is to be contributed to by speech and language therapists and occupational therapists. We do not accept that specialist staff should be available throughout the waking day, although we do believe that the speech and language therapist support is required, we are satisfied that staff who are readily available and spend a large proportion of their working week in the school would be appropriate provision. We see no need to include the phrase *on site*."

10. In essence, the Tribunal decided that C's special educational needs, although wider than those of most other children, could properly be met within the normal school day and that the LEA was not required to provide constant supervision for C outside normal school hours. It considered that his mother's proposals for management behaviour programmes were intended to be placement specific, designed to achieve a place for C at the particular residential school she had identified. In the event, the suggestion that C's special educational needs required to be addressed as a full "waking day" case was rejected. C's needs could properly be met with special attention, to be provided within the normal school day.

11. The Tribunal further acknowledged that C's sleeping difficulties created pressures on C's family, but concluded that they did not constitute or create a special educational need. The Tribunal noted that this particular need was added to the Statement at a time when C was not being educated at school, but at home. There was no convincing evidence about the likely impact of these difficulties on C's ability to learn, and there was no evidence to indicate that the occasions when C became aggressive were consequent on a lack of sleep. His need for supervision at night for reasons associated with safety did not constitute a special educational need.

12. We can fairly summarise the argument and McCombe J's subsequent judgment by reference to the two substantive issues identified by the Tribunal. We shall however take them in a different order to that adopted by him.

Sleeping difficulties

13. Mr Friel submitted that the Tribunal had no jurisdiction to permit this issue to be raised by the LEA. It had been resolved by the Tribunal's first decision. No proper application for amendment was made to the Tribunal for permission to amend the Statement of Case: hence the absence of jurisdiction. Mr Friel contended that the power to amend the Statement of Special Needs was limited to issues raised in the appeal notice, and that there was no general power to direct amendment outside those issues.

14. McCombe J referred to Regulation 13(3) of the Special Educational Needs Tribunal Regulations 2001, and rejected the jurisdiction argument. An amendment to a Statement of Case at the hearing in exceptional circumstances was permitted. He also considered that although formal permission had not been granted by the Tribunal, Regulation 32(4)(b) provided the necessary procedural flexibility to avoid the need for a formal permission to amend. On this basis McCombe J concluded that the decision to allow the LEA to raise the issue was not a "fatal" irregularity, and that the only question was whether the Tribunal had correctly exercised its discretion to allow the issue to be heard and developed at such a late stage.

15. Mr Friel argued that all this happened much too late, and was therefore "unjust". In particular he suggested that the appellant was deprived of the opportunity to adduce fresh medical evidence which would demonstrate that C's sleeping difficulties affected his performance at school. The absence of this evidence led the Tribunal wrongly to conclude that there was no medical evidence bearing on the link between C's sleeping difficulties and his educational performance. McCombe J decided that the Tribunal had properly exercised its discretion on the evidence before it, and that he should not interfere with it. He concluded that the Tribunal's decision on the sleeping issue had been reached on an entirely sound basis, and in the absence of material from the appellant which pointed to the opposite conclusion, no material prejudice had been occasioned.

Constant supervision

16. Mr Friel's argument before McCombe J had a number of different but linked facets. First, the Tribunal was not entitled to revisit an issue which had apparently been decided in the earlier June 2002 decisions. Second, the Tribunal's definition of "Special Educational Needs", and in particular whether constant supervision outside school hours fell within its ambit, was erroneous. Third, the relationship between Part 2 and Part 3 of the Statement of Special Needs was not properly appreciated and applied.

17. Taking these contentions in a little more detail, Mr Friel submitted that the issue of constant adult supervision was finally settled in the June 2002 decision. The only questions to be decided was whether the provision made in Part 3 satisfied C's needs as defined in Part 2, and, given the reference to the child's requirement for constant supervision, whether the placement specified in Part 4 was appropriate. In relation to the relationship or interaction between Part 2 and Part 3 of the Statement of Special Educational Needs, he argued that it was well-established that the contents of Part 3 should match and be consistent with the objectives identified in Part 2 of the Statement. The Tribunal's decision was wrong in law, and in any event irrational, and in particular it failed to take account of evidence from the experts that the provision

for "social care" provided by the Social Services Department of the Council was inadequate. Moreover its decision was based exclusively on the evidence submitted by the LEA.

18. Dealing with these contentions, McCombe J considered that the purpose of the Statement in Part 2 was to point the reader to what he described as "the objective and the provisions to be made in Part 3 by reference to a pen picture of the child" needing education. None of the needs specified in Part 2 should be read in isolation from the other needs, and Part 2, and the educational objectives identified in it, should be read as a whole. In the light of that material the LEA had to decide the provision which was appropriate to satisfy the educational objectives for the individual child. The LEA had therefore correctly understood the purpose of Part 2 of the Statement. When McCombe J examined the irrationality argument, he was not satisfied that any basis for interfering with the Tribunal's factual findings was established. Although he accepted that a passage in a single extract from the decision was "unfortunate", the suggestion that the Tribunal had proceeded on the basis of evidence called by the LEA to the exclusion of evidence put forward on behalf of the appellant was rejected. It appeared to McCombe J clear that looking at the decision overall, the Tribunal indeed considered the evidence of both sides. He believed that he should take a broad overall view of the decision and declined to interfere with it.

The appeal

19. Mr Friel began the appeal by seeking leave to adduce fresh evidence to enable the appellant to deal with what he argued was the procedural unfairness which took place before the Tribunal, and to demonstrate, as the appellant was unable to demonstrate before the Tribunal because of the lateness of the proposal to remove the passage relating to sleeping difficulties in para 9(b) of Part 2, that there was medical evidence showing that C's sleeping difficulties impacted on his education, and ought therefore to have been treated as an educational need.

20. Notwithstanding its very late arrival, and the absence of any application of the same effect before McCombe J, we decided to consider the evidence de bene esse. The significant feature of the evidence is a report from Dr Soppitt largely based on a study of the papers, and without an examination of C.

21. Mr Friel further argued that McCombe J was wrong not to interfere with the Tribunal's agreement to the amendment to Part 2 of the Statement proposed on the second day of the hearing, without prior notice. He repeated his submission to McCombe J that this constituted a breach or breaches of the Tribunal's own procedure, as laid down in the relevant Regulations, as well as constituting unfairness to the appellant's case.

22. It is convenient to deal with these two grounds together. The Special Educational Needs Tribunal Regulations 2001 provide the basis on which the Tribunal may permit or order an amendment to the Statement. Regulation 13(3) says in terms that: "in exceptional circumstances the authority may amend its statement of case if permission is given by … (b) the Tribunal at a hearing". Regulation 32(4) gives the power, if satisfied that it is "just and reasonable to do so" to permit the LEA to rely on grounds not specified in the statement of its case. Finally, Regulation 49(1) provides that an irregularity arising from non-compliance with the Regulations does not "of itself render the proceedings void".

23. The complaint to be addressed relates to the removal of part of a single paragraph in Part 2 of the Statement. It relates exclusively to sleeping difficulties, and this itself is no more than a single manifestation of what remained unaltered, that C needed

"constant supervision". Therefore the critical question of "constant supervision" was left intact for argument and decision: so did major issues bearing on this point, including self-stimulatory behaviours which needed controlling, and the troubles faced by C if he became angry or isolated in his autism. In any event matters arising from C's sleeping difficulties had first been raised by the appellant and the issue had been identified at an early stage in the papers prepared for the Tribunal which examined it in great detail. There are lengthy passages in the judgment where the issue of C's sleeping difficulties, and the question whether they did or did not constitute a special educational need were fully addressed.

24. In my judgment the amendment fell within the proper ambit of the Tribunal's control over its own process. In the result, it did not curtail proper analysis of the possible impact of C's sleeping difficulties. If at the end of the hearing the Tribunal had concluded that the sleeping difficulties were rightly to be regarded as the source of a separate educational need, appropriate orders consequent on that finding would have been made. The issue, however, remained C's need for constant supervision, and the appropriate way of addressing and dealing with that need. Under the pressure of Mr Friel's advocacy, it is possible to allow the issue of the amendment to assume a wholly disproportionate importance. The fundamental issue – unaffected by the amendment – was whether C needed constant supervision. The sleeping difficulty was a feature of the overall case, first introduced by the appellant for the purposes of provision to be made, and then answered by the LEA. In my judgment notwithstanding the irregularities complained of by Mr Friel, McCombe J was entirely right not to interfere with the Tribunal's conduct of its own process.

25. It is in this context that we have to consider the application by Mr Friel to adduce fresh evidence. The evidence is contentious. If an application to enable the appellant to consider whether to advance medical evidence of the kind put before us as fresh evidence had been made to the Tribunal, an adjournment would certainly have been considered and might well have been granted. Perhaps, too, an application to McCombe J to adduce fresh evidence of this nature before him *might* have been successful. I shall not attempt to indicate what McCombe J should have decided if such an application had been made: none was. In any event, although the absence of "authoritative medical evidence" formed part of the reasoning of the Tribunal, and Dr Soppitt's report endeavours to meet that view, the evidence would not impinge significantly on the issue of constant supervision for C, and the provision appropriate for it. In my judgment it would be quite wrong for this evidence to be admitted at this stage of the litigation. Accordingly the application should be refused.

26. In my judgment the most important issue raised in the appeal is the contention that the judge was wrong in law when he failed to determine that provision should be made in Part 3 for all C's needs identified in Part 2 of the Statement. This was linked with Mr Friel's submission that R v Secretary of State, ex parte E [1992] 1 FLR 377 demonstrated that the failure by the LEA to make provision in Part 3 which matched the needs set out in Part 2, rendered the Statement unlawful.

27. Section 324 of the Act provides for the making and maintenance of a Statement of a child's Special Educational Needs where

> "It is necessary for the Local Education Authority to determine the special educational provision which any learning difficulty he may have calls for …"

In short, the Statement is created to enable a proper assessment of the educational provision required for the particular child with Special Educational Needs.

28. Special Educational Needs arise where the child "has a learning difficulty which calls for special educational provision to be made …" and for the purposes of the Act the child has a learning difficulty if

> "(a) He has a significantly greater difficulty in learning than the majority of children of his age,
>
> (b) he has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in schools within the area of local educational authorities …"

29. Special educational provision of itself means

> "(a) … educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age 'in such schools'."

30. The form of the Statement is prescribed, but by s 324(3) it is required to

> "(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 …"

31. The Education (Special Educational Needs) England (Consolidation) Regulations 2001 prescribe the form and contents of the Statement. Thus Part 2 of the Statement is headed "Special Educational Needs". These are to be set out "in terms of the child's learning difficulties which call for special educational provision". Part 3 is entitled Special Educational Provision. In this part of the Statement the objectives which the special educational provision should aim to meet are specified. The educational provision to meet the needs in Part 2 and the objectives in Part 3 are then, in their turn, to be specified. Part 4 is concerned with placement in a school, and Part 5 specifies the non-educational needs of a child for which provision is thought appropriate if the child is to benefit properly from the arrangements for special educational provision.

32. Applying these provisions to the point in issue in this case, and stripping it to its essentials, the argument runs as follows. Part 2 speaks of C's need for "constant supervision". In Part 3 provision is made for "constant adult supervision during school hours". As Part 2 does not include the reference to "school hours", there is an inconsistency between Part 2 and Part 3, and Part 3 should omit the reference to "school hours" to which no reference is made in Part 2. In summary, Mr Friel's submission is that the failure of Part 3 to comply precisely with C's need for "constant supervision" was unlawful. Once it was included in Part 2 without the limitation involved in the reference to "school hours" it was effectively, almost by definition, a necessary educational need for which provision was to be made in Part 3.

33. We must therefore address the decision of this Court in R v Secretary of State for Education and Science ex parte E [1992] 1 FLR 377, which represented the bedrock of Mr Friel's submission. The court was faced with an obvious educational need arising from the child's numeracy difficulties. Part 2 of the Statement identified the difficulty, but Part 3 failed to make appropriate provision to meet it.

34. Nolan J concluded:

> "… the Local Education Authority has accepted M's numeracy difficulties as being sufficiently serious to be included in his Statement, but has failed to make any special educational provision in respect of them. In taking this course it has, in my judgment, misunderstood and misapplied the law. The law, as I understand, is simply this, that if the need is serious enough to appear in the Statement, then it necessarily qualifies for special educational provision."

Pausing there, the passage is liable to be misunderstood unless it is appreciated when Nolan J was speaking about "the need" in that last sentence, he was referring to an educational need. Nolan J continued that the Statement was not an ordinary form, and that it was "axiomatic that Part III must deal fully with Part II. "He drew an analogy with the medical diagnosis (which he linked with Part II, and the prescription for the needs diagnosed)", which he linked with Part III. This approach was fully endorsed in the Court of Appeal, and in particular in the judgment of Balcombe LJ.

35. In my judgment the problem with Mr Friel's submission is that it does not follow from the decision in Ex parte E, that every word or phrase used in Part 2 is deemed to represent, or must indeed constitute an educational need. Neither the Act nor the Regulations require that Part 2 should omit reference to matters which represent narrative account, background or context to the special educational needs of the child, and indeed it would be very surprising if it were to do so, not least because there may well be ongoing learning difficulties requiring reassessment by way of review. Although Part 2 must identify the child's educational needs, it would be surprising if a document prepared to enable informed decisions to be made about the best educational provisions to meet the particular needs of the child did not permit for some flexibility and sensible interpretation of a document with ongoing significance in the child's life. This view is entirely consistent with the Code of Practice for Statements of Special Educational Needs. This expressly states that Part 2 should describe all the child's learning difficulties and should also include "a description of the child's current functioning – what the child can and cannot do", and continues, that "Part 2 should be set out in a fashion which can relate directly to the description of provision set out in Part 3(b)".

36. In this particular case Part 2 includes passages which illustrate something of the depth of C's problems. For example, paragraph 6 in Part 2 reflects the medical assessment that C is in good health, but suffers from respiratory infections and otitis media in winter: these are not educational needs. In paragraph 7 it records that C bites people and objects like electric cables: nor are these. They do however help to inform the overall picture of C, his condition and his problems, and help to put his educational needs into context. It would be inappropriate to castigate a Statement which refers to matters such as these as unlawful, or outwith the statutory framework and it does not follow, when reference is made to them, that they amount to special educational needs for which provision must follow.

37. In my judgment, the principle to be derived from Ex parte E is not as wide as Mr Friel suggests. Consistent with the relevant statutory provision, Part 3 of the Statement must make provision for the educational needs specified in Part 2: no more, no less. Provision is not required to be made in Part 3 for matters of background and comment, nor even for needs which in the judgment of the Tribunal do not amount to educational needs.

38. Mr Friel drew attention to the decisions in Oxfordshire CC v Special Educational Needs Tribunal [2002] EWHC 2908 (Admin) and W v Bedfordshire [2004] EWHC

560 (Admin). On examination, these decisions do not help him. They were both concerned with what were conceded to be special educational needs for which no appropriate provision was proposed. By contrast, in Tottman v Hertfordshire CC [2003] ELR 763 Moses J had to consider a dispute between the parents and the LEA about the appropriate way to meet the needs of a child with autistic spectrum disorder and special educational needs. The parents appealed against the decision of the Tribunal, arguing that it was wrong in law because it failed to identify provision for out of school hours during the waking day, both before and after school, when it had or should have accepted that there was a need for such provision. Moses J decided that the Tribunal had not concluded that special education should be provided throughout the waking day. It was therefore not necessary to specify the means for meeting an educational need which was not established. In short, although the Tribunal accepted that the child needed consistency of approach both when he was at school, and at home, or when receiving respite care, or in other words consistency of approach all round, that did not amount to an educational need for residential education. The Court of Appeal concluded that there was no error of law by the Tribunal, and that Moses J was right to dismiss the appeal by the parents. In effect, the Tribunal as an expert body reached conclusions with which the Court should not interfere.

39. In the present case, McCombe J adopted much the same approach. He explained "Paragraph 9 tells us that C is a boy who needs constant supervision and that [E] is a boy with that characteristic (among others) that needs educating … that may or may not be an education within normal school hours". He went on to conclude that the Tribunal did not ignore C's need for constant supervision in the general sense, but had decided that the need for supervision did not require to be met by educational provision other than in school hours. These decisions are all consistent with the principle I have endeavoured to explain it.

40. In my judgment, the Tribunal was entitled to reach the conclusion it did about the nature and extent of the provision to be made to meet C's educational needs, and McCombe J was right not to interfere with the decision. I have read Wall LJ's judgment in draft. I agree that Mr Friel's "reasons" challenge is not sustained.

41. A number of other arguments were addressed to us in support of Mr Friel's contention that the Tribunal's decision was flawed. In my view they do not take the matter any further forward, and were fully dealt with by McCombe J in his judgment.

42. Mr Friel sought finally to develop a new argument, which he described as a point of practice of some public importance which had never been raised before the Tribunal or McCombe J, nor indeed, so far as he, an expert in this field, is aware, before the High Court or Court of Appeal on any previous occasion. The effect of his submission would have been that the Tribunal would have had some level of jurisdiction over the provision made by the Social Services Department of the Council to ensure that constant supervision was provided for C. This is a radical proposition, boldly advanced for the first time before this Court. My preliminary consideration of the Act and the Regulations suggests that such a jurisdiction is extremely unlikely to have been vested in this specialist Tribunal with specific statutory responsibilities in the field of education. In any event, however, the argument could not sensibly be considered unless and until the particular facts of an individual case have been identified, and the practical possibilities fully examined in the light of those facts. In my judgment it would not be right to permit the point to be argued at this stage.

43. That said, C's problems plainly give rise to a complex of needs, some of which are properly described as educational needs, and others which are not. The account of his

condition needs no repetition, and it equally needs very little imagination to understand the stresses and strains which are imposed on his mother. Rather than repeat Wall LJ's observations on this aspect of the case using my own words, I shall simply record my full agreement with him about the imperative, that so far as possible within the relevant statutory frameworks, a holistic approach should be adopted by the various bodies with different responsibilities for C.

44. However that may be, no basis for interfering with McCombe J's decision has been shown, and none to justify interference with the decision of the Tribunal. Accordingly this appeal must be dismissed.

Lord Justice Thomas

45. I have had the advantage of reading both judgments and agree with each of them.

Lord Justice Wall

46. I have had the advantage of reading Judge LJ's judgment in draft. I am in complete agreement with him that this appeal must be dismissed for the reasons he gives. I wish to add a word of my own on only two points.

47. The first relates to paragraphs I to K on page 11 of the Tribunal's reasons, in which the Tribunal addresses the appellant's argument that C needed a 24 hour/waking day curriculum. The three paragraphs read:

> "(I) We do not doubt that C would benefit from the extended day but there was nothing in the evidence presented by the LEA to indicate that he (h)as a need for such an extended day. We concluded that (his present school) can meet C's special educational needs within the school day. In doing so we recognise the availability of support for C from SSD (the Social Services Department of the local authority). We accept the need for inter-agency working to ensure a consistent programme and approach. It was unfortunate, to say the least, that the SSD had decided to defer its own decision making process until after the conclusion of these proceedings.
>
> (J) We note that a joint placement in a residential placement has not been viewed as appropriate by SSD. We accept that the SSD can and will make the range of provision outlined by Mr Wilson in some detail. We conclude that it would be wrong for us to increase the financial burden on the LEA to provide for C simply because of an alleged delay in SSD meeting its statutory obligation to C of SSD. Having said this, we are concerned at the fact that C's head teacher had not been informed of the contents of SSD's current care plan. We endorse the opinion of Mr Clive Yeadon, independent social worker, who emphasised the need for effective dialogue.
>
> (K) However, we accept that the SSD can and will make the provision to support C and his mother as outlined by Mr Wilson in some detail."

48. Mr Wilson was a social worker employed by the respondent. Mr Yeadon was instructed by the appellant. It appears that towards the end of the hearing on 8 December 2003, the Tribunal advised the parties that it wanted to hear about the

social services provision being made for C and his mother. Mr Oldham, on behalf of the respondent objected to it doing so, submitting in essence that C's social services needs and provision were not relevant to the question of his educational needs. The Tribunal did not agree. It adjourned the hearing to 28 January 2004 to enable the respondent to "bring a third witness to the hearing". The appellant, for different reasons, unsuccessfully sought a review of the decision. Due to meetings between the appellant and the social services department of Leeds City Council, the last of which took place on 22 January 2004, the hearing was further adjourned by agreement on the basis that the latter was to undertake a full assessment of C's social services needs. That evidence was available to the Tribunal at the resumed hearing in May 2004.

49. C, in my judgment, is plainly a "child in need" within section 17(10) of the Children Act 1989, and the social services department of the respondent equally plainly has a duty to provide a range and level of services appropriate to his needs (ibid, section 17(1)). Indeed, as the Tribunal pointed out, it has a care plan for him. In my judgment, the Tribunal was right to seek evidence of what I will call C's "section 17" needs, for the reasons it explained in paragraph F on page 10 of its reasons:

> "Whilst we considered it important that we were aware of, and understood the package of provision that has been available to (the appellant) by SSD and is to be made available to him in the future. (sic) Without this information we would not have had as full a picture of C and his needs as we would have need (sic) if we were to deal comprehensively with C's special educational needs. We needed a total picture. Having done this, we have endeavoured not to stray into the areas of concern regarding C's and those of his family that are properly the concern of SSD. However, we recognise that support may be provided by a range of providers including the LEA and SSD. At times the source of support provided for a child / family may vary on a day to day basis. There can be no clear demarcation between educational provision and non-educational support needs. Similarly there must inevitable times (sic) when LEAs and SSDs take a pragmatic approach as to the way in which they meet their respective statutory duties. We were guided in this by the evidence given by Mr Wilson as to the support that SSD will be providing."

50. I respectfully agree with the Tribunal's approach to its difficult task in determining the content of C's statement of special educational needs, as expressed in this paragraph of its reasons. Because of his condition, C is manifestly a child with multiple needs who poses enormous challenges for those who have to attempt to care for him and provide him with education. Such a child's special educational needs simply cannot be viewed in isolation; nor can his section 17 needs; nor, for that matter, can his need for services provided by the Health Authority and CAMHS. A holistic approach is necessary, and inter-agency co-operation essential, particularly since two of the bodies with statutory responsibilities for (the LEA and SSD) are part of the same local authority.

51. At the same time, of course, the Tribunal is a creature of statute, and its powers are limited to the areas of responsibility given to it by the Education Act 1996 and the consequential regulations. Judge LJ has set out the relevant provisions in paragraphs 27 to 31 of his judgment, and I will not repeat them. In a case such as the present, the Tribunal, in my judgment, had to tread a delicate line between properly informing itself of the "full picture" relating to C, and limiting its decision to a careful

assessment of C's special educational needs within that full picture. In my judgment, this is what the Tribunal conscientiously attempted to do; and accordingly, unless it has committed an error of law in that process, it is not the function of either the Administrative Court, or of this court, to interfere. For the reasons Judge LJ has given, I do not think that any such error of law has been established.

52. My second point is a comment on the note which we invited counsel jointly to provide for us on the case law relating to SENDIST reasons. Although not appearing in his grounds of appeal, Mr Friel sought in his skeleton argument to mount a reasons challenge to the Tribunal's decision, citing the late receipt of public funding as the reason for the absence of an earlier application to amend his appellant's notice. Counsel identified four first instance decisions specifically relating to SENTs. These were: S v Special Educational Needs Tribunal and the City of Westminster [1996] ELR 102, a decision of Latham J; H v Kent County Council and the Special Educational Needs Tribunal [2000] ELR 660, a decision of Grigson J; R (M) v Brighton and Hove City Council and Special Educational Needs Tribunal [2005] ELR 752, and R(L) v London Borough of Waltham Forest and another [2004] ELR 161.

53. I do not think it necessary for this court to add to the already substantial jurisprudence on this topic. Speaking for myself, I have always regarded the judgment of Sir Thomas Bingham MR (as he then was) in this court in Meek v Birmingham City Council [1987] IRLR 250 (even though it substantially antedates the incorporation into English Law of ECHR) as the definitive exposition of the attitude superior courts should adopt to the reasons given by Tribunals. Whilst, of course, some aspects of the reasoning processes of different specialist tribunals are unique to the particular speciality which is engaged, I see no reason, in this context, to distinguish between Employment Tribunals and what are now SENDISTs. Sir Thomas said:

> "It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises….."

54. The Master of the Rolls added:

> "Nothing that I have said is, as I believe, in any way inconsistent with previous authority on this subject. In UCATT v Brain [1981] IRLR 225, Lord Justice Donaldson (as he then was) said at p. 227:
>
> > "Industrial Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon

> any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given.""

55. In my judgment, the reasons of the Tribunal in the instant case are, taken as a whole, what I would call Meek compliant.

56. I would dismiss this appeal.