Neutral Citation Number: [2009] EWCA Civ 108

Case No: C1/2008/0652

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR MICHAEL SUPPERSTONE QC (SITTING AS A DEPUTY HIGH COURT JUDGE)
CO/3388/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2009

Before:

LORD JUSTICE RIX
LORD JUSTICE TOULSON
and
LORD JUSTICE RIMER

- -

Between:

THE QUEEN ON THE APPLICATION OF N	**Appellant**
- and -	
LONDON BOROUGH OF BARKING AND DAGENHAM INDEPENDENT APPEAL PANEL	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Nigel Giffin QC and Ms Fiona Scolding (instructed by **Messrs Fisher Meredith LLP**) for the **Appellant**
Mr James Goudie QC and Mr Peter Oldham (instructed by **Legal Services Division**) for the **Respondent**

Hearing dates: 1 December 2008

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Judgment

Lord Justice Toulson:

1. This appeal concerns the exclusion from school of a girl, N. N was diagnosed as having Attention Deficit Hyperactivity Disorder ("ADHD") at the age of seven. When she was eleven she became a pupil at a maintained comprehensive secondary school in the London Borough of Barking and Dagenham ("the school"). In 2005 and 2006 N was excluded from the school on a number of occasions for fixed terms. Her mother issued proceedings against the school under the Disability Discrimination Act 1995, as amended, alleging that these exclusions constituted unlawful discrimination against N. That complaint was heard and upheld by the Special Educational Needs and Disability Tribunal ("SENDIST").

2. On 9 November 2006 N was permanently excluded by the head teacher, and his decision was upheld by the school's governing body. She was then aged thirteen. N, by her mother, appealed against the decision to the respondent panel ("the panel") which dismissed the appeal. N applied for judicial review of the panel's dismissal of her appeal. Her application was heard by Mr Michael Supperstone QC, sitting as a deputy high court judge. In his judgment [2008] EWHC 390 (Admin), [2008] ELR 154, he granted permission to apply for judicial review but dismissed the claim. N appeals against that judgment.

3. There are two parts to the appeal. The first ground is that the panel wrongly failed to take into its consideration the findings of SENDIST. The second ground is that the panel gave inadequate reasons for rejecting N's complaint that her permanent exclusion from the school involved unlawful discrimination. The second ground makes it necessary to consider whether the phrase in s28B of the 1995 Act that a body "discriminates against a disabled person if…for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply…" is to be interpreted in the same way, mutatis mutandis, as the House of Lords interpreted the same phrase in another section of the Act in *London Borough of Lewisham v Malcolm* [2008] UKHL 43.

Statutory structure

4. Part IV of the 1995 Act concerns education and chapter 1 concerns schools. Section 28A is headed "Discrimination against disabled pupils and prospective pupils" and provides:

> "…
>
> (2) It is unlawful for the body responsible for a school to discriminate against a disabled pupil in the education or associated services provided for, or offered to, pupils at the school by that body.
>
> …
>
> (4) It is unlawful for the body responsible for a school to discriminate against a disabled pupil by excluding him from the school, whether permanently or temporarily."

5. Section 28B is headed "Meaning of "discrimination"" and provides:

> "(1) For the purposes of section 28A a responsible body discriminates against a disabled person if –
>
> (a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and
>
> (b) it cannot show that the treatment in question is justified.
>
> (2) For the purposes of section 28A, a responsible body also discriminates against a disabled person if –
>
> (a) It fails, to his detriment, to comply with section 28C; and
>
> (b) It cannot show that its failure to comply is justified.
>
> …
>
> (6) Less favourable treatment of a person is justified if it is the result of a permitted form of selection.
>
> (7) Otherwise, less favourable treatment, or a failure to comply with section 28C, is justified only if the reason for it is both material to the circumstances of the particular case and substantial."

6. Section 28C, is headed "Disabled people not to be substantially disadvantaged" and provides:

> "(1) The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that-
>
> …
>
> (b) in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled.
>
> …
>
> (4) In considering whether it is reasonable for it to have to take a particular step in order to comply with its duty under subsection (1), a responsible body must have regard to any relevant provisions of a code of practice issued under section 53A."

7. The relevant guidance at the time of N's permanent exclusion was "Improving Behaviour and Attendance Code: Guidance on Exclusions from Schools and Pupil Referral Units" (September 2006).

8. Section 28I provides that complaints of discrimination under Chapter 1 of Part IV of the Act can be made by the child's parent to SENDIST, but that is subject to an exception in cases of permanent exclusion. Under s52 of the Education Act 2002, and regulations made under it, an appeal against a permanent exclusion lies to the panel. In that case, s28I(2) and s28L provide for a complaint that exclusion involved unlawful disability discrimination to be considered by the panel hearing the appeal against the exclusion.

Academic year 2005/06: the fixed term exclusions and SENDIST decision

9. N was excluded on 11 November 2005 for 16 days, 7 March 2006 for 4 days, 19 April 2006 for 5 days and 21 June 2006 for 10 days. Her mother's complaint to SENDIST was made on 4 May 2006. It was heard on 30 October and 12 December 2006. In the meantime, N was permanently excluded by the head teacher on 9 November, the governing body decided to uphold that decision on 17 November, and N's mother was notified of the governing body's decision on 20 November 2006. SENDIST gave its decision on 28 December 2006.

10. SENDIST summarised the reasons for the fixed term exclusions as follows:

> "5. The tribunal bundle contains a great deal of evidence from various teachers at [the school] who have recorded those occasions upon which [N] has caused difficulties. They include episodes of rudeness in class and outside of it; throwing things in class and disturbing her peers by talking loudly; refusing to follow instructions; being involved in fights with other pupils; playing truant; having what was described as a "poor attitude"; refusing to remove a coat when asked to; refusing to carry out a test when asked to; ignoring instructions given to her in class, walking around class being disruptive; wearing makeup and jewellery against school rules; and laughing raucously and inappropriately.
>
> 6. The behaviour that led to those exclusions conceded on behalf of the Responsible Body to have occurred (being those that took place on 11 November 2005, 7 March 2006, 19 April 2006 and 21 June 2006) are described in the documents referred to above and in notes made by [the deputy head teacher] who carried out some of the exclusions and in correspondence between the school and [N's mother].
>
> 7. The 11 November 2005 exclusion was preceded by episodes of N defying school staff who had given her instructions; leaving the school without permission; being verbally abusive to staff; running away from [N's mother] and not stopping when she was asked to; punching another child in the arm; and running and walking around the school site without permission. …
>
> 8. The behaviour that gave rise to the exclusion that took place on 7 March 2006 included failing to follow instructions; being verbally abusive to a teacher;

talking over a teacher; going missing from school; running around school; and walking away from a teacher who had asked her to accompany her to a particular site. …

9. The next exclusion…was that imposed by letter dated 19 April and 2006 and, again, signed by [the head teacher] …N is stated to have gone into a wrong room deliberately and to have refused to cooperate; to have been rude to staff; to have been disruptive and defiant; trying to hide from a senior staff member; refusing to cooperate in a lesson; shouting during lessons; and leaving the room saying that she was going home.

10. The final exclusion was imposed by [a new deputy head teacher]. [The head teacher] wrote to [N's mother] on 20 June and explained that N had been excluded because there had been a serious breach of the school rules…N is recorded as having been disruptive in lessons throughout the day following an incident that had taken place during the first period. N had locked herself in a toilet cubicle with her sister …She had been asked to leave and had been told that it would be necessary for a caretaker to break the door if she did not."

11. It was conceded on behalf of the school that N had a disability, ADHD, but it was argued that the behaviour which she had exhibited did not arise from her ADHD. SENDIST rejected this submission. Having found that the conduct which gave rise to N's exclusions was related to her disability, SENDIST went on to find that there had been unlawful discrimination for the following reasons:

> "J …There was no evidence presented to us that could lead us to conclude that other children who were not disabled were treated as N had been…
>
> K We were not content that the lengthy exclusion that took place in November 2005 was justified. With respect to the Responsible Body's witnesses their assertions that N was giving cause for concern for health and safety was not further explained, nor was it explained why the length of the exclusion was 16 days.
>
> L So far as the other instances of exclusion were concerned, they were all for disruptive behaviour and fell within the range that the school procedure allowed. N was behaving in such a way as to seriously undermine discipline and morale and it is evident from the staff log that she was causing real problems.
>
> M We noted the range of options available to the school to assist them to deal with N. When asked which had been used on which occasion however we were simply told that they had been used without example. We considered it to be more likely than not that such strategies that had been tried had been tried in no more than a piecemeal way without analysis and there was certainly no clear analysis of N's good behaviour in order to learn from it. Further there had

been no attempt to contact Dr… or any outside agent (such as an educational psychologist) for guidance. In our view the Responsible Body ought to have contacted Dr… and other professionals for advice; analysed the causes of N's good behaviour with a view to learning from it; and formulated a plan which systematically utilised the various strategies devised for her. They amount to reasonable adjustments [which] could have been made.

N We conclude finally that had the reasonable adjustments been carried out it would not have been justified to exclude N as a disabled child on the several occasions that she was excluded."

The academic year 2006/07 and the permanent exclusion

12. At the start of the new school year N was due to move to a more senior part of the school which occupied a different site. From the evidence presented to the panel, it is apparent that before the end of the previous year a good deal of thought was given by the school to how N was going to make the transition and how a repetition of the past problems could be avoided. £1500 was provided by the school for transitional care and for one-to-one sessions of two hours in the mornings. (This had never before been done in the school). A tutor was provided for N, 3 weeks before the end of year 8, in order to ease her into year 9 and she was taken to the upper school site in order to become familiar with it. The plan was explained to N and she was happy with it. However, after a short time she said that she did not like the tutor and refused to spend time with him. N also had a key worker, Mrs T, who was based in the Learning Support Centre.

13. N had numerous one-to-one sessions with her key worker, who went through targets with her to try to see that she was on track. N spent time discussing her anger with the key worker, ways in which she could control it and techniques for relaxing and de-stressing. N spent a lot of time discussing with the key worker situations which made her angry. N also attended anger management sessions in the school led by an educational psychologist.

14. A statement of N's special educational needs was prepared, revised and agreed. It was formally dated 10 October 2006, but it had been completed by the end of the summer. In preparing a strategy for coping with N's needs, the school consulted the manager of the local education authority's special needs team, and a member of his team had various discussions with the school including meetings with N.

15. Part of the strategy was to have a flexible timetable, which was reviewed weekly with N from the start of term, with N taking an active part in designing a timetable with which she felt able to cope.

16. Although N behaved well at times, unhappily her behaviour over the 2 months prior to her permanent exclusion was repeatedly disruptive to the point of being beyond control. The appendix to this judgment contains extracts from the school file which give a flavour of things.

17. On a number of occasions between September and November 2006 the school attempted to discuss N's behaviour with her mother. Apart from a meeting on 17 October 2006 to review N's statement of needs, which was attended by N, her mother, several of her teachers, representatives from the local authority's SEN department and the head teacher from the PRU, these attempts were largely unsuccessful.

The panel's decision

18. N's appeal against her permanent exclusion was heard by the panel on 8 January, 16 January and 31 January 2007. Excluding breaks, the hearings lasted for a total approaching 10 hours. During that time the panel heard evidence from N's mother, the head teacher, deputy head, the manager of the local authority's special educational needs team, the head of special educational needs at the school and a number of other teachers.

19. At the hearings, the panel made it clear that it would not be taking into consideration the previous fixed term exclusions or SENDIST decision in relation to them, because it did not consider those matters to be relevant to the determination of the appeal.

20. In its decision dated 2 February 2007 the panel first considered whether N was disabled within the meaning of the 1995 Act and whether she had been discriminated against for a reason related to her disability. It concluded:

> "The Panel found that, as an ADHD sufferer, N is disabled and indeed the School conceded that at the start of their case. However, the Panel did not feel that N had been treated less favourably by the School for reasons related to her disability, nor did they feel the School had failed to make reasonable adjustments for N. The Panel felt that the School had done everything they could to cater for N's needs".

21. The panel then went on to consider whether N did what she was alleged to have done and, if so, whether permanent exclusion was the appropriate response to her behaviour.

22. As to those matters, the panel related that the school based its decision to exclude N on a series of alleged incidents between September and November 2006 and that at the hearing it had made particular reference to incidents on 9 days (12, 13, 15, 18, 20 and 22 September, 4 and 31 October and 8 November 2006) as examples of her behaviour. It summarised the behaviour as:

> "Refusal to follow teacher's instructions; refusal to complete work; refusal to adhere to the school uniform policy by wearing an earring; the use of rude, abusive and/or obscene language to staff; barricading herself in the classroom by placing a chair against the door, damaging School property, disrupting classes, both her own and others; encouraging other students to misbehave; wandering round the School without permission; leaving lessons without permission; and leaving the School site without permission."

23. The panel noted that the main grounds of the appeal of N's mother's both in writing and at the hearing were that N disputed the majority of the incidents; that the school had not kept N's mother fully informed of the incidents, but had excluded her from meetings called regarding N's progress; that the school had not put in place successful strategies to deal with N's behaviour; and that the school had not given support as it claimed.

24. The panel found that N had acted as the school alleged, that the school had exhibited considerable patience when faced with her defiant behaviour and that it had given her every opportunity to change her behaviour. It therefore concluded that there had been a series of serious breaches of the school's behavioural policy and it accepted that for N to remain in the school would seriously harm her own education and that of other pupils.

25. In considering whether permanent exclusion was the appropriate sanction, the panel had regard to the welfare of N and other pupils and staff (to which it considered that N's continued presence at the school constituted a threat) and it had particular regard to the statutory guidance document on exclusions. Since N was the subject of a statement of special educational needs, it also had particular regard to the guidance that every effort must normally be made not to exclude such a pupil. In that context it again considered the attempts which the school had made to maintain N at the school. It concluded that despite her statement of special needs the persistence and seriousness of her behaviour made it a case in which permanent exclusion was the appropriate sanction.

The deputy judge's decision

26. The deputy judge rejected N's argument that the panel erred in law by not considering the SENDIST decision. After referring to and distinguishing the authorities relied on by Mr Giffin QC, the deputy judge set out his reasons as follows:

> "24 In the grounds for renewal of the application for permission to apply for judicial review it was said that "it was incumbent on the [panel], as a minimum, to consider the [tribunal] decision and to explore what, if anything, had changed in relation to the defects identified by [the tribunal] between June and November 2006" (para 1). In my view that would have been the wrong approach. The panel had to consider the evidence that was presented to it in November 2006. As Mr Goudie QC, for the defendant, submits, that evidence related to different incidents; different periods of misbehaviour; different school years; the evidence was given by different witnesses; and the fixed term exclusions occurred before the statement of special educational needs took effect. Further, the panel may not have known of the evidence that led to the tribunal decisions save in so far as that evidence is referred to in the decision itself. By contrast it is clear that the panel was presented with detailed evidence of N's misbehaviour during the period from September to November 2006 and of the strategies that the school had in place to promote positive behaviour on N's part during that material period.
>
> 25 In my view the decision of the panel is a properly reasoned decision based on the evidence adduced before it. The sole ground of challenge is that the

> panel should have had regard to the tribunal decision; otherwise it is not alleged that the panel erred in law. In my judgment there was no obligation on the panel to take the tribunal decision into consideration."

Was the panel under an obligation to take the SENDIST decision into consideration?

27. Mr Giffin repeated the submissions which he had made to the deputy judge. He argued that N's behaviour over the period from September to November 2006 was simply a continuation of her pattern of behaviour which had led to the fixed term exclusions considered by SENDIST; it was, as he put it, "more of the same". Therefore the panel should have taken as its starting point the SENDIST decision. It was not bound to reach the same conclusion, but if it differed from SENDIST it was incumbent on it to explain its reason for doing so. If, on the other hand, it accepted the SENDIST decision as correct, then it had to explore and explain what, if anything, caused it to conclude that the school was justified in November 2006 in permanently excluding N for continuing a pattern of behaviour for which the school's earlier decision to impose the lesser sanction of fixed term exclusions had been unlawful.

28. Mr Giffin did not suggest that there was technically an estoppel, but he submitted in his skeleton argument that:

> "The practical reality here is that the conclusion of the SENDIST and the conclusion of the [panel] are simply inconsistent. The two bodies took different views of the reasons for N's behaviour and of the adequacy of the school's response to it. The vice of the [panel's] decision is that this inconsistency came about, not as the result of a conscious decision to depart from the SENDIST's views for some sensible reason (e.g. important evidence not before the SENDIST), but after the SENDIST decision had deliberately been ignored. Apart from anything else, such an outcome must bring the administration of the [1995 Act] into disrepute."

29. In concise but cogent submissions, Mr Goudie argued that the deputy judge was right. Leaving aside cases of estoppel or where a decision making body is required by statute to take a particular matter into consideration, such a body can only be said to have acted unlawfully in failing to take a particular matter into consideration if its omission to do so was *Wednesbury* unreasonable. The panel was not obliged as a matter of law to approach the issues which it had to decide by the indirect route which Mr Giffin suggested. The panel was entitled to go directly to the points which it had to decide. Since the conduct (and the only conduct) relied on by the school to justify N's permanent exclusion was her conduct between September and November 2006, the panel had to decide whether she had behaved as alleged; whether the school had unlawfully discriminated against her, in particular, by failing to make reasonable adjustments appropriate to her needs in order to prevent her from behaving as she had allegedly done; and whether in all the circumstances her permanent exclusion was an appropriate response to her behaviour from September to November 2006. The school did not dispute before the panel that N's behaviour was related to her disability, but it gave detailed evidence of the strategy which it had unsuccessfully adopted from the summer of 2006 in order to meet her needs and try to prevent her behaving in the way that was alleged. The panel could not be said to have acted

unreasonably, let alone in the *Wednesbury* sense, in concentrating on those issues, and in declining to be led into the byway of making judgments about the conduct of N and the school both prior to N entering year 9 and prior to the school adopting the strategy which it did for assisting her in that year.

30. Looked at as a matter of principle, in agreement with the deputy judge I would accept the submissions of Mr Goudie. I would add that on the factual evidence I would not accept the suggestion that as a matter of practical reality the conclusions of SENDIST and the panel are simply inconsistent. That is to overlook the substantial body of evidence about the considerable lengths to which the school went to prepare N for and support her during year 9, which plainly impressed the panel that heard direct evidence from those involved.

31. I turn to the authorities relied on by Mr Giffin.

32. *R (Von Brandenburg) v East London and City NHS Trust* [2003] UKHL 58, [2004] 2 AC 280, concerned the scheme under the Mental Health Act 1983 for compulsory detention of a person suffering from mental illness of a kind justifying such detention and, in particular, the roles of the approved social worker and the Mental Health Review Tribunal ("MHRT"). It was held that where a tribunal decides to discharge a patient, a social worker may not lawfully apply for that person's re-admission unless he reasonably and in good faith considers that he has information, unknown to the MHRT, which put a significantly different complexion on the case. Given that the Act itself gives to the tribunal the judicial responsibility for determining whether a person should be released from detention, it would nullify that scheme if a social worker who took a different view could for that reason alone procure the immediate fresh detention of the person concerned. In that context Lord Bingham said at para 8 that:

> "…the rule of law requires that effect should be loyally given to the decisions of legally-constituted tribunals in accordance with what is decided. It was clearly established by the House in *P v Liverpool Daily Post and Echo Newspapers PLC* [1991] 2 AC 370 that a mental health tribunal is a court to which the law of contempt applies. It follows that no one may knowingly act in a way which has the object of nullifying or setting at nought the decision of such a tribunal."

33. That decision in my view has no bearing on the present case. In this case SENDIST and the panel were separate bodies exercising judicial responsibilities but with different jurisdictions. The decision of the panel in no sense nullified or undermined the decision of SENDIST. For example, SENDIST's decision, on the evidence before it, that such strategies as had been tried by the school for dealing with N had been tried in no more than a piecemeal way without analysis, is not undermined by the panel's decision, on the different evidence before it, that over the later period of time considered by it (during which N's statement of special needs had been agreed) "the school had done everything they could to cater for N's needs".

34. In *X County Council v DW* [2005] EWHC 162 (Fam), [2005] 2 FLR 508, a child with autism was placed in the interim care of the county council, which was also the local education authority. The authority made a statement of special educational needs

identifying a particular school which it considered would best meet the child's needs. The authority's care plan, approved by the court, was that the child should go to that school. The child's parents strongly disagreed and had a right to appeal against the needs statement to SENDIST. Mumby J was asked to consider the hypothetical position if SENDIST were to exercise its powers on appeal so as to conflict with the care plan approved by the court. He observed that the court and SENDIST had different functions, and neither could dictate to the other what decision it should make, but that the questions for them both were so similar that he had no doubt that the family court would pause before differing from the carefully considered view of SENDIST, although the family court was not obliged to agree that the child be sent to the school identified in the statement.

35. In *AA (Somalia) v Secretary of State for the Home Department* [2007] EWCA Civ 1040, [2008] Imm A R 2, the court was concerned with two asylum appeals. In one case a brother and sister each left Somalia. The asylum claim of the sister was determined before that of the brother. In the other case two homosexual partners left Iran and claimed asylum on the grounds that they would be liable to persecution on return because of their sexual orientation. The claim of one was determined before that of the other. The question before the Court of Appeal was what regard should be paid by the second tribunal to the decision of the first. Carnwath LJ giving the leading judgment of the majority, referred to the principle of administrative law that persons should be uniformly treated unless there is some valid reason to treat them differently. He said that in cases where there is not merely an overlap of evidence, but where the cases arise out of the same factual matrix, e.g. the same relationship or same event or series of events, the second tribunal should follow the decision of the first in the absence of some very good reason for not doing so, such as compelling new evidence.

36. Finally Mr Giffin referred to the following extract from the judgment of Sir Anthony Clarke MR in *Secretary of State for the Home Department v AF* [2008] EWCA Civ 117 (para 36):

> "I would not cast doubt on the general proposition that in public law cases, where there has been a previous decision in proceedings between the same parties, and the same question arises in subsequent proceedings the starting point is likely to be the decision in the first proceedings. However, all will depend upon the circumstances."

37. I do not see any of those authorities as supporting the proposition that the panel was obliged by law to approach the appeal before it in the manner suggested by Mr Giffin. There were similarities in N's behaviour before and after September 2006, but the factual matrix (to follow the term used by Carnwath LJ) was far from identical, particularly in relation to the measures taken by the school to try to help N. The questions for the panel were not the same as the questions which SENDIST had decided, and there was no necessary or indeed logical basis for taking SENDIST's decision as a starting point for deciding issues which the panel had to determine and upon which it had heard different evidence.

Adequacy of the tribunal's reasons

38. Although the grounds in the application for judicial review included a complaint that the panel failed to give adequate written reasons, the point does not appear to have been advanced separately before the deputy judge. He noted in his judgment (para 15) that although the claim form set out various grounds of review, Mr Giffin had limited himself in his oral submissions essentially to the one argument based on the decision of the panel to disregard the SENDIST decision. But Mr Giffin advanced it on the appeal without objection from Mr Goudie.

39. As previously set out, the panel stated that:

> "The panel did not feel that N had been treated less favourably by the School for reasons related to her disability, nor did they feel the School had failed to make reasonable adjustments for N."

40. The panel amplified the second part of that finding but not the first part. The two parts of the findings go to the two possible forms of discrimination outlawed by s28B(1) and (2). The first relates to positive discrimination against a disabled person; the second relates to what is commonly described as failure to make reasonable adjustments.

41. A responsible body commits the first form of discrimination against a disabled person if "for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply", unless the treatment is justified.

42. To decide whether there has been such discrimination it is first necessary to identify the relevant comparator. If the comparator is someone who had behaved in the same way as N, but did not suffer from N's disability, there was no basis on the evidence for a case of positive discrimination and the panel could not be criticised for dealing with that point summarily. But is that the right comparator? Mr Giffin submitted not. He submitted that the proper comparator was someone who had not behaved as N did (i.e. someone to whom the reason for the school's treatment, namely exclusion, would not apply). If so, there is force in his complaint that the panel's rejection of discrimination under s28B(1) required fuller reasoning.

43. The form of words used in s28B(1)(a) appears in several sections of the Act. In *Clark v Novacold* [1999] ICR 951 the court had to construe the same words in Part II of the Act, which deals with employment. The Court of Appeal adopted the construction contended for by Mr Giffin, i.e. that the relevant comparator was someone who had not acted in the way that caused the employer to treat the employee as it did.

44. In *Malcolm* the House of Lords was concerned with the construction of the same phrase in Part III of the Act. It overruled the decision in *Clark v Novacold* and held that the proper comparator was someone who had behaved in the same way as the person concerned, but did not suffer from that person's disability.

45. Mr Giffin submits that in Part IV, chapter 1, the phrase should be construed as it was by Court of Appeal in *Clark v Novacold*, and not as it was by the House of Lords in *Malcolm*. He has advanced a closely reasoned argument for doing so, but I am unable to accept it.

46. First, there is a strong presumption that where the same formula is used in different parts of the same Act it is intended to bear the same meaning.

47. Secondly, the fundamental reason which caused the House of Lords to overrule the construction adopted by the Court of Appeal in *Clark v Novacold* applies equally to s28B(1). This was that on the *Clark v Novacold* construction, whenever the reason for a person's treatment related to his disability he would be logically bound to be able to satisfy the requirement that his treatment was less favourable than would be accorded to others to whom the reason did not apply. The comparative test would not be a test at all: see Lord Bingham at 13-16, Lord Scott at 32-34, Lord Browne at 112-113 and Lord Neuberger at 137-142.

48. Thirdly, the point made by Mr Giffin that discrimination under s28B has a wider range than discrimination under Part III (with which the House of Lords was concerned), because s28B(2) contains the alternative form of discrimination based on failure to make reasonable adjustments, does not in my judgment assist N. On the contrary, one of the points of concern expressed in the House of Lords in *Malcolm* was that the construction which it felt constrained to adopt gave a narrow meaning to discrimination, but there is *less* reason for concern on that score where there is the alternative form of discrimination under s28B(2).

Conclusion

49. I agree with the deputy judge that the panel was under no legal obligation to take the SENDIST decision into consideration in arriving at its conclusion and that its decision was a properly reasoned decision based on the evidence produced before it. I would dismiss this appeal.

Lord Justice Rimer:

50. I agree.

Lord Justice Rix:

51. I also agree. I was at one time concerned that the panel had erred in law in declining to consider the previous fixed term exclusions and SENDIST's decision in relation to them. It declined to do so on the ground that those earlier events and the decision in relation to them were not relevant to the decision that the panel itself had to make on new, later, and different facts. As a note of their (interlocutory) decision, dated 8 January 2007 put it: "Their findings [ie SENDIST's] were relevant to the previous fixed term exclusion and not to the permanent exclusion." I do not myself think that the earlier matters or SENDIST's views about them were irrelevant as a matter of argument: although, after examination, they might be shown to be more or less relevant, or even entirely irrelevant, in the light of the changed circumstances which are clearly described in Lord Justice Toulson's judgment above. However, I am persuaded that the Panel was not under a legal obligation to take account of them, or, as Mr Giffin sought to put it, obliged as a matter of law to approach the issues which it had to decide via the route of the earlier incidents and SENDIST's views about them. I agree that the panel could not be said to be acting unlawfully, or unreasonably, in concentrating on the events and issues with which it was concerned and refusing to be drawn into other earlier and different events, with which it was not concerned.

52. It does not follow that in other circumstances, where the issues of earlier fixed term exclusions and a later permanent exclusion overlap, that another panel would be excused for failing to take account of the total history of events (as this court has been asked to do for the purpose of this appeal). It is true that SENDIST and the independent panels operate separate jurisdictions. However, as Exclusions Guidance observes:

> "A decision to exclude a child **permanently** is a serious one. It will usually be the final step in a process for dealing with disciplinary offences following a wide range of other strategies, which have been tried without success. It is an acknowledgment by the school that it has exhausted all available strategies for dealing with the child and should normally be used as a last resort."

53. In the present case, I am inclined to think that it would have been wiser for the panel to have considered the SENDIST decision so that it could confirm by reference to it that it could be satisfied that the events of the new school year, on both sides, were properly to be regarded as being insulated from any behaviour or errors of the previous year. Nevertheless I do not consider that its failure to do so amounts to an error of law such as vitiates its decision. Particularly where N no longer wishes to return to the school from which she has been excluded, I do not see here a case for the interference of these courts by way of judicial review.

APPENDIX

"…

8.9.06

…

Period 2

I asked N what was wrong and she said that she would not do any work because she was being kept in at break time. I asked if N knew why she was being kept and she said she did. She said her mum had written to teacher 2. I explained to N that she should try and do the work that had been set and as I was geography teacher I could help her with it. N said "not doing it". I asked her what she thought she should be doing while in school, she said "dunno". I told N she should be trying to get on with her work, she said "don't care". She complained that she was not able to go to her lessons. I explained to N that her attitude towards me showed that this could be a problem. N put her head down on the table and refused to listen.

…

12.9.06

Period 4 Art Lesson

N was extremely disruptive and walked out of the lesson when the teacher spoke to her about her behaviour.

Period 5

N refused to complete work set and start walking around the school building. She came back to the LSC (learning support centre) after a few minutes.

Period 6

N refused to follow instructions when asked to complete work.

…

19.09.06

At the beginning of period 1, N came to LSC. I told her that she had an English lesson. She at first refused to go to the lesson. I explained to her that she could not choose when to attend but had to attend all the lessons that were agreed.

During lesson 2 teacher 1 came to see N and withdrew her from the LSC to discuss her pastoral support programme. N's behaviour deteriorated on her return.

At the end of break, N did not return to the LSC, she eventually returned with another pupil having been walking around the school collecting work. I told N that it was not acceptable, she said "if I want to go, I will". During lesson 3 N continued to be both disruptive and rude about teacher 2 and members of staff. She repeatedly refused to work and defaced work sheets provided.

N was allowed to go to the toilet, monitored by teacher 3. On her return, she refused to come and sit down. Another pupil was going to collect work. N was hanging about outside the door of the LSC. I politely asked her to come and sit down. She again refused and said that she was waiting to speak to the other pupils. I asked her again but raising the tone, she said she did not want to. I told N that her immature behaviour was not acceptable and that she was now a year 9 pupil.

Whilst I was taking other pupils to lunch, N had walked out of the LSC. I asked her why she had walked out, she said "it's got nothing to do with you, so don't bother asking".

N came back to the LSC at the end of lunch. She repeatedly began knocking on the outside wall calling for another pupil. She began running around the LSC knocking on the windows and crouching down hiding.

…

19.09.06 period 3

Refused to complete set work (history)

Disrupting other students in the LSC.

Defaced the resources provided by the history department.

…

19.09.06 period 5

N refused to go into the LSC if teacher 4 was in there.

N walked round the back of the LSC and banged on the windows and wall of the LSC.

Teacher 3 asked N to move round to the front of the LSC, which she did.

N then entered the main building and began swinging her bag around, walking up and down the corridor.

Teacher 3 explained to N that she either had to work in the LSC in an empty classroom or go to the PRU.

N decided to go to the PRU but again became very abusive, shouting that she "hates this school".

N sat at the back of the PRU and became very disruptive when asked by teacher 8 who was on duty for her name, form, etc.

N refused to work, ripped up the work which had been given to her and threw it in the bin. Teacher 8 intervened, to which N replied "be quiet, I don't like you".

Teacher 3 withdrew N from the PRU and told her that she must return to the LSC.

Teacher 3 escorted N to the LSC. However N refused to go into the LSC and a senior member of staff was called.

N locked herself in the corridor which leads to the 6th form block.

N left this corridor, ran into the G corridor and out into the quad. At this time she was making comments such as "teachers piss me off".

…

03.10.06 period 5

N was late to lesson. I tried to escort her to her lesson, she found it funny to run around with another student. I escort her to the lesson, as she walked in she told me that she did not want to go, that the lesson was "crap" and that she would get sent out. N was sent out and proceeded to call teacher 14 "a fat elephant".

…

04.10.06

N ran out of the LSC with another pupil when asked not to – N also threw her work down the corridor. Teacher 15 came into the LSC and spoke to N about her behaviour. She was quite rude to the assistant head with regard to teacher 14. When asked not to speak to staff in that way she repeatedly replied "I don't care, I don't care". N again refused to do any work set, she did not follow instructions.

…

09.10.06

As soon as the lesson began, it was clear that N did not wish to be in the lesson. She was turning around talking and calling across the room. When students were asking questions, she was answering for me. N was not following instructions.

…

I asked N to come outside to talk. She was still unresponsive so I asked her leave. I went to collect her equipment and N told me not to touch her stuff. N then left the room before I had a chance to give her work saying "this teacher is a fucking mug" – several members of the class heard this.

…

31.10.06 period 6

Refused to work. Aggressive challenging behaviour.

…

31.10.06 – General Comments

…

I spoke to N regarding her timetable as part of her supported reintegration programme. N needs to attend more of her lessons, this is the school's aim. N refused to attend any of the following lessons, art, maths, music, science, geography, RE and technology.

N's behaviour has been erratic, she has refused to do any of the work set. N became abusive towards the school "this school is so shit, I hate school and the teachers". N makes it increasingly difficult to discuss her behaviour, her attitude towards the school. N at times throws and slams things on the desk in order to avoid the conversation.

N walked out of the LSC – came back and threw her blazer on the floor and started damaging school property (sharpening the ends of paintbrushes). When asked to put her blazer back on she replied "I bloody can't – it's got bird pooh on it". Behaviour aggressive and challenging.

…

8.11.06

…

Periods 2 and 3

Refused to do work set, instead drew on planner. She continue to graffiti her planner – wrote "teacher 2 is an idiot for ever". Then continued to be rude and abusive. N refused to go to the next lesson saying "nobody ever f… listens to me. It gets on my f… nerves".

Period 4

N came into the maths room but when asked about her book she did not have one. She refused to have any paper as she said she was not doing any work. Teacher 17 spoke to N and got the same response so I had to ring the LSC to get someone to collect her.

…N returned to the LSC where she barricaded herself in the classroom by setting her chair up against the door. Despite several requests, N refused to open the door. Some pupils were moved out of the LSC and another teacher was called. N eventually opened the door and let me in.

…

Period 5

Refused to do the work set, unable to sit in chair. N found it extremely difficult to stay inside, running in and out of the LSC…

Period 6

Refused to work, sat chatting, then running around the LSC. When spoken to about her behaviour said "I hate this school, it's a bloody joke". Kept standing on the chair and shouted at pupils taking PE, including a team from another school. N kept shouting "oi" over to the girls and then shouting "who are you looking at" when they responded, she was trying to provoke an argument/make fun of the other girls.

During period 6 teacher 7 came into the LSC to speak with N. Teacher 7 handed N a letter and explained that due to her behaviour today and on previous occasions she had no alternative but to exclude her. N immediately took the letter and ripped it in two and threw it on the floor. On doing so she walked away from teacher 7, she became abusive and aggressive, saying "you stupid c..t, go away". N continued "I f… g hate her". N then walked out of the LSC.

…N was followed by myself and teacher 7 and again N was extremely abusive towards teacher 7 shouting "why are you f… following me". I again spoke to N in the back playground, she became extremely upset. "See what I mean, I haven't done anything, its not my fault". N then threatened teacher 7 "if she comes anywhere near me I'll f…ing smash her face in".

N then ran off into the main building, she ripped posters from the wall and slammed doors into the walls. N threw her books down the corridor.

N returned to the LSC. She collected her things. She kept walking around the school building, tearing posters as she went. N then went into the main school building followed by myself and met by teacher 7.

Again more abuse aimed at teacher 7. "Who does she think she is, I hate her. She's got it in for my family, stupid dickhead".

…"