

Neutral Citation Number: [2009] EWHC 1651 (Admin)

CO/2646/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 28th April 2009

B e f o r e:

TIMOTHY BRENNAN QC
Sitting as a Deputy Judge of the High Court

Between:
THE QUEEN ON THE APPLICATION OF M_

Claimant

v

EAST SUSSEX COUNTY COUNCIL_

Defendant

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Mr D Wolfe (instructed by Douglas Silas Solicitors) appeared on behalf of the **Claimant**
Mr M Haukeland (instructed by East Sussex County Council) appeared on behalf of the
Defendant

J U D G M E N T
(As Approved by the Court)

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1. TIMOTHY BRENNAN QC: There is before me, pursuant to an order of Sales J made on 19th March 2009, an application for permission to apply for judicial review, which Sales J ordered should be heard at the same time as the substantive hearing if permission were to be granted. Having read the papers and heard oral argument, I consider that the case is plainly arguable. I grant permission and will deal with the substantive application.
2. The claimant, "Mrs M", is the mother of "C", a child now 11 years old who has special educational needs. In compliance with the provisions of the Education Act 1996, C is the subject of a Statement of Special Educational Needs. His parents do not agree with the statement in Part 4 of that statutory statement that the appropriate school for C is "GP" School, a maintained special school. They appealed in 2006 to the Special Educational Needs and Disability Tribunal against the contents of the statement. Their appeal was successful in respects which are now immaterial, but was unsuccessful in so far as it concerned the identity of the school at which C was to be educated. In due course, therefore, they placed C at "SM" School, an independent special school where he currently remains and has made good progress. They wish him to stay there for the secondary part of his education.
3. The issue before the court arises because the defendant has declined to amend C's Statement of Special Educational Needs. The significance of the refusal to amend the statement is that it prevents Mr and Mrs M from launching an appeal against the contents of that amended statement under section 326(1)(b) of the Education Act 1996. The statement currently specifies GP as the school which would adequately fulfil C's needs. They wish to contend, in the context of his forthcoming secondary education, that the statement should specify SM as the appropriate school.
4. In order for that dispute to be put into its statutory context, it is necessary to consider some of the provisions of the Education Act 1996 and the regulations made thereunder. By section 2 of the Act, "primary education" means *inter alia* "(1)(b): "full-time education suitable to the requirements of junior pupils of compulsory school age who have not attained the age of 10 years and 6 months", and by section 2(2), "secondary education" means:

"(a) full-time education suitable to the requirements of pupils of compulsory school age who are . . .

(ii) junior pupils who have attained the age of 10 years and six months and whom it is expedient to educate together with senior pupils of compulsory school age . . . "

By section 4(1) of the Act, "school" means an educational institution which, with irrelevant exceptions, is an institution for providing (a) primary education, (b) secondary education, or (c) both primary and secondary education. By section 5(1), "primary school" means, subject to regulations, a school for providing primary education. By subsection (2), "secondary school" means - again subject to irrelevant exceptions - a school for providing secondary education.

5. That introduction as to the kinds of schools is necessary in order to put into context the structure of Part 4 of the Act and how it deals with children with special educational needs.
6. It is common ground in this case that C has special educational needs and requires special educational provision as those terms are defined in section 312 of the Act. By section 323, a local authority is obliged, in circumstances which applied in the present case, to consider whether to make a statement of special educational needs. Section 324(1) reads so far as material:

"(1) If, in the light of an assessment under section 323 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 the special educational provision which any learning difficulty he may have calls for, the authority shall make and maintain a statement of his special educational needs.

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

Section 324(4) provides:

"(4) The statement shall --

(a) specify the type of school or other institution which the local education authority consider would be appropriate for the child . . . "

7. The content of a Statement of Special Educational Needs is further amplified by regulations. The regulations relevant to this case are the Education (Special Educational Needs)(England)(Consolidation) Regulations 2001, SI 2001 No 3455. Schedule 2 to those regulations, introduced by regulation 16, provides in respect of Part 4 of the statement (under "Part 4: Placement") that the statement should specify:

"(a) the type of school which the authority consider appropriate for the child and if the authority are required to specify the name of a school for which the parent has expressed a preference, the name of that school . . . "

That reflects what I have already read out from section 324(4), so there is an express statutory obligation in the primary legislation to specify the type of school and it is echoed, as one would expect, in the regulations which set out the detailed provision for what the statement shall contain.

8. At the heart of the difference between Mrs M and the defendant lies the correct construction of regulation 19. I will read it as a whole:

"19(1) This regulation applies where --

(a) a statement is maintained for a child, and

(b) the child is within twelve calendar months of a transfer between phases of his schooling.

(2) In this regulation a transfer between phases of schooling means a transfer from --

(aa) infant school to junior school;

(ab) primary school to middle school;

(a) primary school to middle school;

(b) primary school to secondary school;

(c) middle school to secondary school, or

(d) secondary school to an institution specified in section 2(2A) of the Act."

(3) Where this Regulation applies an authority must ensure that the child's statement is amended so that before 15th February in the calendar year of the child's transfer the statement names the school or other institution which the child will be attending following that transfer."

9. We are in the calendar year of the child's transfer. Accordingly, regulation 19 required, in respect of the Statement of Special Educational Needs applicable to C, that the authority must ensure that his statement was amended so that before 15th February it named the school or other institution which he would be attending following that transfer.
10. In order to identify what amendment might be required, it is necessary to go to the Statement of Special Educational Needs itself as it stood after the appeal to the Tribunal in 2006. It is a detailed document. It is not necessary to consider its detail, but one can turn directly to Part 4. As I have said, both section 324 of the Act and the regulations require that the type of school is specified in Part 4 of the statement. The statement produced by the defendant in this case failed to do this. Part 4 reads in its entirety:

"Placement at [GP] school, Crowborough, East Sussex."

Nothing is said about the type of school which is appropriate for C. The named school is in fact a maintained special primary school. It is also, by reference to the statutory definitions which I have already mentioned, a maintained special secondary school.

11. The authority's position is that since it does not propose that C should change schools from his notional attendance at GP School for primary education to notional attendance at GP School for secondary education, no amendment to Part 4 of the statement is required. In my judgment, that contention can only be given a semblance of correctness by ignoring the defect in Part 4 of the statement, which fails to state the type of school which the authority regards as appropriate for the child. The structure of

regulation 19 is that where a child transfers between phases of his schooling - in this case from primary school to secondary school - at that stage, and without prompting or demand from the child's parents, the local authority must ensure that his statement is amended so as to name the school regarded by the authority as suitable for satisfaction of his special educational needs during the secondary phase of his education. The type of school will have to be stated in the statement, so as to comply with section 324(4) of the Act.

12. For the authority, as it has done in this case, to point to Part 4 of the statement and to say that it does not propose an alteration in the name of the school, does not, in my judgment, satisfy its statutory obligation. The core statutory obligation is to identify and state the type of school and, in certain circumstances, its name. Here, if the local authority had identified that the appropriate primary provision for C's education was a maintained special primary school, the requirement in order to comply with regulation 19 to alter it to a maintained special secondary school would be obvious. Having produced a statement which failed to comply with the statutory obligation in section 324(4), the authority is, in my judgment, doing what Mr Wolfe on behalf of the claimant described as taking advantage of its own wrong. The inference which Mr Haukeland, counsel for the defendant, accepted could be drawn, was that the local authority was refusing to amend the statement because it knew that if it did amend the statement, this would have the effect of triggering the parents' right to a statutory appeal.
13. In my judgment, the authority's refusal, when C was within 12 calendar months of a transfer between phases of his schooling, to amend the statement so as to name the school which C should be attending for secondary education was a failure to comply with the terms of regulation 19 and was therefore unlawful. It is the phase change, not the change of any particular institution, which triggers the obligation to amend. In those circumstances, this claim for judicial review succeeds and I will hear submissions from counsel as to what, if any, consequential orders should be made.
14. MR WOLFE: My Lord, we seek an order that the defendant pay the claimant's costs, to be assessed if not agreed.
15. TIMOTHY BRENNAN QC: I will come to costs in a moment.
16. MR WOLFE: In terms of the detail of it, in one sense I could ask for an order quashing their refusal and ask for a mandatory order requiring them to produce an amended statement. Some would say that that was heavy handed and that all I actually need is a declaration that they have acted unlawfully in not producing one so far. Obviously what we are concerned about is the consequential results. If there was any doubt that a declaration would be sufficient, I would ask for a more heavy handed order.
17. TIMOTHY BRENNAN QC: There may be a time element in it if they now take time to consider the judgment. You will not get the transcript immediately and as far as I can see nobody is with Mr Haukeland today. In order to give the SENDIST the jurisdiction to entertain the appeal, you actually need a document.

18. MR WOLFE: We need an amended document. It may be not heavy handed to say that their refusal to produce an amended statement should be quashed and the court should order that they produce an amended statement within X days.
19. TIMOTHY BRENNAN QC: Yes.
20. MR HAUKELAND: For my part, if it assists, I can see the merit for putting a time limit on it, given the time is running out. Certainly the amendment is a simple one. It does not require any great consideration. Perhaps 21 days or thereabouts will suit.
21. TIMOTHY BRENNAN QC: You want 21 days in order to alter Part 4 to say placement at GP being a special secondary school?
22. MR WOLFE: My Lord, I am told the information we have from the Tribunal is that if we are to get a hearing before the Tribunal and a determination before the summer when the Tribunal does not sit, we would need to kick off our appeal within the next seven days so I do not know why so long is needed for such a trivial amendment.
23. TIMOTHY BRENNAN QC: I do not see why it could not be done this afternoon.
24. MR WOLFE: Maybe I shall be asking for seven days.
25. MR HAUKELAND: My Lord, again I see that time is pressing. Seven days must be sufficient. I am only anxious because my instructing solicitor is away this week. He is in hospital. I will obviously try to ensure that a short note of judgment and its effects gets to the right person.
26. TIMOTHY BRENNAN QC: Yes, although communication lines are difficult and it has to get to the correct person, presumably in the department of the Director of Education, does it not?
27. MR HAUKELAND: Yes.
28. TIMOTHY BRENNAN QC: Are you content with seven days?
29. MR WOLFE: I am content with seven days.
30. TIMOTHY BRENNAN QC: You did say you need to get your appeal in within seven days.
31. MR WOLFE: We need to get our appeal in, yes. Seven days would be sufficient.
32. TIMOTHY BRENNAN QC: For the amended statement.
33. MR WOLFE: Yes. We will get on to the Tribunal this afternoon to tell them it is coming, but jurisdictionally they cannot do anything about it until then. The slight difficulty is that the Tribunal process is circumscribed by some statutory time periods, exchange of evidence and so on, so you cannot do too much to truncate that.

34. TIMOTHY BRENNAN QC: Subject to the precise wording, what I am inclined to do is to quash the refusal to amend the statement, to direct that the defendant produce an amended statement and serve it on the claimant's solicitors by 2 pm next Tuesday, whatever date that is. Perhaps you would formalise that into an order and hand in a note of it.
35. MR WOLFE: Shall we email that to the associate?
36. TIMOTHY BRENNAN QC: Whatever is the most convenient way.
37. MR WOLFE: Yes.
38. TIMOTHY BRENNAN QC: Given the shortage of time, I suggest you do it that way.
39. MR WOLFE: My Lord, we suggest that the schools be named GP and SM.
40. TIMOTHY BRENNAN QC: Why not include that in the order.
41. MR WOLFE: My Lord, I mentioned the application for costs.
42. TIMOTHY BRENNAN QC: Yes, you did. I have a statement.
43. MR WOLFE: That was a summary assessment schedule. If my Lord is minded to do a summary assessment then by all means, but I was not going to press the point.
44. TIMOTHY BRENNAN QC: Let us see how much of it is in dispute.
45. MR HAUKELAND: My Lord, I have a statement which is dated 24th April. I hope you have the same one.
46. TIMOTHY BRENNAN QC: I have one.
47. MR HAUKELAND: It is signed and dated 24th.
48. TIMOTHY BRENNAN QC: What is the total on the figure you have?
49. MR HAUKELAND: I have a total of £19,212. My Lord, I can take the matter fairly quickly. If we start from page 1, I have no observation to say make on the first page of part 1, no observations to make on part 2. Part 3, when we get to page 5, this is the total time engaged, 14 and a half hours on documents. My Lord, just taking a step back, if you like, that appears to me to be somewhat high, given the compressed time within which these events have taken place and what is required; just on the high side. In particular, if we look at page 5 on the top, preparing amendments for correspondence and drafting a second witness statement. My Lord may have seen those witness statements. They, in my submission, add nothing to the claimant's case.
50. TIMOTHY BRENNAN QC: It is an hour and a half claimed there. What is the hourly rate?
51. MR HAUKELAND: £304 for a Grade A.

52. TIMOTHY BRENNAN QC: So the claim is for a total of nearly 15 hours going from the pre-action protocol letter.
53. MR HAUKELAND: To 21st April. My Lord, I do not say it is dramatically high but --
54. TIMOTHY BRENNAN QC: What do you say it should be?
55. MR HAUKELAND: I would say 10 or 11 hours. I calculated 10 hours. Again, nothing then, finally, on page 5. Move on to part 2, page 1 of part 2, attendance on court, that is 7 hours. It is just past 12 o'clock. That could be halved, in my submission. Documents, again. These are in addition of course. It is a further seven hours on top of the 14 and a half hours. It is getting on for three days work. Those figures should probably be halved, in my submission. Finally, counsel's brief fee. Notwithstanding Mr Wolfe's experience and expertise in this area, if one bears in mind the guideline rate for summary assessment in the Administrative Court, for a half day hearing, which this is, in 2007 the figure was £1,746 or thereabouts. Plainly that needs an uplift. In my submission a figure of £2,000 would be reasonable for the defendant to pay. My Lord, I have done some figures. I had not got to the very end. Taken as a whole, I am in the court's hands as to any detailed calculations but, taken as a whole, a figure of, let us say, £16,500 seems to reflect the submissions I have made.
56. TIMOTHY BRENNAN QC: Thank you.
57. MR WOLFE: My Lord, there are three points. The first is on page 5 which is the witness statements of Mr Silas and Ms McConnell. Your Lordship may recall that witness statement explains quite how tortuous it would be to bring a re-assessment process. Just causatively, it appears that that witness statement alleged the defendant to change its position from where it was suggesting that that was an alternative remedy (not quite using those words but that was the gist of it) to then abandoning that point in the submissions in its skeleton. In my submission, that was time that cannot be complained of.
58. The second element which is court time, I cannot argue that it has taken less than seven hours to hear the case. In round figures, my learned friend says three and a half hours rather than seven. Round that to £1,000, so I would accept that £1,000 would be taken off the final total on that basis. Again, the preparatory time on documents, my learned friend has not suggested any specific time that has been wasted. There is a detailed schedule of what has been done. In my submission, there is no basis to reduce those times. In relation to my brief fee, all I would say is that it includes not just this hearing but also preparation of the skeleton arguments and bundles of legal materials. On that basis, whilst accepting reduction in the figure for the attendance in court and therefore a price reduction of £1,000, I would invite my Lord to make the order of £18,212.48 rather than £19,212.48.
59. TIMOTHY BRENNAN QC: I have considered the submissions which you made. It seems to me that the most powerful point is that the part 2 projected costs were on the basis of a workmanlike estimate for how long the case might take. It was not in the hands of the parties whether it was listed to come on first this morning or second, so

they might perfectly well have been here the full day. In those circumstances, it is appropriate to make some reduction, which I do not doubt will be reflected in a reduction in what the claimants actually have to pay their lawyers, because the case has in large part, because of their skill and economical presentation of it, taken a rather shorter time than it would have done. In the circumstances, I summarily assess the costs at £18,000 including VAT.

60. MR WOLFE: My Lord, I am obliged.
61. MR HAUKELAND: My Lord, may I ask for 21 days in which to pay that? I appreciate that the usual order is 14, but I am slightly anxious that the lines of communication I am going to have to establish should be set in motion.
62. TIMOTHY BRENNAN QC: I do not see why the local authority should have longer than an ordinary litigant. 14 days. Thank you both very much for your economical presentations.