Case No: CO/4016/2003

Neutral Citation Number: [2003] EWHC 3368 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Tuesday 25th November 2003

Before :

MR. DAVID LLOYD JONES QC.
SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

	A	Appellant
	- and -	
	THE SPECIAL (1) EDUCATIONAL NEEDS & DISABLITY TRIBUNAL (2) LONDON BOROUGH OF BARNET	Respondents

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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David Wolfe (instructed by Alexander Harris) for the Claimant
Elisabeth Laing (instructed by the London Borough of Barnet) for the Respondent
The SENDIST did not appear and were not represented

- -

Judgment
As Approved by the Court

Mr. Lloyd Jones:

1. This is an appeal on points of law pursuant to section 11, Tribunals and Inquiries Act 1992 against a decision of the Special Educational Needs and Disability Tribunal issued on the 24th July 2003.

2. S was born on the 13th September 1995 and was therefore 7 years of age at the date of the decision. She has significant special educational needs within the meaning of Part IV of the Education Act 1996 including cerebral palsy. Her parents, to whom I shall refer as Mr. and Mrs. A, are divorced but they are both closely involved in the upbringing of S.

3. Mr. and Mrs. A and S are orthodox practising Jews who are committed to an orthodox Jewish lifestyle including strict observance of the Sabbath and Jewish festivals and following a strict kosher diet.

4. From September 2000 S attended the Rosh Pinah School, a maintained mainstream school for children from an orthodox Jewish background. However, she made little or no educational progress. Her parents and their advisers concluded that S was now unable to function appropriately within Rosh Pinah as a mainstream school. Mr. and Mrs. A, due to S's religious upbringing and environment, had stated a preference for her transfer to Kisharon Day School, an independent Jewish day school.

5. On 13th February 2003 the London Borough of Barnet ("Barnet"), the Local Education Authority responsible for S within Part IV of the Education Act 1996, made a Statement of Special Educational Needs in respect of S in accordance with the statutory scheme set out in the Education Act 1996 and the Education (Special Educational Needs (Consolidation)) Regulations 2001. Part 2 identified S's special educational needs. Part 3 specified her special educational provision and Part 4 named Northway School, a special school maintained by Barnet as the appropriate placement for her education.

6. On 11th April 2003 Mr. and Mrs. A appealed to the Special Educational Needs and Disability Tribunal pursuant to section 326, Education Act 1996, against the contents of Part 2, 3 and 4. They contended that the sort of special school provision which Kisharon could provide was necessary for S as,

although they recognised that religion may not be considered strictly as a special educational need, they considered that the nature of S's learning difficulties meant that her educational, social, cultural and religious needs was inextricably linked together and that it was only with her continuing education in a Jewish framework that she would be able fully to appreciate her educational terms of reference and make appropriate academic progress. They maintained that this was necessary due to the fact that all her education to date had been within a Jewish environment. Their grounds of appeal to the Tribunal included the following statement:

"In essence, they do not believe that Northway is able to meet all of S's special educational needs. This is particularly because it would be an alien environment to S who has been steeped in a Jewish religious environment up until now and would not be able to properly fit into secular day special school environment which contradicts her home setting and separates her from her Jewish identity.

Placing her at Northway would also be disadvantageous not only because she will have difficulty accessing the educational curriculum which is very different to that which she has been exposed to up until now but also because practically she will become very excluded by definition due to her need to take off further time for religious holidays, having to leave early on Fridays for the Jewish Sabbath during the winter, having to be withdrawn from assemblies or other environments which deal with religious aspects of the curriculum as well as other difficulties with keeping to a strict kosher diet. The additional strain and anxiety caused to S by being placed in this kind of situation will not be amenable to her making appropriate educational progress and will be to her detriment."

Accordingly, Mr. and Mrs. A sought amendments to Parts 2, 3 and 4 of the Statement.

7. Barnet in its Statement of Case to the Tribunal stated that its SEN Panel had taken the view that S's needs could no longer be met in mainstream provision with support. However, it considered that whilst it was clear that S had significant needs, these were not such as to require an independent or non-maintained special school programme. It was satisfied that effective and appropriate local provision could be made for S by a local special school, as was offered. The relative costs involved were its primary reason for the determination, as it was required by the Educational Act 1996 to take into account questions as to the efficient use of resources. In view of the difference in the level of presumed costs, the LEA did not accept that the provision of a

place at Kisharon School for S would be an efficient use of resources and concluded that it would be an unreasonable public expenditure. With regard to the issue of Jewish schooling, it accepted that it was required to respect the religious and cultural preferences of parents. It was not, however, required to consider these as special educational needs. It considered that the parental proposal was in essence a challenge to the ruling in *G v. London Borough of Barnet and the Special Educational Needs Tribunal* [1998] ELR 480. However, if it was accepted that S required specialist provision, Barnet would expect this to be made in a maintained provision locally.

8. The task for the Tribunal was, therefore, to determine S's special educational needs under Part 2 of the Statement, to specify the special educational provision to be made in her case under Part 3, and to determine the placement or other arrangements under Part 4.

9. The hearing before the Tribunal took place on the 15th July 2003. Mr. Lebrett, the Head teacher at Kisharon School gave evidence on behalf of Mr. and Mrs. A. Mrs. Ruth Birnbaum, an Educational Psychologist, also gave evidence on behalf of Mr. and Mrs. A. Mrs. Burgess, the Headmistress of Northway School gave evidence on behalf of Barnet. There was also before the Tribunal a recent OFSTED report on Northway School.

10. The Tribunal had previously been provided with a report by Mrs. Birnbaum. A second report by Mrs. Birnbaum was admitted at the hearing. With regard to S's needs under Part 2 Mrs. Birnbaum, in her first report, considered, inter alia:

> "As S is very aware of differences, it is important that she remains with her peer group as much as possible. Removing her from lessons for reasons of religion may increase her already significant feelings of being different. It is very important that withdrawal is kept to the minimum.
>
> …
>
> S needs an environment which can offer her an integrated approach to her learning including therapeutic input.
>
> She needs to be able to understand her own religious upbringing within the context of her social and cultural needs."

Mrs. Birnbaum considered that the required provision under Part 3 included the following:

> "S needs to be in a small school which specialises in the education of children with moderate learning difficulties and complex needs. She should be with children who have similar needs to herself and whose behaviour is a model. Because of her insecure social skills she would benefit from being with a group of Jewish children so she can share social activities and visit their homes with ease. The whole school environment should provide a seamless provision between S's home and school life so that she can generalise her learning in all contexts and not be confused. In this sense a Jewish education is an educational need as S will have difficulty in learning from experiences that are alien to her. Her learning takes place best with concrete experiences. The use of objects of reference must be steeped in her own cultural environment to ensure a meaningful experience and solid transfer. Keeping her with a peer group and avoiding withdrawal will enhance her confidence and self esteem. A Jewish school will enable this to occur. A secular curriculum in a non-Jewish school will inevitably increase her feelings of difference rather than similarities.
>
> …
>
> S responds well to consistency and enjoys the predicable sequence of Jewish days, festivals and diary dates. These can be used to promote her learning and encourage the use of routine in her life."

11. Mr. and Mrs. A and their advisers drew up proposed amendments to Parts 2, 3 and 4 of the Statement. A copy was provided to the representative of Barnet before the hearing began.

12. At the hearing Mr. and Mrs. A were represented by Miss Patry, a barrister acting voluntarily. Barnet was represented by its official Mr. Luck. During the first part of the hearing there was some discussion about the parts of the Statement that Barnet suggested should be amended. Miss Patry's account, which is not disputed, is that after this discussion the Tribunal Chair stated that the Tribunal did not want now to discuss the reasons for the amendments proposed by the parties with reference to the evidence, but that it should instead be left to the Tribunal to decide after the hearing what amendments were necessary on the basis of the evidence that they would hear because they already knew what each party wanted. She indicated that the main issue for the appeal was over S's placement and that the parties should concentrate on that.

13. The Tribunal issued its decision on the 24th July 2003. At paragraph 4 it stated:

> "The essential issue that we had to decide was whether S's special educational needs could be met by the LEA proposal, namely placement at Northway an LEA maintained special school or at Kisharon, an independent special school for orthodox Jewish children."

A section headed "The Facts" was followed by a section headed "Conclusions" which it is necessary to set out in full:

"Conclusions

In reaching our conclusions we have taken into account section 9 Education Act 1996 whereby an LEA must have regard to the general principle that children should be educated in accordance with parents wishes so far as it is compatible with the avoidance of unreasonable public expense. We have also taken into account the guidance set out in the Code of Practice in particular paragraph 8.65 whereby an LEA must consider very carefully a preference stated by parents for a denominational non maintained special school. This duty to respect the parents' view is also set out in the European Convention on Human Rights which is now part of our law. It was conceded that S's Jewish faith of itself cannot constitute a special educational need.

a. We find that both schools could meet S's special educational needs. They offer two very different models of education, one a multi-cultural model that embraces diversity, the other an exclusive faith model. There was no issue that both schools have a high level of expertise in teaching children with moderate learning difficulties, have a high staff : pupil ratio and that S would benefit from being in a resource with therapists on site. It was agreed that S would benefit from further assessment of her speech and language needs and occupational therapy needs, both delivered directly if appropriate. It was further agreed that she could be assessed by a psychiatric social worker and her mother will follow this up.

b. We agree that S's needs should be further assessed. On the evidence we heard and read it was not clear why she made such limited progress at Rosh Pinah, albeit in a Jewish environment in keeping with her parents' wishes. An obvious explanation is that she was wrongly placed in a mainstream school and could not access the curriculum, so that ultimately she spent large parts of the day being withdrawn from the classroom. We have noted her parents concern that S's difficulties may have been in part due to a lack of support and not

receiving any input at all from a speech and language therapist or occupational therapist. It has yet to be seen what progress she can make in a special school where it was accepted that her needs will be better understood and provided for. Her levels of engagement, understanding and ability to follow the differentiated curriculum will have to be monitored. It is obviously to be hoped that they will rise and that this will increase S's sense of self esteem and prevent any emotional barriers to her learning.

c. Mr and Mrs. A both agreed that Northway and Kisharon are good schools. Their preference for one rather than the other is understandably linked to their very strongly held view that the family's religious beliefs with all their daily manifestations are not in any way compromised. Whilst we accept that Mr. and Mrs. A would find it very difficult to accept anything other than an orthodox Jewish school for S, we are not satisfied that S's special educational needs require that. The law only requires that parental wish to be actively respected and we are satisfied from the examples given by Mrs. Burgess that the school takes that responsibility very seriously.

d. We find that placement at Kisharon would not be an efficient use of the LEA's resources.

e. We order that S's statement be amended in line with the LEA's proposals set out in WD2 annexed hereto. This reflects areas agreed by the parties. We find that it incorporates a need to respect their S's faith without that being an exclusive object."

14. It appears from Annex WD2 that a substantial number of the amendments to the Statement proposed by Mr. and Mrs. A were accepted by the Tribunal. I set out below certain of the amendments proposed by Mr. and Mrs. A which were accepted by the Tribunal showing in parentheses amendments which were not accepted by the Tribunal.

> "She has a need for consistency in her educational experience [particularly to reinforce home/school environments]."
>
> "S is prone to becoming physically aggressive towards other children if she cannot be fully included in the activities of those children. [S needs to be included in all activities with her peers so that she can be a valued member of her environment.]"

"When learning to broach more complex forms of communication between signs and words, S works better with [Jewish] objects of reference which relate to her existing understanding of her [Jewish] environment and provide her with a link between home and school."

"S also works better in general with visual cues, when [Jewish] objects of reference including Jewish objects of reference are used they serve as an excellent aid to her memory, as they are meaningful, motivating and offer the opportunity of frequency of experience [linking home and school]." The words underlined were proposed by Barnet.

"S needs an educational environment which is sensitive to [also able to integrate] her social, religious and cultural needs. [S needs to be able to understand her own religious upbringing within the context of social and cultural needs in order to develop her self-image and consequently her self-esteem.]" The words underlined were proposed by Barnet.

The following proposed amendments were refused.

"[S needs an educational environment which is also able to integrate her social, religious and cultural needs. S needs to be able to understand her own religious upbringing within the context of her social and cultural needs. She needs consistency.]"

"[S needs an appropriately integrated, focussed and holistic approach to her learning in order to make even basic educational progress. The whole school environment should provide a seamless provision between S's home and school life.]"

"[She will have access to learning about the predictable sequence of Jewish days, festivals and diary dates in order to encourage her sense of routine and promote her learning.]"

"[She should be in a group of Jewish children so that she can share social activities and visit their homes with ease."]

However, the Tribunal did accept the following amendment:

> "Concrete Jewish objects of reference should be used as appropriate in order to bridge more complex forms of communications between signs and words and between home and school.". The words underlined were proposed by Barnet.
>
> The following proposed amendment to the Statement of Provision was rejected:
>
> "[S requires a placement with a group of children with moderate and/or complex difficulties who provide an appropriate social model and share similar values and therefore a Jewish school would be appropriate as it can provide a whole school environment and a holistic approach appropriate to all her needs including her social and emotional needs.]"

15. Due to a clerical error by the Tribunal in the preparation of WD2 the appeal to this Court was commenced on a false basis. However, when the error became apparent revised skeletons were submitted on behalf of both the Appellant and the Respondent. At the hearing of this Appeal Mr. Wolfe on behalf of Mrs. A, who is the Appellant in this Appeal, made the following submissions.

(1) The Tribunal approached the questions it was required to decide in an incorrect order;

(2) The Tribunal failed to give reasons for rejecting the parental requests;

(3) The Tribunal failed to give reasons for rejecting Mrs. Birnbaum's evidence;

(4) The Tribunal failed to consider the relationship between S's Jewish religion and identity and the ability to meet her special educational needs;

(5) The Tribunal failed to give effect to S's rights under the European Convention on Human Rights, Articles 8, 9 and 14.

16. In approaching this appeal I bear in mind the observations of Sedley L.J. in *London Borough of Bromley v. Special Educational Needs Tribunal and Others* (26th May 1999) as to the particular expertise of the Special Educational Needs and Disabilities Tribunal.

17. In producing a statement of special educational needs under section 324, Education Act 1996 it is the duty of a local education authority to decide first

what are a child's special educational needs within Part 2, secondly what special educational provision is necessary to meet those needs within Part 3 and thirdly to make an appropriate placement within Part 4. These questions have to be addressed in this order because it is only when a decision has been taken as to a child's special educational needs that it is possible to decide what provision is required to meet them. Similarly, it is only when a decision has been taken as to the necessary provision that it is possible to decide which school can make that provision. By way of example, if the amendment to the Statement of Provision in Part 3 proposed by Mr. and Mrs. A, quoted above, had been accepted, it would clearly have been determinative of the placement under Part 4. Thus in *R v. Kingston Upon Thames Council and Hunter* [1997] ELR 223 McCullough J. stated the principle as follows (at p. 9):

> "… Part 4 cannot influence Part 3. It is not a matter of fitting Part 3 to Part 4 but of considering the fitness of Part 4 to meet the provision in Part 3."

For the same reasons, it is essential that a Special Educational Needs and Disability Tribunal decide these issues in that order.

18. In the present case it appears that the Tribunal took the unusual course of indicating, after some discussion about the parts of the statement that Barnet suggested amending, that the main issue for the appeal was over S's placement and the hearing should concentrate on that. I was told on behalf of the Appellant that there was no debate in the course of the hearing before the Tribunal as to what should be in Parts 2 or 3. However, the Tribunal did hear evidence from Mrs. Birnbaum and Mr. Lebrett about the interaction between S's Jewish religion and identity and her special educational needs. The Tribunal clearly considered that the essential question was whether S's special educational needs could be met at Northway School or at Kisharon School. It said so at paragraph 4 of its decision. In addition, this is clear from the whole structure of the decision. The section entitled "Conclusions" is largely devoted to the question of placement. It is only at the end of that section that the Tribunal refers to its conclusions on need and provision as set out in the revised Statement. The final sentence of paragraph (e) expressly relates to the decision on Parts 2 and 3.

19. Against this background Mr. Wolfe submits that the Tribunal approached the issues in the wrong order. He submits that the Tribunal decided on what it considered to be an appropriate school and that it then allowed that to influence its decision on Parts 2 and 3. In his Submissions in Reply he contended that having decided that a multi-cultural school would be appropriate the Tribunal then addressed the statements of needs and provision deleting those items

which could not be satisfied in a multi-cultural school.

20. It is clear that the Tribunal concentrated on the issue of placement at the hearing and that this dominates its written decision. However, it is not clear to me that the Tribunal in arriving at its decision decided first on the appropriate school and then worked backwards from the answer. It had before it the detailed proposed amendments to Parts 2 and 3. In arriving at that decision it was required to consider these and to decide which of the amendments it had accepted. I note that, as Annex WD2 shows, while it rejected those which would inevitably have led to the need to provide education at a special Jewish school, it accepted many of the amendments proposed by Mr and Mrs. A including some referring to matters relating to the Jewish religion. The course taken by the Tribunal at the hearing was an unusual one. However, it had previously been provided with detailed written submissions by both parties on the issues of special educational needs and provision and with Mrs. Birnbaum's first report which dealt in detail with the questions of needs and provision. I do not accept the submission that the Tribunal decided the question of the appropriate school by reference to the statement under appeal. Both Mr. Lebrett and Mrs. Burgess were there to give evidence as to the provision their respective schools could make for S. It was open to the Tribunal to invite the parties to concentrate on the question of whether the needs of S could be met by Northway School or Kisharon, even though the issues of S's needs and provision had not yet been resolved by the Tribunal.

21. Evidence was lodged on the appeal to this court for the purpose of demonstrating what occurred in the hearing before the Tribunal. Mr. Luck, who represented Barnet at the hearing before the Tribunal, stated in his Witness Statement:

> "This hearing did not differ from the usual pattern. The Chair identified the issues in this case as being (a) What was the provision at Northway and how it would meet S's needs. (b) What were the cost elements including transport costs. With regard to (a) discussion centred around three questions for the school. 1. What are the needs? 2. What reference does the school make to religious and cultural needs? 3. Can Northway meet the totality of need?"

However, Miss Patry, who represented the Appellants, states that while the Chair did try to identify the issues she did not do so in such an absolute way as Mr. Luck suggests. Miss Patry states that her

recollection is that she did not identify point 1. However, the Chair's notes read as follows:

'Issues

1. What is outstanding Pts 2 & 3 –
- points of disagreement
- not written in correct way
2. (Parents (rep)). Which of S's special educational needs could not be met at Northway.
3. Costs."

This strongly suggests that the Tribunal appreciated the correct sequence in which these issues are required to be addressed. Accordingly, I am not persuaded that the Tribunal took a decision on placement and allowed that to influence its decision on needs and provision.

22. It is well established and was common ground both before the Tribunal and before me that a child's Jewish religion and identity cannot constitute a special educational need. (*G v. London Borough of Barnet and Special Educational Needs Tribunal* [1998] ELR 480 per Ognall J. at pp. 483-4.) However, a decision maker required to make decisions as to what are a child's special educational needs and the required provision must have regard to a child's Jewish religion and identity if they are relevant to that child's special educational needs or the manner in which they may be met. (*R v. Secretary of State for Education ex parte E* [1996] ELR 312 per Hidden J.)

23. In the present case Mr. and Mrs. A proposed many detailed amendments to the Statement. Many of these related to S's Jewishness and its impact on her special educational needs and the appropriate provision. Similarly, the expert evidence of Mrs. Birnbaum before the Tribunal dealt in detail with S's Jewishness and the ways in which Mrs. Birnbaum considered it affected her special educational needs and the provision to be made for them. There is a clear correspondence between certain passages in Mrs. Birnbaum's evidence and many of the amendments to the Statement proposed by Mr. and Mrs. A. In general, the amendments which were specifically based on the evidence of Mrs. Birnbaum were not accepted by the Tribunal although other amendments proposed by Mr. and Mrs. A were accepted. In the result, the statement of needs in Part 2 adopted by the Tribunal did include a number of references to matters connected with S's Jewishness. So far as the decision itself is concerned, the only reference to the rejected amendments is at paragraph (e) where the Tribunal merely states that the amended Statement reflects areas agreed by the parties and that the Tribunal finds that it incorporates a need to respect S's faith without that being an exclusive object. No further reasons are

given for the rejection of the proposed amendments. The Appellant contends that this failure to give reasons invalidates the decision.

24. In approaching this question it is important to bear in mind that Regulation 36(2), Special Educational Needs and Disability Tribunal Regulations 2002 SI 2002/1985 states:

> "The decision of the tribunal may be given orally at the end of the hearing or reserve, and, in any event, whether there has been a hearing or not, shall be recorded forthwith in a document which, save in the case of a decision by consent, shall also contain, or have annexed to it, a statement of the reasons (in summary form) for the Tribunal's decision, and each such document shall be signed and dated by the Chairman."

There is, therefore, a duty on the Tribunal to give reasons but only in a summary form. In *S (a minor) v. Special Educational Needs Tribunal and Another* [1995] WLR 1627 Latham J., as he then was, referred to an earlier provision requiring the Special Educational Needs Tribunal to give a statement of reasons in summary form and observed that:

"It seems to me, therefore, that a balance has to be struck between giving effect to the clear intention of Parliament that the requirement of reasons is to be met by a short form document and proper concerns that the right of appeal under s.11 of the Tribunal Inquiries Act 1992 would be emasculated if the document did not at least enable the aggrieved party to identify the basis of the decision with significant clarity to be able to determine whether or not the Tribunal had gone wrong in law.

…

I consider that the balance is properly struck by requiring that the statement of the reasons should deal, but in short form, with the substantial issues raised in order that the parties can understand why the decision has been reached." (at p.1636).

There, it was held that the obligation was satisfied by a short form conclusion as to what evidence has been accepted and what evidence had been rejected with a short form reason for that conclusion.

25. Similarly, in *H. v. Kent County Council and the Special Educational Needs Tribunal* [2000] ELR 660 Grigson J. held at p.669:

> "… the aggrieved party should be able to identify the basis of the decision with sufficient clarity to be able to determine whether or not the Tribunal had gone wrong in law. Further, … statements of reasons should deal in short form with the substantial issues raised in order that the parties can understand why the decision has been reached; in other words, what evidence is rejected and what evidence is accepted."

26. Miss Laing, on behalf of Barnet, reminded me that this is an expert Tribunal and submitted that the question of adequacy of reasons must be considered against the background of persons familiar with this specialist field. I do not accept that this is the correct approach. It is essential that the Tribunal's decision should be intelligible to all and not merely to those expert in the field of special educational needs. In this case it is essential that the decision should explain to Mr. and Mrs. A why the Tribunal has not accepted their proposed amendments to S's Statement, in particular so that they may understand the thinking behind the decision and so that any defect in the decision making process may be apparent. It totally fails to do so. In particular, contrary to the submissions on behalf of Barnet, it is not sufficient that it is apparent from WD2 which amendments have been accepted and which have not. That reveals the conclusions of the Tribunal but gives no indication as to why it has reached those conclusions.

27. The importance of the Tribunal's conclusions on S's special educational needs is obvious. Not only are they important in their own right, but they have a vital bearing on the subsequent issues on provision and placement. The failure to provide a summary of the reasons for reaching this conclusion is a fundamental defect in the decision.

28. A further point arises here. I have referred above to the close link between many of the amendments to the Statement proposed by Mr. and Mrs. A and the expert evidence of Mrs. Birnbaum. In my judgement, if the Special Education Needs and Disability Tribunal reject the view of an expert it should say so specifically and give brief reasons why it has done so. (See *H. v. Kent County Council* [2000] ELR 660 per Grigson J at paragraph 50; *R (M) v. Brighton and Hove City Council* [2003] EWHC 1722 Admin 4 July 2003, Leveson J. at paragraph 3). This obligation is the greater where, as here, the expert evidence was directly relevant to crucial issues and there was no expert evidence produced on behalf of the other party. Before me, it was contended on behalf of Barnet that in the present case Mrs. Birnbaum was merely expressing an opinion on a matter which is not within the exclusive competence of experts

and on which the Tribunal was entitled to reach its own conclusion. I do not accept that submission. Mrs. Birnbaum is an expert educational psychologist. While it may be open to a Tribunal to accept or reject the evidence of an expert, if it rejects that evidence it must give at least brief reasons for doing so.

29. It may well be that in the present case one or more members of the Tribunal possessed an expertise in relation to the matters to which Mrs. Birnbaum's evidence related and held independent views on these matters. If that is what occurred and if the Tribunal acted on its own expertise in rejecting Mrs. Birnbaum's assessment the Tribunal would have been under a duty to disclose its view so that Mr. and Mrs. A and Mrs. Birnbaum could have the opportunity of addressing that independent view. (*Mahon v. Air New Zealand Limited* [1984] AC 808 per Lord Diplock at p. 821; *R v. Vaccine Damage Tribunal ex parte Loveday*, The Times, 10th November 1984; *R v. Mental Health Review Tribunal, ex parte Clatworthy* [1985] 3 All E.R. 699 per Mann J. at p. 703). If the Tribunal had proceeded on a basis known to them but unknown to others its decision would be flawed on grounds of procedural fairness. However, in view of the failure of the Tribunal to give reasons, we cannot know what in fact occurred in this regard.

30. Although many of the amendments proposed by Mr. and Mrs. A to Part 2 of the Statement were not accepted, the amended Statement adopted by the Tribunal included a number of special educational needs in relation to the provision for which S's Jewishness was relevant. These include the following:

> "She has a need for consistency in her educational experience."
>
> "S is prone to becoming physically aggressive towards other children if she cannot be fully included in the activities of those children."
>
> "S is acutely aware of being different and removing her from lessons may increase her already significant feelings of being different."
>
> "Her degree of confidence should be promoted."
>
> "Her behavioural and emotional difficulties should be addressed."
>
> "S needs an educational environment which is sensitive to her social, religious and cultural needs."

In the same way as in *R v. Secretary of State for Education, ex parte E* [1996] ELR 312 the special educational need for "support to encourage a sense of self" identified in Part 2 demanded careful consideration of its relationship with the suggested need for a Jewish school, in the present case S's special educational needs identified above required careful consideration of the impact of her Jewishness on the means of meeting those needs and on her placement. Of particular significance here was the inevitable need to withdraw S from certain lessons and activities at a non-Jewish school because of the requirements of her Jewish faith.

31. In this regard, it should be borne in mind that Mrs. Birnbaum's expert evidence related not only to her assessment of S's special educational needs, but also to the issues of provision and placement. Although Mrs. Birnbaum's assessment of special educational needs had not been accepted by the Tribunal in its amendment to Part 2, her evidence remained highly relevant to the means of meeting the needs accepted by the Tribunal and to placement. In its decision the Tribunal has rejected the amendment proposed by Mr. and Mrs. A to the special education provision in Part 3, which proposed amendment was based on Mrs. Birnbaum's report. Moreover, it has concluded, contrary to Mrs. Birnbaum's recommendation, that S should attend Northway school.

32. In the body of the decision itself, the Tribunal gives a brief summary of Mrs. Birnbaum's evidence and that of Mr. Lebrett, in the section headed "The Facts". This refers to the relationship between religious observance and educational needs. In the section headed "Conclusions" the Tribunal states at (a) its conclusion that both schools could meet S's special educational needs. At (c) the Tribunal states that it is not satisfied that S's special educational needs require an orthodox Jewish school. At (e) the Tribunal orders that the statement be amended and expresses its conclusion that it incorporates a need to respect S's faith without that being an exclusive object.

33. I am unable to detect in the decision any discussion of the impact of S's Jewishness on the means of meeting her special educational needs or any statement of reasons why despite the requirements of S's religion her special educational needs would be met in a school which was not an orthodox Jewish school. While the summaries of the evidence of Mrs. Birnbaum and Mr. Lebrett show that the members of the Tribunal were aware of the issue, the decision does not explain how they have dealt with it, if they have done, in arriving at their conclusion.

34. On behalf of Barnet it was submitted that the issue is addressed in those parts of the decision relating to Mr. and Mrs. A's preference that S be educated

at an orthodox Jewish school. However, I consider that the issue of the impact of S's Jewishness on the provision required for her special educational needs is a distinct matter from the preferences of her parents and required separate consideration. Similarly, I am unable to accept that the matter was addressed in paragraph (b) of the Conclusions. That paragraph addresses the reasons for her failure to make progress at Rosh Pinah School and refers to certain of her special educational needs including her emotional needs. It refers to the possibility that her lack of progress at Rosh Pinah School was due to her inability to cope with the curriculum and being withdrawn from the classroom. However, it fails to address the question of the effect of S's exclusion from lessons or activities at a non-Jewish school by reason of the requirements of S's orthodox Jewish faith. I conclude therefore that the decision fails to explain the Tribunal's reasoning in relation to the central issue in that appeal.

35. Furthermore, the decision fails to deal with the expert evidence of Mrs. Birnbaum in relation to the impact of S's Jewishness on the necessary provision for her special educational needs. This gives rise to the same criticisms as are set out above in relation to the Tribunal's treatment of Mrs. Birnbaum's evidence assessing those special educational needs. The Tribunal has wrongly failed to explain why it rejected this expert evidence. If it applied its own expertise and decided the question on the basis of the matters known to it but not to others it was required to make the Appellants aware of them so that they could deal with them.

36. It is not possible to discover from the decision how the Tribunal dealt with the issue of the impact of S's Jewishness on the means of meeting her special educational needs. Furthermore, the decision does not disclose whether the Tribunal took account of Mrs. Birnbaum's evidence on the point, if so what view they formed of it, and, if they rejected it, why they did so. In short S's parents were entitled to be told the way in which the Tribunal dealt with the issue which was of central importance in the appeal. The decision does not tell them.

37. This failure on the part of the Tribunal in its decision to explain the basis on which it reached its conclusions as to S's special educational needs and the provision to be made for them, to explain the basis on which it rejected the evidence of Mrs. Birnbaum and to address the issue of the impact of S's Jewishness on her special educational needs and the provision to be made for them leads me to the conclusion that these matters were not properly considered by the Tribunal. In reaching this conclusion I have had regard to all the circumstances of the case. I bear in mind the great emphasis which the

Tribunal placed both at the hearing and in its decision on what it considered to be "the essential issue": whether S's special educational needs could be met by the LEA proposal or at an independent special school. While, for the reasons I have given, I am not persuaded that the Tribunal addressed the questions in the wrong order so as to permit a decision as to the appropriate school to influence its conclusions on S's special educational needs and the provision they required, the emphasis placed by the Tribunal suggests that the questions of needs and provision have not received the attention they required. In particular, I consider that the Tribunal failed to give proper consideration to the impact of S's Jewishness on the provision for her special educational needs accepted by the Tribunal. Although the Tribunal had rejected the proposed amendments to Part 2 based specifically on Mrs. Birnbaum's evidence, there remained a number of accepted special educational needs which required the Tribunal to consider how the requirements of S's religion could be reconciled with the provision for her identified needs which could be made in a non-Jewish school. The Tribunal's failure to include in its decision any reference to this question, which is of central importance to the case of Mr. and Mrs. A as presented in the materials before the Tribunal, leads me to conclude that it did not go through the correct thought processes in relation to this issue.

38. On behalf of the Appellant it was submitted, further, that the Tribunal failed to give reasons for rejecting the parental requests in respect of provision in Part 3.

39. The Tribunal expressly referred in its decision to the fact that section 9, Education Act 1996 requires a local education authority to have regard to the general principle that children should be educated in accordance with their parents' wishes, so far as it is compatible with the avoidance of unreasonable public expense, and stated that it had taken this into account. It also referred to the guidance set out in the Code of Practice, in particular paragraph 8.65 whereby a local education authority must consider very carefully a preference stated by parents for a denominational, non-maintained, special school, and stated that it had taken this into account. Furthermore, it stated that the duty to respect the parents' view also arises under the European Convention on Human Rights. At paragraph (c) of its Conclusions the Tribunal stated that Mr. and Mrs. A agreed that Northway and Kisharon are both good schools. It stated that their preference for one rather than the other was understandably linked to the very strongly held view that the family's religious beliefs with all their daily manifestations should not be in any way compromised. The Tribunal accepted that Mr. and Mrs. A would find it very difficult to accept anything other than an orthodox Jewish school for S, but it was not satisfied that her special

educational needs required that. The law only required that the parental wish be actively respected and the Tribunal was satisfied from the examples given by Mrs. Burgess that Northway school takes that responsibility very seriously. At (d) the Tribunal found that the placement of S at Kisharon would not be an efficient use of the resources for the Local Education Authority.

40. Accordingly, the Tribunal has set out the reasons for its conclusion on this issue. However, to the extent that that reasoning depends on its conclusion that S's special educational needs do not require provision of an orthodox Jewish school, it is defective for the reasons set out above.

41. On behalf of the Appellant Mr. Wolfe advanced further arguments on the basis of the European Convention of Human Rights and the Human Rights Act 1998. He accepted that the Tribunal had properly taken account of the Convention rights of Mr. and Mrs. A under Article 2 of the First Protocol. However, he contended that the Tribunal had failed to have regard to the Convention rights of S herself. In this regard he advanced arguments on the basis of Articles 8, 9 and 14 ECHR. He accepted that the Tribunal was not obliged to allow the appeal to succeed by virtue of these provisions but contended that the Tribunal should have expressly addressed the question whether these provisions were engaged and the justification for any interference with the rights they confer. At the heart of this part of his case was the alleged failure of the Tribunal to take account of S's Jewishness in deciding her special educational needs and the provision to be made for them. It seems to me that the arguments based on Convention rights add nothing to the Appellant's case. Provided that the Tribunal approached the question of S's special educational needs and the provision to be made from them in accordance to the statutory scheme of the Education Act 1996 and the judicial decisions to which I have referred – which would necessarily require the Tribunal to take proper account of the impact of S's Jewishness in assessing her special educational needs and the provision to be made for them – it seems to me that there could be no question of the infringement of any rights under Articles 8 or 9 ECHR or of discrimination against S in her enjoyment of those rights. As Miss Laing put it in argument, framed as Convention arguments these considerations add nothing to the basic framework of the case. In these circumstances, it was not necessary for the Tribunal to embark on an analysis of the case before it in terms of Convention rights.

42. Accordingly, and for the reasons set out above, the decision of the Tribunal will be quashed and the matter remitted for reconsideration by a differently constituted Tribunal.

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THE DEPUTY JUDGE: For the reasons set out in my written judgment, I propose to make an order that the decision of the tribunal be quashed and the matter remitted for reconsideration by a differently-constituted tribunal. Copies of the judgment can now be handed down.
MR WOLFE: My Lord, I am grateful.
THE DEPUTY JUDGE: Mr Wolfe, perhaps it would be appropriate for me to mention at his point that I have made an order under the Children and Young Persons Act prohibiting the publication in newspapers of any information revealing the identity of the child, S.
MR WOLFE: My Lord, I am grateful for that reminder.
My Lord, I think a potential form of words for the order has been placed on your desk, which I hope is consistent with your Lordship's comments, firstly, and also has been the subject to a certain amount of discussion between the parties. I think it is uncontroversial, except that I need to draw your Lordship's attention to paragraph 3 in the draft, which invites your Lordship to make an order that the rehearing be expedited and listed as soon as possible. I think on further discussion we are not sure your Lordship has jurisdiction to make such an order.
THE DEPUTY JUDGE: That was going to be my next question. I doubt that I have. It is really a matter for the tribunal.
MR WOLFE: What we were going to invite your Lordship to do, if your Lordship were willing to do so, was simply to mention a shared wish -- certainly on the parties' part, and I hope the court might share the same view -- that that end be achieved. But obviously that is not by way of an order, it is by way of an expression of hope rather than anything else.
THE DEPUTY JUDGE: The position at the moment, as I understand it, is that S has started at Kisharon school this term and has been there since the beginning of term.
MR WOLFE: She is there effectively on a bursary from the school, and nobody wants to prolong that goodwill any longer than is absolutely necessary. Of course everybody wants a speedy resolution to the rehearing question.
THE DEPUTY JUDGE: It may assist if I say that is the shared wish -- is that right, Miss Laing -- of the parties.
MISS LAING: Yes.
THE DEPUTY JUDGE: It may assist then if I say that it is the shared wish of the parties that the rehearing should take place as soon as possible. It also seems to me that it would be extremely sensible and in the best interests of child S if that were to be possible.
MR WOLFE: My Lord, I am most grateful for that.

THE DEPUTY JUDGE: What about the other parts of the order?
MR WOLFE: I think the other parts are uncontroversial. I would simply ask my Lord to make an order in those terms.
THE DEPUTY JUDGE: Yes.
Miss Laing, anything else that you would wish to raise?
MISS LAING: My Lord, no. Can I simply thank you Lordship for sitting early this morning, which was very helpful.
THE DEPUTY JUDGE: Not at all.
I will make an order in the following terms: (1) the decision of the Special Educational Needs and Disability Tribunal issued on 24th July 2003 be quashed; (2) that the appeal against the statement of special educational needs dated 14th February 2003 be remitted to a freshly-constituted tribunal panel for rehearing; (3) that the second respondent pay the appellant's costs on a standard basis to be assessed if not agreed; and (4) that there be a detailed assessment of the appellant's costs in accordance with the Community Legal Service (Funding) Regulations 2000.
Mr Wolfe, is it necessary for me to incorporate in any order the order I have made under the Children and Young Persons Act?
MR WOLFE: My Lord, I think not. I think that goes as a separate order on the court file, your Lordship having made it at the beginning of the hearing the other week.
THE DEPUTY JUDGE: Yes, very well. I am very grateful to both counsel for your assistance, thank you very much indeed.
There may be some further copies of the judgment, I am not sure we have brought enough copies to court. I can provide one more copy at this stage. I hope that will be of assistance. Thank you very much.