Case No: CO/1581/2003

Neutral Citation Number: [2003] EWHC1770 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 21st July 2003

Before :

THE HONOURABLE MR JUSTICE MACKAY

- -

Between :

THE QUEEN ON THE APPLICATION OF KW — Appellant

- and –

(1) THE SPECIAL EDUCATIONAL NEEDS TRIBUNAL — Respondents

(2) ROCHDALE METROPOLITAN BOROUGH COUNCIL

- -

(Transcript of the Handed Down Judgment of
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Mr. D. Wolfe (instructed by Levenes solicitors) for the Appellant
Mr. J. Findlay (instructed by Rochdale Borough Council Solicitors) for the 2nd Respondent

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Judgment

Mr Justice Mackay:

1. This is a statutory appeal against a decision of the Special Educational Needs and Disability Tribunal (the Tribunal) relating to a 12 year old girl whom I will call 'I'. She had been born extremely prematurely and as a result suffered grievous problems. She is totally blind due to retinopathy of prematurity and also has severe global developmental delay. Her learning and visual difficulties interact and together impede the development of her skills in all areas of her life. Although now chronologically aged 12 she operates at a pre-school level in most areas of functioning, that is social, sensory-motor, language and other living skills.

2. Since 1996 she has had a statement of her special educational needs, and from September of that year went to a special school maintained by her local educational authority for children with severe learning difficulties. In September 1999 her parents moved her to W School where she remains. She is a weekly boarder for some 38 weeks of the year, staying at the school between Monday morning and Friday lunchtime. This is a non-maintained school and the Local Education Authority declined to fund her attendance; the fees are therefore paid for by her trust fund.

3. Towards the end of 2001 Rochdale Metropolitan Borough Council ('the LEA') initiated the procedure of reassessing I's needs, which culminated in a fresh statement issued on 20th March 2002. Her mother appealed to the Tribunal against part of that statement, under s.326 The Education Act 1996. In this appeal she now claims that the Tribunal erred in law in two respects and seeks an Order quashing its decision and as well as other forms of relief. At this hearing the Tribunal though a Respondent, in accordance with its normal practice, has not appeared before me but the LEA as Second Respondent has.

The relevant legislation

4. The relevant parts of the Education Act 1996, so far as this appeal is concerned, are as follows:-

> "S.312(1): A child has "special educational needs" for the purposes of this Act if he has a learning difficulty which calls for special educational provision to be made for him.
>
> (2) Subject to subsection (3) ….. A child has a "learning difficulty" for the purposes of this Act 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 the local education authority …..
>
> (4) In this Act "special educational provision" means -

(a) In relation to a child who has attained the age of 2, educational provision which is additional to, or otherwise different from, the educational provision made generally for children of his age in schools maintained by the Local Education Authority …."

5. By s.313 the Secretary of State is required to issue a code of practice giving practical guidance to LEA's to how to discharge their functions under the Act, and the LEA's are placed under a duty to have regard to its provisions.

6. The Act contains provisions for the identification and assessment by the LEA of children within their area with special educational needs. This process culminates in the production of a statement of special educational needs which is dealt with in the Act as follows:

"S.324(1) If, in the light of an assessment …. of any child's educational needs and of any representations made by the child's parent in pursuance of Schedule 27 it is necessary for the Local Education Authority to determine special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs.

(2) The statement shall be in such form and contain such information as may be prescribed.

(3) In particular, the statement shall –

(a) give details of the authority's assessment of the child's special educational needs, and

(b) specify the special educational provision to be made for the purpose of meeting those needs, including the particulars required by subsection (4).

(4) The statement shall –

(a) Specify the school or other institution which the Local Education Authority consider would be appropriate for the child …

(5) Where a Local Education Authority maintain a statement under this Section then –

(a) Unless the child's parent has made suitable arrangements, the authority –

(i) Shall arrange that the special education or provision specified in the statement is made for the child; and

(ii) May arrange that any non-educational provisions specified in the statement is made

> for him in such manner as they consider appropriate ….."

7. S.326 of the Act gives a right of appeal against the contents of such a statement to the Tribunal including an appeal against the special educational provision specified in the statement and the name of a school so specified. It was under this section that I's mother appealed to the Tribunal.

8. The regulations made under The Education Act 1996 include the Education (Special Educational Needs) (England) (Consolidation) Regulations 2001. They prescribe a form for a statement of special educational needs which is significant in the context of this case. The form divides the statement into six parts. The first contains details of the child and its position. Part 2 describes the child's special educational needs. Part 3 sets out the special educational provision proposed to meet those needs under three headings: objectives, educational provision to meet needs and objectives and monitoring. Part 4 deals with placement and should specify the type of school which the LEA considers appropriate and the name of that school. Parts 5 and 6 deal with non-educational matters which are not relevant to this appeal. The code of practice, so far as Part 3 of this statement is concerned gives detailed guidance as to what this part should contain. As to the second subsection dealing with educational provision it says at 8:34:

> "The second subsection should specify all of the special educational provision the LEA consider appropriate for <u>all</u> the learning difficulties in Part 2, even where some of the provision will be made by direct intervention on the part of the authority, some will be made by the child's school from within its own resources, and some may be made by the health authority. It is the LEA that is responsible for arranging the provision in the statement, irrespective of who actually delivers it, unless the LEA is satisfied that the child's parents have themselves made suitable arrangements".

<u>Educational Provision</u>

9. The statutory framework described above immediately throws up the difficult question of what type of provision is to be categorised as an "educational provision" since it is necessary to be able to identify this before proceeding to identify whether a particular provision is a "special educational provision" under s.312(4).

10. This question was addressed by the Court of Appeal in <u>London Borough of Bromley –v- Special Educational Needs Tribunal and Others</u> 1999 ELR 286. In that case a tribunal had held that the acknowledged needs of a severely disabled 12 year-old boy for physiotherapy, occupational therapy and speech and language therapy formed part of his educational needs and were therefore special educational needs which should have been set out as such in Part 3 of his statement.

11. At 294 Sedley LJ identified the important question in that case in this way:

> "Are the therapies which S needs directly related to his learning difficulties?"

On a reading of the statute he held that special educational provision was whatever was called for by a child's learning difficulty, namely by anything inherent in the child which makes learning significantly harder for him than most others or which hinders him from making use of ordinary school facilities.

> "What is special about special educational provision is that it is additional to or different from ordinary educational provision (see s.312(4)). So far the meaning is open ended. It is when it comes to the statement under s.324 that the LEA is required to distinguish between special educational provision and non-educational provision; and the prescribed form is divided up accordingly".

He acknowledged that in practice there would be a:

> "Potentially large intermediate area of provision which is capable of ranking as educational or non-educational".

He concluded that this was because the matter was not amenable to tight statutory definition but should rather be left to the judgement of the LEA and, if necessary, the SENT to identify on a case by case basis with the aid of their respective experience in this field. The High Court would only intervene where errors in law were shown.

The Cambridgeshire Case

12. Both parties to this appeal referred me to a valuable authority namely A –v- Cambridgeshire County Council and another 2002 EWHC 2391 (Admin), a decision of Mr. Justice Pitchford in this Court. In that case it was contended on the child A's behalf that she needed special educational provision throughout her waking day (she was fully mobile but had very significant cognitive delay compounded by an autistic spectrum disorder with communication skills at the 12 month level). The Tribunal had said this of A (see para. 43):-

> "Like all pupils with severe learning difficulties the programmes used in A's educational setting will need to be re-enforced in her care setting because her educational needs extent throughout her waking day. This can be done by those caring for A, participating in devising her education programme and being guided on how to support her educational programme in the home setting by those working with her at school".

The Claimant argued that the Tribunal's conclusion that "It should be possible to meet A's out of school hours needs at home", by her parents participating in devising and supporting her programme amounted to an improper placing of a burden on to their shoulders which belonged on the shoulders of the LEA. The LEA said that, read as a whole, the Tribunal was not saying that she required a round the clock, highly structured and expertly developed

programme of learning but attendance at school by day at which that programme was delivered and a measure of continuity of approach to A at home.

13. Mr. Justice Pitchford resolved this issue by referring to the statutory definition of Special Educational Provision. At paragraph 60 he found as follows:

> "Such a service would, in my opinion, include speech and language and communication skills training outside the experience of the main stream. The duty under s.324(5)(a) does not require the provision of a service which is not educational in the wide sense approved by the Court of Appeal in The London Borough of Bromley case. I therefore accept [the Appellant's] submission that if the Tribunal found special educational needs included, for example, the provision of specialist communications skills training in the home, the LEA and not the parent was under a statutory duty to provide it. Only if any separate arrangements made by the parent for provision were objectively suitable would the LEA be relieved of that duty. In my judgment the LEA would not be performing its statutory duty if directly or indirectly it imposed upon the parent, when specifying special educational provision under s.324(3), an obligation to meet part or all of that provision herself" (original emphasis).

14. Both parties to this appeal accept that last sentence as a correct statement of the LEA's position. The dispute in the present appeal centres on whether "directly or indirectly" the decision of the Tribunal has done that which is there stated to be impermissible.

15. In paragraph 63 Mr. Justice Pitchford went on to analyse the position in his case in a helpful way. He said this:

> "The Tribunal used the phrase "because her educational needs extend through her waking day". In what sense was that expression used? It seems to me that the Tribunal was mindful of the fact that this little girl communicated and behaved at the most basic level. She could not on her return home from school exercise the same capacity for play and communication which the ordinary 7 year old could. For this child all communication was an educational process. The tribunal did not, however, say that her educational needs should be met by a special educational provision throughout her working day. The special educational provision needed was that which would be provided in school; that is the expert delivery of one to one tuition and support with many repetitions and daily communications skills training with speech and language therapy. What it seems to me the Tribunal had in mind when considering A's home circumstances was the desirability that such communication with A as was possible could be best achieved by [her mother's] understanding of what the agreed programme at school was seeking to achieve. There would be no point in the school adopting a teaching strategy only to find that the strategy was being undermined at a basic level of communication at home. Hence in my view the reference …. to supporting the

> programme at home, in other words adopting a constructive and compatible approach at home during times of non-educational care".

He therefore went on to conclude that on the facts before him the Tribunal was not requiring the mother to provide part of the child's special educational needs nor was it assuming that she would do so.

16. This decision was considered by the Court of Appeal on an application for permission to appeal, which was refused. Scott Baker LJ said this:

> "Education is in the broad sense a continuing process. It does not stop at the school gate. The Judge's conclusion was that the Tribunal concluded that placement at [the relevant] school coupled with close consultation with her carers at home could meet A's needs. In my judgment the learned Judge's analysis of the Tribunal's reasoning is one that he could properly make ….. the learned Judge was entitled to interpret the Tribunal's decision in the way he did".

17. Another first instance decision which considered this question was DM and KC –v- Essex County Council and Another 2003 EWHC 135 (Admin), a decision of Mr. Justice Henriques. He found that a programme of support devised by the LEA which required among other things the parents to "implement the agreed programmes" and "design a programme" with the help of a specialist teacher and "implement the professional advice and plan programmes in the home" and to "develop and deliver her programme" all pointed to a regime:

> "in which parents are required not only to participate but to formulate and deliver the programme…that is quite permissible, and would meet G's needs if there were parental consent to such a regime. There is not. Accordingly I conclude that the LEA as failed to fulfil its statutory duty to arrange appropriate provision".

I's statement

18. Part 2 assessed her special educational needs in a way that was not controversial. It is however illustrative to note that her needs included difficulty in such areas as, for example, "self-care skills such as washing, dressing, feeding and toileting" which were therefore recognised by the LEA as educational needs. This statement was in large part based on the views of an educational psychologist employed by the LEA, one of whose recommendations was that I should attend a school which could provide:

> "Emphasis on developing [her] independent living/life skills in school hours and beyond".

Part 3 of the statement set out in detail the special educational provision proposed under the three headings required by the regulations it included the funding of a special support assistant for 15 hours a week in addition to that already provided within the school's setting.

The relevant part of the Appellant's grounds of appeal to the Tribunal against the statement is to be found at 4(e):

> "She requires a 24 hour curriculum whereby the whole of her schooling, including speech therapy, is implemented throughout as well as outside normal school hours in order to achieve the necessary repetition and reinforcement of skills. The normal school day makes the intensive programme required by her impossible".

The LEA's response to this in its reasons for opposing the appeal were:

> "It is the LEA's responsibility to identify provision appropriate to I's educational needs only. It is not a requirement for this to be better provision than is available elsewhere nor to offer more in terms of time available for educational input than other placements."

While the first sentence of this response is accepted by the Appellant as correct, the second sentence is not understood, but it may mean that it was the LEA's position that they could not be required to make provision for educational needs outside the limits of the normal school day. At the hearing the chairman's notes, albeit in very compressed form, indicate that the Appellant's solicitor was seeking a:

> "24 hour curriculum to achieve necessary repetition re-enforcement of skills, I need a residential curriculum."
>
> To which he records the LEA's advocate as responding "[B School] [the school proposed in Part 4 by the LEA] now: In partnership with parents/carer and other agencies – offered a waking day curriculum now".

The Tribunal's decision

19. In the first section of its decision, in the form normally found in such decisions, the Tribunal addressed what it called the facts. So far as Part 3 was concerned it recorded the area of dispute as follows:

> "A waking day curriculum provided in a residential school is required [by I's parents] to achieve the necessary repetition and re-enforcement of learning and skills so as to enable I to progress".

The LEA for its part:

> "Did not agree that a residential school placement was necessary but agreed the principle of a waking day curriculum, arguing that this could be provided through a day school placement, in partnership with others supporting work out of school hours and in the home."

20. Much uncertainty has been injected into this case, and some is reflected in my judgment in the Tribunal's decision, by the use of the jargon phrase "24 hour curriculum" or "waking day curriculum" which others have found unhelpful in other cases. It will have been noticed how Mr. Justice Pitchford unpacked this phrase in paragraph 63 of his judgment so as to analyse what it really meant.

21. In its conclusions the Tribunal, considering Part 3, identified two questions. The first was whether I needed a "24 hour curriculum" (apparently using that phrase interchangeably with "waking day curriculum") and secondly whether she required access throughout each day to a teacher qualified with working visually impaired pupils. I should set out their conclusion on the first question in full:

> "D. Dealing with the first issue, we do not conclude from the evidence that I needs to be in a residential school setting in order for her educational needs to be met properly. There was clear evidence that her family provides ably for I in the family and local community setting. In particular it appeared to us that the family are able to liaise well with school, therapists and others (including the mobility officer if appropriate) in order to help I make progress out of school hours."

22. The real issue at the heart of the appeal to the Tribunal was whether the LEA ought to pay for I to be educated at the W School for 38 weeks per annum as a weekly boarder, or whether her needs could be met, as the LEA contended, at B School. A key part of the Appellant's case to the Tribunal was the evidence of Professor Tobin, who had great expertise in this field. He had visited and examined both schools. His opinion as to I's educational needs was expressed in these words:

> "As it is the low incidence of her particular combination of disabilities and the unique, idiosyncratic ways in which they interact with one another, can only really be addressed effectively where there is a recognition that her educational needs cannot be separated from her other needs (physical, sensory, social, self-care and hygiene, mobility etc.) since these are the bedrock upon which her communication, numeracy, literacy and other learning needs are crucially dependant; this recognition entails substantive periods of one to one teaching and the existence of an extended, what is now labelled the "whole day, the 24 hour curriculum" in which teachers, classroom assistants, speech therapist, physiotherapists, mobility instructors cooperate to implement the programme, by continuous teaching, practice, monitoring and re-enforcement in all the activities of the child's daily life."

This, therefore, was what he meant by the "24 hour curriculum". Armed with that and the results of his inspection of both schools his conclusion was that to meet these needs an educational setting was required where "a whole day, 24 hour system of education and care is in operation"; excellent though B School was, his judgement was that a placement at W School was necessary "to ensure that the totality and specificity of her needs are to be met". At the Tribunal the LEA's representative is recorded as putting her case in the way I have already recorded at paragraph 19 above.

23. The Tribunal recorded other evidence it had heard; that B School gave daily physiotherapy support; that speech and language therapists came to the school; and that while it did not have an occupational therapist in attendance, pupils who required this service received it at home. It was also recorded that the mobility officer went to the homes of pupils at B School to help with mobility in the home setting and around the children's local area. It was therefore the case that it was not the LEA's point of view that I's education was not a continuing process or that it "stopped at the school gate", to use Scott Baker LJ's phrase. It was not, conversely, anyone's case as I understand it that I's needs were for continuous one on one therapy training and education on a positive basis for every minute of the day she was awake. The difference between the two points of view was one of emphasis and degree and not of principle. Nor was it the case that the debate focused on whether any specific special educational need identified in Part 2 was or was not met by a corresponding special educational provision listed in Part 3. It is not therefore surprising, in my judgment, that this question was to an extent "collapsed", to use Mr. Wolfe's word, into the question of whether a residential school setting and specifically that to be found at W School, was needed to meet I's special educational needs. The two competing points of view were well understood by both sides and by the Tribunal. Mr. Wolfe on the Appellant's behalf makes a strong attack on the answer that the Tribunal gave to this first question. In the circumstances of this appeal I do not consider that this was a flawed approach to that question. If there was a fault it lay in the formulation of the question, which should really have asked really which of two competing "24 hour curricula" was appropriate to I's needs, rather than whether she required such a curriculum at all, something which was not truly in dispute.

24. What matters more is that I should carry out the sort of exercise that Mr. Justice Pitchford carried out in the Cambridgeshire case, to scrutinise the Tribunal's decision and see whether it allows, directly or indirectly, the LEA to escape its statutory duty to provide everything which could be described as a special educational provision by placing the same on the shoulders of the parent. To this end Mr. Findlay for the LEA, rightly in my view, encouraged me to look at the decision as a whole rather that analysing it or construing it in the way that one might with a statute or statutory instrument.

25. The Tribunal correctly understood the LEA's "package" as including provision of educational needs by the day school "in partnership with others supporting work out of school hours and in the home". Some of those "others" were identified, as I have already said, for example the peripatetic occupational therapist and mobility officer. The family was described as one which "provides ably for I in the family and local community setting" and as being "able to liaise well with school, therapists and others (including the mobility officer if appropriate)". In their decision at G the Tribunal concluded that B School had,

> "the quantity of support and level of expertise both from the school staff and those working in support of them from outside to ensure that I continues to make progress"

and later at H they concluded

> "our judgement is that the staff at [B] together with the outside specialists in support of them would be able to provide appropriately for I's special educational needs".

26. What role did they envisage the parents, therefore, as playing? Plainly they were expected to "liaise" with the school, therapists and others. That was specifically stated as a requirement in Part 3 of I's statement. Her parents have other children to consider, and are therefore unable to offer themselves as providing for or meeting I's educational needs, for entirely understandable reasons. But nobody suggests, least of all the parents themselves, whose devotion to I's interests is clear, that they should have no role to play in her life. Liaison with the school is one such role, as also would be liaison with any visiting therapist or specialist. Undoubtedly they would participate in the support programme for I's out of school education in the senses described in the two first instance decisions I have quoted from above. That as I understand the position is not to offend against the fundamental proposition that it is the LEA and the LEA alone that has the legal burden of providing special educational provision. Mr. Wolfe complains that nowhere in the Tribunal's decision can one see them asking themselves the question that the Bromley case requires them to ask, namely what is it in the LEA's scheme that the parents have to contribute to I's upbringing, and is it or any of it educational provision. He is right, in the sense that nowhere is the question posed in terms. But the LEA answer, I believe rightly, that the decision as a whole shows they were alive to the point. Nowhere does the decision require I's parents to do more than participate in her educational programme to the extent they do now (for example) in the 14 weeks of each year when she receives no educational provision from W School. To require them to do that, to work with the grain of the specialist treatment she receives, to liaise with the specialist providers by "adopting a constructive and compatible approach at home during times of non-educational care", to use Mr. Justice Pitchford's phrase, does not offend against the principle that it is for the LEA and for it alone to provide for I's special educational needs.

27. I remind myself that this Tribunal is a specialist tribunal whose very constitution is designed to enable it to decide questions of the sort that were in issue in this appeal. The Court of Appeal's decision in Bromley, acknowledging that there is a very substantial "grey area" of provision which falls between the obviously educational and the obviously not educational, is to the effect that the Tribunal deciding the appeal is accorded a wide margin of appreciation on this question. Unless an error of law can be detected in its approach to it, or unless the result of its decision is unlawful in the sense that it plainly imposes a burden on the parents that should not be there this Court ought not to interfere with its decision on an appeal such as this. Notwithstanding the high quality of the arguments advanced on behalf of the Appellant in this case I am unable to accept that this Tribunal was in error in any respect and this appeal therefore fails.