

CO/5944/2003

Neutral Citation Number: [2004] EWHC 422 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 12th February 2004

B E F O R E:

MR JUSTICE CHARLES

THE QUEEN ON THE APPLICATION OF M

(CLAIMANT)

-v-

CHAIR OF THE SPECIAL EDUCATIONAL NEEDS TRIBUNAL

(FIRST DEFENDANT)

SALFORD CITY COUNCIL

(SECOND DEFENDANT)

Computer-Aided Transcript of the Stenograph Notes of
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MR M HUNT (instructed by Alexander Harris) appeared on behalf of the CLAIMANT

The FIRST DEFENDANT did not appear and was not represented

MR D STILITZ (instructed by Salford City Council) appeared on behalf of the SECOND
DEFENDANT

J U D G M E N T

(As Approved by the Court)

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1. MR JUSTICE CHARLES: This is a statutory appeal against the decision and order of a Special Educational Needs and Disability Tribunal dated 30th September 2003, in which it dismissed the appellant's appeal under section 326 of the Education Act 1996 against Part 4 of the Statement of Special Education Needs issued by a local education authority for the son of the appellant, who has been referred to as "Jack", which I understand is not his name. His date of birth is 7th June 1992 and therefore the decision relates to his move to secondary education. I have made an anonymity order in this case.
2. I say at this stage that I am going to allow this appeal and I am going to remit the mother's appeal under the Education Act to a differently constituted tribunal so that the matter can be determined again.
3. The issue as stated in the supplementary skeleton argument put in on behalf of the appellant does, in my view, encapsulate the issue, and it is as follows:

"This appeal is brought on a single ground: that the Tribunal's decision is flawed because it proceeded on a material error of fact, namely that there existed documentary evidence in the form of reports from expert independent consultants demonstrating that [the school] had significantly improved since the adverse OFSTED Report on the school in 1998 which made a number of criticisms about the school's provisions for pupils with PMLD."
4. It is common ground that that OFSTED Report does make a number of those criticisms. That is inevitably common ground from a reading of the Report. I have been referred to certain passages in it.
5. As, in my view, correctly set out in argument on behalf of the respondent, central issues before the Tribunal were whether the school had improved since that report, and how significant was that improvement. The overall conclusion the Tribunal reached was that there had been improvement and that that improvement was sufficient to found their decision that the appeal before them should fail and Jack should go to that school.
6. Jack's particular difficulties and special needs are set out in a report in the bundle before me: bundle 1, pages 39 through to 40. Those show significant special needs and the importance of the school to which he goes. I do not propose to read those passages out: it is common ground that Jack, amongst other children who would attend both the schools that were in play before the Tribunal, have difficulties of a similar nature and extent.
7. The decision letter is obviously an important document in the context of this case. It appears at pages 17 and onwards in the bundle. It reads as follows:

"1. Jack has severe developmental delay, cerebral palsy, visual impairment and he also shows some features associated with mild autism. As a consequence, Jack has profound and multiple learning difficulties,

and physical disability. He does not have verbal communication, and he uses a wheelchair.

"2. Jack's first statement of special educational needs was issued in 1999, and [school A] was named. The statement was amended in 2001 when, as a result of re-organisation, Jack transferred to [school B], a ... LEA maintained special primary school. This placement has been satisfactory. [School B] provide for children with profound and multiple learning difficulties, and also for children with autistic spectrum disorder. Jack has not been placed within the discreet autistic provision at [school B], notwithstanding that there is a possibility that some of Jack's difficulties are derived from a mild autism. Rather, Jack has been seen, largely, as a boy with profound and multiple learning difficulties, coupled with a visual impairment, and this has been the primary focus of the special educational provision provided for Jack at [school B], where he has made good progress.

"3. It is now appropriate that Jack transfer to a special secondary school. As a consequence, the LEA proposed some amendments to Jack's statement, and [the mother] exercised her right to express a preference, under the provisions of Schedule 27 of the Education Act 1996 (the Act). [The mother] told the LEA that she did not want Jack to attend at [school C], which would be the local maintained special school intended to cater for children with profound and multiple learning difficulties, from age 11 to 19. Instead, [the mother] said she wanted Jack to attend at [school D], a maintained special school also intended to cater for children like Jack, but located within the area of [a different] LEA. The age group at [school D] is 4 to 16.

"4. In 1998, [school C] was the subject of a poor OFSTED report. Amongst the positive features were the strong drive of the Deputy Headteacher to improve the school (the Deputy Headteacher at that time is now the Headteacher), and the very good behaviour of children, and the positive attitude, throughout the school. But negative aspects included the teaching of children with profound and multiple learning difficulties, and inequality of access to the curriculum, and other activities, for pupils with physical disabilities. In 2003, [School D] has been the subject of a more complimentary OFSTED report, although five years before it had been put into special measures. The improvement since then is apparent from the recent OFSTED report. There is no up-to-date report in relation to [school C], although OFSTED inspectors were due to arrive at the school on the day of the tribunal hearing.

"5. Efforts made by [the mother], and her representative, to see documentary evidence of improvement have not been fruitful, although there is dispute as to what was requested when, and by whom. Nevertheless, we were told that such documentation exists, in the form of outside consultancy records, governors' reports and the recent school

prospectus. Unfortunately the LEA in their bundle of evidence did not include this documentation. Instead the only evidence of improvement made available to us was the oral evidence of ... the Headteacher at [school C].

"6. [The mother] has knowledge of the case of another child who attended at [school C], whose parent was extremely dissatisfied with the school, and who is now funded by [the LEA] to attend at [school D], notwithstanding a Special Education Needs Tribunal decision that [school C] could meet that child's needs. [The mother] visited [school C] himself about 6 months ago, and she formed a poor view of the school as a consequence of what she saw. Accordingly, she now wishes her son to attend at [school D], also. The LEA accepts that [school D] could meet Jack's needs, but they insist that their own maintained special school, [school C], could also meet Jack's needs.

"7. The oral evidence from [the headteacher] was to the effect that very major and significant improvements had been achieved since the 1998 OFSTED report. These improvements included recruitment of some well qualified staff, whole staff training, better staff/pupil ratios, the development of an action plan, a much more committed governing body, improved teaching strategies, and input from expert independent consultants. The whole school was due to move into a new purpose-designed and purpose-built building next year [September 2004].

"8. The LEA also called Mr Hobbs, an Educational Psychologist, to give evidence. He had not had a chance to meet Jack, since he was only asked to become involved in the case 4 days prior to the hearing. Nor had he recent familiarity with [school C]. Nevertheless, he had carefully read the reports of colleagues, was able to give general evidence about the sort of needs children like Jack have, and the sort of provision schools like [school C] provide. He saw no reason to disbelieve [the headteacher] and - in the absence of a multi-disciplinary assessment - urged caution with regard to any suggestion that Jack was autistic. From what he knew of [school C], Mr Hobbs was confident that the school could meet Jack's needs.

"9. According to a letter from [the LEA] to [the mother's] representative dated 03/07/03, the cost of a placement at [school C] is £13,537. However, in relation to the actual or extra cost to [the LEA's] budget, it has to be noted that [school C] is a [school within that LEA]. Moreover, [school C] is funded for 78 places, and it currently has 73 children on roll. This means that (applying the principles that fell from the House of Lords in B v London Borough of Harrow [2000] ELR 109) the focus has to be on the cost to [that LEA], rather than on the cost to public funds generally. Moreover, applying the principles revealed by the Court of Appeal in Oxfordshire County Council v GB (2002) ELR 8, the cost to the LEA of placing Jack at [school C] is *nil*. Nor is there a transport cost,

since a mini bus already undertakes the journey from Jack's home area to school, and there is room in it for Jack and his wheelchair. On the other hand (excluding transport costs) the price to [the LEA] if Jack went to [school D] would be £13,800 - which would have to be paid to [the other LEA]. We exclude transport costs because [the mother] undertook to the Tribunal to take Jack to [school D] every day, and it is established law that we would, in an appropriate case, be entitled to accept and rely on such an undertaking. The result is that, although the difference to public funds is only £263 per annum, the difference to [the LEA] is very substantial indeed - year on year.

"Tribunal's Conclusions with Reasons.

"A. The Tribunal has had careful regard to all the oral and documentary evidence. We also have regard to the Code of Practice. The precedents set out by the House of Lords and Court of Appeal bind us. We bear in mind the provisions of Section 9 of the Act. The onus is on the LEA to establish, on balance, that [school C] is able to meet Jack's special educational needs, and make available the necessary special educational provision. Moreover, we consider that, in the light of Schedule 27, Para 3(3) of the Act, the onus is on the LEA to establish, on balance, that compliance with [the mother's] preference would be incompatible with the efficient use of resources, that is to say, the resources of [the LEA] - bearing in mind that the presently unfilled place at [school C] is already, in effect, paid for.

"B. The Tribunal were disappointed that apparently available documentary evidence demonstrating tangible improvements at [school C] was not made available to [the mother]. Given that the LEA stands to lose at least £13,800 per annum for the next several years if the decision in this case goes against them, we were even more astonished that the LEA did not make this evidence available to us. However, in the absence of any compelling reason not to do so, we accept the evidence of [the headteacher] that major strides have been taken since the last OFSTED report. We recognise that [the mother] has made a number of allegations against the school following her visit, but those allegations cannot be properly tested, and we cannot say that those allegations outweigh the evidence of the current school headteacher who has been in post for a year, and whose evidence is supported by the LEA Educational Psychologist."

8. As I understood it, the psychologist who gave evidence came on the scene quite late in the proceedings and had not seen the child.
9. Returning to the decision letter, paragraph C of the conclusions and reasons:

"C. If [school C] is unable to adequately meet Jack's needs then it would follow, unavoidably, that the school could not meet the needs of the vast

majority of its pupils, since Jack is pretty typical of children at [school C], and falls squarely within the school's stated pupil-profile group.

"D. We are persuaded, on balance, that [school C] can meet Jack's needs, although we can well understand [the mother's] view that [school D] has proved itself, whereas [school C] has provided no documentary reassurance of change. Were we making a straight comparison, we might well have preferred placement at [school D]. We suspect that [school D] might be better able to meet Jack's needs, and it would certainly have the enthusiastic support of Jack's mother, who has irredeemable reservations about [school C]. But, in the light of the Harrow and Oxfordshire cases, the question is not one of comparison, or even one of preference, at all. Nor is it a question of overall public expenditure, since the two schools cost their authorities more or less the same, per pupil. Rather, the question is whether the extra cost to [the LEA] of placement at [a special school within another LEA] is incompatible with the efficient use of [the LEA's] resources. Given that we feel bound to conclude on the evidence before us, that [school C] is adequate, we also conclude that placement at [school D] would be incompatible with the efficient use of [the LEA's] resources.

"E. We are anxious that our lukewarm assessment of [school C] should be seen in context. The most recent documentary evidence given to us in relation to the school is the unimpressive OFSTED report of 5 years ago. As [the mother's representative] said: 'If school had provided the (apparently up-to-date) evidence (of improvement), an awful lot of [the mother's] fears would have been alleviated'. We were pleased to hear, and now record, an undertaking from [the headteacher] that this documentary evidence will now be sent to [the mother], forthwith. We also trust that the next OFSTED report will provide objective confirmation of significant improvement.

"F. We find as fact that [school C] would be an adequate placement for Jack, because its Headteacher has, through her oral evidence, persuaded us that her school is now capable of meeting Jack's special educational needs. Although compliance with [the mother's] preference would not involve much extra expense to public funds generally, it would represent an inefficient use of [the LEA's] education resources, because the place at [school C] is presently available and (in effect) paid for."

10. What the appellant says is that the decision letter shows that the understanding of the Tribunal was that there was documentation as described in paragraph 5 of the letter in existence as at that date. That documentation, as the Tribunal described it, is in the form of outside consultancy reports, governor's reports and the recent school prospectus.
11. That understanding of the Tribunal was incorrect. It seems to me from the information that has been provided to me, and in particular the notes of the headteacher which she

used to enable her to give evidence, and the Chair's notes of the evidence, that the Tribunal simply misunderstood the position, and in no respect were they being misled by the headteacher. In her statement for the purposes of these proceedings, the headteacher makes it clear that the information she was seeking to give the Tribunal was that in respect of the outside consultancy reports there had been oral feedback. In the context of what has happened, the reason for it one knows not, the Tribunal clearly reached the conclusion, or had the impression, that that feedback (as well as the governor's reports and the recent school prospectus) was in the form of documents at that stage and, importantly, that those documents in general terms supported the headteacher's description of the improvements at the school. It seems to me that that flows clearly from paragraph 5 and also from paragraph E of the decision. I see force in the proposition that paragraph E can be read as an attempt to smooth the way to Jack being placed in the school by giving the mother confirmatory information from an independent source that her concerns, fears, points about the school were unfounded.

12. However, it does seem to me that paragraph E also carries with it the point that the Tribunal clearly had the impression, (a), that such documentary material existed; and (b), that it would provide the mother with that comfort. It follows to my mind, as I have already said, and as is demonstrated by paragraph 5, that that was what the Tribunal had in their minds.
13. The appellant has referred me to authorities, in particular a recent decision of the Court of Appeal in E & R v the Secretary of State for the Home Department [2004] EWCA Civ 49, where the Court of Appeal addressed the questions described in paragraph 1 of the judgment of Carnwarth LJ as follows:

"These two appeals have been heard together because they raise a common issue as to the powers of the Immigration Appeal Tribunal ("IAT") and the Court of Appeal (a) to review the determination of the IAT, where it is shown that an important part of its reasoning was based on ignorance or mistake as to the facts; and (b) to admit new evidence to demonstrate the mistake."

14. The most relevant paragraphs of the judgments in E & R begin at paragraph 36. In paragraph 59, a case I shall refer to in a moment is referred to (the case of Simplex) and the conclusion is summarised in paragraph 66. I read the end of that paragraph:

"Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

15. The Simplex case is Simplex GE (Holdings) v Secretary of State for the Environment [1988] 3 PLR 25. I was referred to it as an example of a similar type of error. In particular I was referred to holding 2 in the headnote and passages at the end of the judgments of Purchas LJ and Staughton LJ. I cannot give the page reference now because my bundle does not have page numbers on it.
16. I was also referred in this context to another decision dealing with education, R (on the application of K) v London Borough of Wandsworth [2003] EWHC 2992 (Admin). This is an unreported decision of Maurice Kay J, as he then was, and it is simply an example of an application of what can now be described as the E & R approach in this field of law.
17. It seems to me that those authorities found the argument and approach advanced by the appellant and the approach of the respondent in this appeal was not as to the principles of law but as to their application to this case. The argument of the respondent has been helpfully and clearly set out in the skeleton argument provided by its counsel and also orally today. Orally, the argument was put under four headings.
18. Firstly it was said that a careful reading of the Tribunal's decision shows that the nature and content of the documents in question did not impact on the way the case was decided. Secondly, it was said that so far as there was any misunderstanding, it was **de minimis** and therefore immaterial. Thirdly, it was said that in the light of a new OFSTED report, the central and core findings, namely as to improvement, since 1998, cannot be said to be erroneous. Fourthly, in the light of the new OFSTED report, it was said that the effectively inevitable result of a rehearing would be that the appellant would fail in her appeal.
19. As to the basis of the decision, in helpful and clear and, if I may say so, persuasive written and oral submissions made on behalf of the LEA, the respondent, I was taken through in particular paragraphs (5), (7), (B) and (D) of the decision letter. The argument was to the effect that those paragraphs show that the Tribunal thought that there was a document or documents from independent consultants which, if included in the bundle, would have supported the Headteacher's contentions. It was pointed out to me, and I accept, that the Tribunal had a legal adviser, and it would be surprising if the Tribunal were relying upon the content of any document that they had not seen. Also it was argued that the Tribunal had been careful in their reasons not to take into account the content or, as counsel put it, the existence of the document. Further and perhaps out of respect for his client counsel pointed out that there was a light criticism of the LEA in respect of the provision of documents to the Tribunal. It seems to me that this criticism was fairly forceful.
20. Counsel then submitted, and I agree, that at the end of the day, the issue was one as to the credibility of the headteacher.
21. Dealing with counsel's first point, which he, I think correctly, isolated as a freestanding point: it seems to me that a fair reading of the decision letter taken as a whole is that a part of the approach of the Tribunal was that they were accepting, admittedly on the basis of a misunderstanding, that documents from independent experts did exist at the

date of the hearing to support what the headteacher was saying, and that the issue they were faced with was one of credibility. The contest before them was effectively between the mother, whose evidence in part was necessarily anecdotal, and of the headteacher who was describing changes in the school. I have to stand back and ask myself: what would have been the position if the misunderstanding had been drawn to their attention and they had been informed that there were no written reports from independent experts at that time? Would that have been material to their thought process?

22. To my mind, clearly it would have been material. To a degree, it is speculation as to what would have happened, and I propose to deal with that under the next heading, which is the argument on **de minimis**.
23. So as to the first heading of argument, it seems to me, on a careful and fair reading of the decision letter, that the argument advanced on behalf of the LEA is incorrect and that the Tribunal did rely as a material part of their reasoning on their understanding, which was a misunderstanding of the evidence, that there were in existence at that date written reports or records from outside consultants which supported the evidence of the headteacher.
24. I turn to the next heading: the **de minimis** point. In this context, I was referred to a number of extracts from LEA reports, none of which were before the Tribunal at the time of the hearing. I am told, although I have not studied them in detail, that in the witness statements there is a dispute as to whether or not these LEA reports could fairly be described as independent. Looking at the description in paragraph 5 of the decision letter of the documents the Tribunal thought existed, clearly these LEA reports are not governor's reports or the recent school prospectus. Also, it seems to me that they are not "outside consultancy records" albeit that I am prepared to accept that they should be treated as independent reports for present purposes. They show that the views of the relevant LEA inspectors were that there had been improvements since 1998.
25. I was then taken to two letters from consultants who had been involved, and they are at page 594 and 596 of the bundle. Going back to the headteacher's statement for the purposes of these proceedings, it asserts that she had oral feedback from those consultants identifying their view that there had been improvements. Those letters confirm that position.
26. My approach in this case is that there was simply a misunderstanding by the Tribunal; that the headteacher was not misrepresenting the position and was intending to give the Tribunal the impression that the feedback she had been given from the independent consultants was oral. That was the material that was in existence at the time. If someone had suddenly raised the point in the middle of the hearing, no doubt the headteacher would have described the oral feedback and made it clear that there had not been any written reports or feedback from the outside consultants. It is also likely that the headteacher would have referred to the LEA reports and other documents then in existence which she maintained confirmed the view that there had been improvements.

27. Can that misunderstanding be said to be **de minimis**? To my mind, it cannot, although it is again a matter of supposition as to how things would then have gone before the Tribunal. It seems to me that the most likely outcome, given that both sides had representatives, would have been an adjournment so that the mother could have studied in some detail what the independent consultants had done and their oral feedback and the other documents relied on but not produced, so that she could make comments. The headteacher would then have had to deal with those comments.
28. Although I confess I see force in this line of argument taken by the LEA and can understand why they have run it in this case, I am not persuaded that the misunderstanding of the Tribunal as to the position can safely be treated as **de minimis**. What, it seems to me, it does show is that the misunderstanding, if it had been corrected, was one that would have prompted the Tribunal not only to further criticise the local education authority for not putting relevant documents in, but would have prompted and precipitated the documents being considered; that in turn would have prompted and precipitated further argument as to the detail one way or the other so that the Headteacher's position could be tested against the further material. Thus to my mind it cannot be said that the error is simply **de minimis**.
29. Correctly, in my view, counsel for the LEA said that there was an overlap between his third and fourth points. The third point was as to whether or not there was an error of the type referred to in paragraph 6b of the E & R decision, because the new OFSTED report, the "missing documents" and the oral feedback show that the Tribunal reached the correct conclusion on the central issue concerning the existence of improvements. I have already given my reasons as to why it seems to me that the error or misunderstanding relied on namely as to the existence of confirmatory documents from expert independent consultants plays a material part in the reasoning of the Tribunal and triggers the grounds upon which the appellant brings this appeal.
30. The third and fourth points then elide into this issue namely that given the documentation that I have referred to which existed at the time; given the confirmation by the independent consultants and the correspondence I have referred to; and, most importantly in this context, given the new OFSTED report which was the product of inspection that was virtually contemporaneous with the Tribunal hearing, the LEA say that the result before a new tribunal will inevitably be that the mother will fail on her appeal.
31. In this context a point was raised as to the admissibility of the new OFSTED report, and I was referred by counsel for the respondent to Oxfordshire County Council v GB & Others [2001] EWCA Civil 1358, at the end at paragraph 9 of the judgment of Sedley LJ. I agree that this provides support for the proposition that in the context of remedy, updating information in the form of the new OFSTED report is admissible before this court so that it can consider whether a remission to a differently constituted tribunal would simply be a waste of time because that tribunal would be bound to reach the same decision, albeit on different reasoning and facts, as the original tribunal.
32. I pause to comment that passages of the new OFSTED report to which my attention was specifically drawn show that it is a report in which the present headteacher can take

some real pride, particularly as to the comments that are made about her and the progress that she has brought about at the school.

33. I was also directed by counsel for the LEA to a number of passages, and I shall limit myself to only a few of them. The first is under a heading "Parents and Pupils' Views of the School", page 620 of the bundle, page 7 of the report.

"Parents and carers think highly of the school. They particularly like the friendly atmosphere and the dedication of the staff. Pupils and students really enjoy school life. They report their teachers are fun, that they have the chance to try lots of new things. They especially like art, games and the after school club."

34. Importantly, at 621, paragraph 1 page 8 of the report:

"Commentary.

"1. There has been good improvement in pupils' achievement since the last inspection when progress was judged to be satisfactory overall. It was unsatisfactory for pupils with profound and multiple needs and for pupils in Years 7 to 9 in some subjects. New staff and a review of what is taught, and how it is taught, have resulted in achievement for these pupils now being good."

35. At page 626 of the bundle, page 13 of the report, paragraph 21, the first bullet point:

"21. Good improvement has been made to the curriculum since the last inspection.

"• Pupils with profound and multiple needs now have a suitable programme which reflects the National Curriculum while taking account of their complex needs ...

36. And the next paragraph, under the heading "Care, Guidance and Support":

"22. Provision for pupils' care is very strong. Staff know their pupils very well and provide good support, advice and guidance so pupils are able to take full advantage of learning opportunities. Good systems are in place to seek pupils' views. Staff make great efforts to involve pupils, whatever their special educational needs, in making choices and decisions that will lead to greater independence."

37. At 628, under the heading "Leadership and Management":

"34. The leadership and management of the school are both good. The leadership of the headteacher is very good. She manages the school very well and has been effective in bringing about many improvements in the quality of education. The governance of the school is now good. This is a significant improvement since the last inspection ... "

"Commentary.

"35. The headteacher is very hardworking and is committed to providing a high quality education for all pupils. She inspires staff to follow her example. She has successfully steered the school through very difficult changes resulting in many new appointments at senior level."

38. Counsel's submission was that those passages are in fairly glowing terms. I accept they do speak of real and general improvement. He says therefore on his third point that this shows that the Tribunal here got it right; and as to his fourth point, he says that it is inevitable that another tribunal will reach the same conclusion. In that context, he referred me to the appellant's statement and points that she was raising. Some of them, he pointed out, were anecdotal and would have difficulty in standing with the new OFSTED report. It seems to me there is force in that submission.
39. Other points which the mother refers to by reference to paragraphs of the old OFSTED report are points that I have not studied in detail.
40. It seems to me that it is not appropriate in the circumstances of this case, having reached the conclusion that I have on the first three headings of argument advanced on behalf of the respondent to this appeal, to accept the fourth head.
41. By reference to what Simon Brown LJ said in Haile v Immigration Appeal Tribunal [2001] EWCA 1663, it seems to me that there has been a regrettable, although perhaps understandable, mistake made by the Tribunal in this case which, in my view, was not brought about by anything that was designed to be misleading. It was simply a misunderstanding. But in my view it has produced a result which it seems to me would leave this mother and importantly her son with a profound feeling of unfairness if the matter was not looked at again.
42. The relevant decision-maker as to the detail of comparison between the two OFSTED reports is not me, but the Tribunal that hears these appeals. It seems to me it would be wrong for me to embark upon a detailed analysis of paragraphs of the new OFSTED report, which the mother would wish to urge to advance her appeal, and to see what I would decide and, more importantly, whether I would then decide that any tribunal would be bound to decide the same thing. That is a detailed exercise which in the circumstances of this case, in my judgment, the court should not embark upon.
43. Although with some cautiousness, having regard to comments made during submissions in relation to paragraph E namely that it was said that one of the motives of the Tribunal was likely to be to smooth the way in the relationship between the headteacher and the mother, and that these sorts of comments often do not carry any real weight with people outside the courtroom, I comment that the mother here is clearly well advised, and she clearly does need to look with some considerable care at the prospects of success having regard to the new OFSTED report.
44. This is because the paragraphs I have read are clear evidence of the improvement at the school which is not the school of her choice. I think I will be saying nothing new to her

when I indicate that there is force in the submission made on behalf of the LEA that the new OFSTED report provides compelling evidence and support for the conclusion that was originally reached as to which school would be the appropriate school for Jack.

45. For the reasons I have given, I will allow this appeal and remit the mother's appeal under the Education Act to a differently constituted tribunal if the mother decides to pursue that appeal.
46. MR HUNT: My Lord, I am obliged. My Lord, the appellant is publicly funded, and we ask for the appellant's costs of the appeal.
47. MR STILITZ: My Lord, I do not resist that. I am instructed to ask for permission to appeal: the first ground is one where, in my opinion, if the matter were pursued by the LEA, it is quite possible that they would take a different view in relation to construction. On that basis I ask for permission.
48. MR JUSTICE CHARLES: I have been asked for permission to appeal. It seems to me that if this is an appropriate case for permission to be granted that the Court of Appeal should make the decision. I think correctly, the application has been put on the interpretation I have put on the decision letter. I do not think this raises any general point or any point of legal difficulty. I think the Court of Appeal should decide for itself whether it wishes to hear an appeal in this case.
49. Thank you both very much.