Case No CA-2024-001599

Neutral Citation Number: [2024] EWCA Civ 951
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
The Honourable Mr Justice Choudhury
[2024] EWHC 1798 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2024

Before :

LADY JUSTICE MACUR
and
LADY JUSTICE ANDREWS

- -

Between :

THE KING (on the application of LONDON BOROUGH OF ISLINGTON)	**Claimant/ Applicant**
- and -	
THE SECRETARY OF STATE FOR EDUCATION	**Respondent**
-and-	
(1) INTERIM EXECUTIVE BOARD OF POOLES PARK PRIMARY SCHOOL	
(2) THE BRIDGE MULTI-ACADEMY TRUST	**Interested Parties**
-and	
PAUL LEVY-ADOPHY on behalf of PARENTS SUPPORTING POOLES PARK PRIMARY SCHOOL (an unincorporated association)	**Intervenor**

- -
- -

Joanne Clement KC (instructed by **London Borough of Islington**) for the **Applicant**
Alan Bates (instructed by **Government Legal Department**) for the **Respondent**
Paul Levy-Adophy (in person) for the **Intervenor**
Hearing date: 1 August 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lady Justice Andrews:

Introduction

1. The Claimant local authority, the London Borough of Islington ("the Council") sought permission to appeal against the order of Choudhury J dated 12 July 2024. The Judge dismissed the Council's claim for judicial review of the decision by the Respondent, the Secretary of State for Education ("the SSE") not to exercise the exceptional power to revoke an Academy Order made under section 4 (A1) of the Academies Act 2010 ("the 2010 Act") in respect of Pooles Park Primary School in Islington ("the School"). The decision under challenge was made on 14 November 2023 by Baroness Barran ("the Minister") on behalf of the SSE.

2. On consideration of the papers, Whipple LJ directed that the application for permission be listed for an oral hearing before two Lord or Lady Justices of Appeal and expedited. In accordance with those directions, the hearing took place before Lady Justice Macur and myself on 1 August 2024. The Council was represented at the hearing by Ms Joanne Clement KC and the SSE by Mr Alan Bates, both of whom had argued the case in the court below. Ms Clement's junior in the Administrative court, Mr Raphael Hogarth, contributed to the Council's skeleton argument on the permission application. We are grateful to all counsel for their written and oral submissions, and to Mr Levy-Adophy for his succinct and focused oral submissions on behalf of the Intervenor, opposing the Council's application.

3. After consideration of all those submissions, Lady Justice Macur and I found ourselves in agreement that neither of the proposed grounds of appeal had any real prospect of success, and that there was no other compelling reason for the Court of Appeal to entertain an appeal. Accordingly, permission to appeal should be refused. Since the parties needed to know as soon as possible whether the School would be re-opening after the summer holidays, My Lady announced in open court that permission to appeal was refused, and that our reasons would be given in written judgments which would be handed down remotely so soon as was practicable.

4. These are my reasons for joining with My Lady in the decision to refuse permission to appeal.

Background

5. The background is set out in great detail in the Judgment below [2024] EWHC 1798 (Admin). For present purposes the following overview will suffice.

6. The Council is responsible for strategic planning in relation to education within its area. One of the biggest challenges it faces is a significant reduction in pupil numbers, leading to a surplus of places in mainstream schools across the Borough. As schools receive most of their funding on a "per pupil" basis, but many of their costs are fixed regardless of the number of pupils enrolled, a school operating significantly under capacity will come under severe financial pressure. This in turn can lead to a deterioration in educational standards.

7. Another major challenge which the Council faces is meeting the high demand for places at school for children with Special Educational Needs ("SEN"). There is a

general trend of increasing SEN demand, and the demand for SEN places far outstrips the provision that is currently available. Local authorities owe a number of statutory duties to children and young people within their area who have been identified as having SEN, under Part 3 of the Children and Families Act 2014. Each such child or young person must have their needs assessed. If it is found to be necessary for special educational provision to be made for him or her, the local authority must secure that an EHC plan is prepared for the child/young person, and must maintain the plan thereafter. The school which is to provide their education must be named in the plan. There is a complex process involved in selecting that school, which involves the local authority taking into account the wishes of the child and their parents, consulting the proposed school, considering its suitability for the child's age, ability and needs, and deciding whether the proposed placement would make an efficient use of resources (relevant factors will include, for example, the cost of transportation).

8. Local authorities are provided with a "high needs funding block" as part of the Dedicated Schools Grant by the SSE. This will be used to fund the additional cost of a pupil's special educational provision over and above the £6,000 per pupil which each school is expected to use from within its own budget to meet the cost of special education provision for all children enrolled at that school. A local authority can make additional provision for children with more complex SEN ("high needs place funding") through the commissioning of an SEN unit or development of Additional Resourced Provision ("ARP") at mainstream school sites. However there is no requirement for a school to have an ARP in order for a local authority to place children with EHC plans in it.

9. In October 2022 the Council adopted a Schools Organisation Plan ("the Plan") which set out its strategy for managing the surplus capacity for mainstream places, whilst at the same time ensuring that it met its legal duty to ensure a school place for each child. The proposals to reduce capacity would be carried out in phases, and would be guided by a number of specified criteria, including financial stability, the level of surplus capacity, the demographic of the local pupil population, parental preference for particular schools, quality of education, available steps to improve viability, opportunities for merger, and the condition of the school buildings, as well as other community facilities provided (for example, this School has a community garden).

10. At the time when the Plan was adopted, there was no proposal to close the School; instead it was proposed to reduce its pupil admission number ("PAN") (which governs the number of places that must be made available by the Council at a school each year) and to "prioritise it for potential co-location of other service provision in the community." However, the implementation of phase 1 of the Plan still left a substantial surplus of places across all schools in the Borough. Therefore the Council conducted an evaluation of the status of all the schools to assess their sustainability.

11. In an Ofsted report published on 30 January 2023, following an inspection and an initial assessment in November 2022, the School was rated as "Inadequate" and placed into special measures. That rating meant that the SSE was required by the 2010 Act to make an Academy Order, that is, an order that the School would become an Academy under the control of a sponsor Academy Trust. A school which is the subject of an Academy Order ceases to be maintained by the relevant local education authority on the date when it opens as an Academy. As soon as that happens, the local authority loses its autonomous power to close it. That does not mean that the local

authority is powerless if the sponsor fails to turn a school around as an Academy. It simply means that the SSE and the sponsor would also have to be involved in any future decision about its closure.

12. The SSE had no discretion whether to make an Academy Order, and the order in respect of the School was duly made on 13 February 2023. The fact that the SSE has no discretion reflects the policy underlying the 2010 Act that maintained schools which have been found to require significant improvement should be given the opportunity to improve with the support of a new sponsor with the experience and ability to bring fresh leadership and vision.

13. The SSE does have a statutory power to revoke an Academy Order under section 5D of the 2010 Act before a school is converted into an Academy. However, the SSE's published policy, "Schools Causing Concern" dated October 2022, makes it plain that this discretionary power "will only be used in exceptional circumstances… In the Secretary of State's view, transferring underperforming maintained schools to academy trusts is the most effective means of securing their rapid improvement." Among the non-exhaustive examples of "exceptional circumstances" given in the policy is the situation where "the Secretary of State considers that the school would not be viable as an Academy. In these cases we would expect the local authority to close the maintained school and the Secretary of State can direct them to do so if necessary."

14. As the Judge explained at [62] to [64], there were also two relevant unpublished policies. The Government's definition of viability was set out in paragraph 1 of one of these, the 2018 "Internal Viability Guidance":

> "A financially unviable school is one where:
>
> a. projections indicate large financial deficits going forward, and
>
> b. there is no realistic prospect of it *achieving financial viability* due to low numbers on roll and insufficient demand for places based on projections of need and capacity in the local area *over the medium to long term* and therefore future levels of surplus places."
>
> [Emphasis added].

As the Judge rightly pointed out later in his judgment, at [101](v):

> "A school operating with a significant but manageable deficit could still be considered viable if there were a realistic prospect of reducing the deficit in subsequent years. The assessment of viability involves a question of judgment."

15. A school which has been made the subject of an Academy Order does not become an Academy immediately; rather, the Regional Director ("RD"), a senior civil servant in the Department for Education acting on behalf of the SSE, will aim to identify the most suitable sponsor to try to improve the school, and broker the relationship between the school and that Academy Trust. Five trusts were approached in this case.

Three expressed an initial interest, but ultimately only two of them decided to make formal bids to take over the School. Both these trusts referred to the fact that they had successfully addressed falling rolls and raised performance in cohorts at other schools with similar problems, and set out their strategies for achieving the same with the School. They provided further information as and when requested by the civil servants within the Department for Education who were assisting the RD.

16. Whilst the process of seeking a sponsor was underway, the Council concluded its evaluation of the schools within its area and the results were entered into an Evaluation Matrix. The School was the lowest scoring community school in the borough. It already had the lowest number of pupils on roll. Although the number of vacancies was only marginally greater than those in the three nearest schools, its roll of pupils was in decline and projected to continue to fall. It was also the only school in Islington which was not rated "good" or "outstanding" by Ofsted. As the Judge found, that may have been what tipped the balance when the Council decided that it should be closed.

17. In March 2023 the Council resolved to begin an informal consultation on a proposal to close the School at the end of the year, as part of phase 2 of the Plan. It could not implement that proposal if the School became an Academy, and therefore on 25 April 2023 the Council sent an email to the RD inviting the SSE to exercise her discretion to revoke the Academy Order. It indicated that if the proposal to close the School were not to progress, the Council would be forced to consider closing another local school with a better Ofsted rating.

18. The consultation document was published on 28 April 2023 and the consultation ran until 5 June. Responses were overwhelmingly against the proposal. Meanwhile, efforts continued to find a suitable sponsor for the School. One of the two trusts which expressed an interest in taking on the School was the Bridge Multi-Academy Trust ("the Trust") which already ran several schools in Islington, and had considerable experience in the provision of education for children with SEN. Importantly the Trust had experience of improving an "inadequate" rated mainstream school in the borough, Hungerford school, which was now rated "good" by Ofsted, although there was still room for academic improvement.

19. The Trust's proposed strategy involved substantially reducing the number of pupil places available at the School, with the aim of stabilising numbers, so that it operated at capacity as a one form entry school within three years. It proposed to share staffing and other resources with Hungerford school, and also to replicate its approach to SEN at Hungerford, encouraging applicants with SEN across both schools and developing over time a centre of expertise for SEN teaching within a mainstream setting.

20. As and when requested, the Trust provided further information in support of its bid. As part of its proposals, on 20 June 2023 the Trust's CEO, Dr Penny Barratt, sent to the project leader at the Department for Education (the person responsible for collating and summarising the various options available) an internal modelling document ("the Modelling") which set out a proposal as to how the School would operate with both the currently projected mainstream pupil numbers, and lower mainstream numbers with increased SEN intake. The Council's primary contention before the Judge, which he rejected, was that this document was fundamentally flawed and that when adjustments were made for what the Council contended were

key erroneous assumptions, it demonstrated that the School could not be viable as an Academy.

21. The options available to the RD, namely, transfer to one of the two potential sponsors or closure of the School, were summarised in an options paper presented to the Advisory Board for the London Region, an expert body which is responsible for advising and challenging the RD on Academy-related decisions. The Board considered the options and reached a clear consensus that the Trust's option was "a credible and viable option" which was "by a considerable margin" preferable to the closure of the School. The RD considered the Board's recommendations and concluded that "the model proposed by the Trust offered an innovative approach to the dual challenge of surplus places and increasing demand for high quality provision for students with SEND within a mainstream setting". Accordingly she decided to appoint the Trust as sponsor of the School.

22. That decision was communicated to the Council in writing on 26 June 2023. The Council's Executive had decided to proceed with the proposal to close the School only four days earlier. This led to the Council expressing its disappointment with the RD's decision in very strong terms. It sent a letter to the SSE on 29 June 2023 formally requesting that the Academy Order be revoked.

23. On 13 July 2023 the RD made a submission to the Minister that the request to revoke the Academy Order should be refused. The submission was accompanied by a number of documents, including the options paper, the Plan, the Council's consultation document, and its briefing notes on the School. The Minister met with her officials, and sought and obtained further information relating to the performance of Hungerford school. That led to her taking the provisional view that she should accept the RD's recommendation. However, before any final decision was taken, the Council sent a pre-action protocol letter to the SSE challenging the refusal to revoke the Academy Order. In answer the SSE pointed out, correctly, that no final decision had yet been made.

24. This correspondence prompted the RD to make a further submission to the Minister ("the Submission") which addressed the concerns articulated by the Council and annexed both the original documentation and further documents, including the pre-action protocol correspondence and the minutes of the Council's meeting at which the decision had been taken to close the School. There was also, we were told by Mr Levy-Adophy, a six-page document containing representations made on behalf of parents of children at the School, who were "overjoyed at the prospect of the Bridge being the sponsor, as it was just the type of sponsor they wanted."

25. The Submission recommended that the Minister should refuse the request to revoke the Academy Order because "a strong academy sponsor had been identified who was willing to support the school and it was considered that the school was viable as an Academy and that the Council's concerns could be addressed through that strong sponsor." The Minister ultimately accepted that recommendation, stating among other matters that, having considered all the evidence, she considered that the School would be viable as an Academy.

The judgment of Choudhury J.

26. In its claim for judicial review, the Council raised five grounds of challenge to the decision, of which only the first two are of direct relevance to the proposed appeal. The first ground was that the decision that the School was viable as an Academy was irrational. Before the Judge that was put both on the basis that it was *Wednesbury* unreasonable, i.e. no reasonable decision-maker could ever have reached it, and on the basis that there was no evidence to support an important step in the reasoning, see *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [98], approved by this Court in *R(Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778. The second ground was that the decision taker (the Minister) failed to take any or any reasonable steps to acquaint herself with relevant material in breach of the *Tameside* duty: see *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014.

27. In a conspicuously sensitive, conscientious and thorough judgment, the Judge addressed each of the grounds of challenge in turn, considered the rival submissions, set out the relevant legal principles and then applied them to the evidence. On Ground 1, he concluded at [102] that the Minister's decision cannot be said to be irrational either in the *Wednesbury* sense or on the basis that a legally relevant matter was not taken into account. At [72] he correctly noted that the key question was whether the Minister had all the information that it was legally relevant for her to know in order to make the decision. He identified at [74] that the complaint which lay at the heart of the criticism levelled at the decision by the Council was the fact that the Modelling was not put before the Minister or referred to in the Submission.

28. The Judge rightly pointed out at [75] that the Minister was concerned with whether the School would be financially unviable as an Academy, and that necessarily involved making a judgment as to the potential impact that academisation would have on the way the school is managed and run, and on its potential attractiveness to the parents of potential pupils.

29. He then dealt with the detailed criticisms made of the Modelling and found them to be largely misconceived, or based on incorrect assumptions, in the light of the evidence of Dr Barratt. He found that the detailed figures in the Modelling, which were indicative projections in any event, were not legally relevant for the Minister to know, and that she was provided with all the information that it was legally relevant for her to know before making the decision. He identified, in particular, that she was told of the falling numbers of pupils on roll, the surplus of places, the increasing demand for SEN places, the Trust's proposal which was based around additional SEN provision and shared resources, the wider local interest in maintaining the School, and the Council's concerns. He found as a fact, at [102], that all of the Council's concerns about viability were appropriately summarised and addressed. There is and can be no complaint about that finding.

30. The Judge dealt with the *Tameside* ground of challenge more shortly, at [104] to [107], because there was a degree of overlap with the complaints made under this ground and those made under the rationality challenge. He found the Minister had not failed to make adequate inquiries in any of the respects alleged. In particular, as the decision was predicated upon an acknowledgment of the declining roll and reducing per pupil income, it was not a breach of the *Tameside* duty for the Minister (or those

advising her) to fail to ask for the up to date numbers of pupils enrolled at the School. Since the Council was mistaken in its belief that it was the Trust's proposal to fund a special unit or formal ARP at the School, there were no further inquiries to be made in that regard.

31. As to an alleged failure to ask questions about the Trust's plans to "address surplus places at Hungerford school", the vacancies at Hungerford were lower than the Council thought. (Part of Hungerford's site was rented out to provide a self-contained "overflow" unit for a special school, which the Trust also ran.) Dr Barratt's belief that there was a demand for further SEN places, based upon her knowledge and experience in the sector, was not inconsistent with the Council's own assessment of SEN demand, and therefore there was no need to address the issue of surplus places at Hungerford school.

The proposed grounds of appeal

32. The grounds for which permission to appeal was sought were:

    i) The Judge erred in concluding that the SSE's decision on the viability of Pooles Park Primary School was not irrational.

    ii) The Judge erred by finding that the SSE did not breach the *Tameside* duty.

    Expressed in that manner, the grounds appear to be nothing more than disagreement with the Judge's decision. Indeed Mr Bates submitted that Ground 1 was, in reality, a challenge to the substantive conclusion reached on the first ground of judicial review, which was taken after a careful analysis of the contemporaneous documents that informed the Minister's decision.

33. However, Ms Clement in her written and oral submissions clarified that the Council was contending that the Judge's conclusion on the rationality challenge was wrong because he applied the wrong legal test. She submitted that the Judge erred in his application of *R (National Association of Health Stores & Anr) v Department of Health* [2005] EWCA Civ 154, both in respect of the test to be applied in determining what material had to be put before the Minister, and in respect of the requirement that relevant matters be considered by the decision maker personally. She contended that his finding at [100] that the Minister was entitled to rely on the "summary" from her officials involved a serious misunderstanding of the test. All the Minister had was a summary of her officials' view (or at least their understanding of the Trust's view), that the School would be viable as an Academy. However, what public law required was that she should be told the salient facts from which she could herself make an informed judgment on that issue. In other words, she had to be told the factual basis for her officials' views. Ms Clement said that this did not require provision of the detailed figures, but rather, provision of the basis on which the numbers would be positive rather than negative and the nature of the evidence for that assertion.

34. Ms Clement pointed out that it was common ground that the School was not viable as a standalone mainstream school and that the financial deficit was projected to increase as the numbers of mainstream pupils enrolled grew smaller. Sharing teaching and other resources with Hungerford would not be enough in itself to address that deficit. The proposed turnaround was predicated upon successfully attracting sufficient SEN

placements with their associated funding, all of which would come from the placed child's local education authority.

35. It is fair to say that there has been a refinement of the Council's case as to what the Minister should have been told, focusing as it now does upon Dr Barratt's explanation for her assessment of viability which was given in the course of the Judicial Review proceedings, rather than on the Council's own understanding of the Modelling document. At the heart of Ms Clement's oral submissions was the complaint that although the Minister was told that the Trust considered the School would be viable as an Academy, she was not told that the Trust's assessment of viability was "based on a critical mass of SEN children (30/40) with EHC plans being placed at the school, with each child funded at £29,000 per child" which she claimed would mean "millions of pounds of ongoing funding from the Council's high needs funding block or the high needs blocks of neighbouring local authorities". The Minister was not told that an assumption had been made that the funding would be forthcoming without asking those responsible for providing it, i.e. the local authorities. Without that information, Ms Clement submitted that the Minister had insufficient information to make a judgment for herself about the viability of the School as an Academy.

36. Ms Clement contended that the Judge never grappled with that submission because he concentrated on the issue whether the Modelling was based on the funding by the Council of a special school or special unit within the School (see the Judgment at [79] to [81]). She said that the criticism advanced by the Council did not depend on the precise nature of the SEN model envisaged because "the model depends on using local authority funding for SEN to subsidise the mainstream" (a characterisation with which Mr Bates, on behalf of the SSE, understandably took issue, and which I would not endorse). Ms Clement complained that the Judge extensively relied on Dr Barratt's expertise and experience in formulating her judgment about viability, but Dr Barratt was not the decision maker, and her explanation of the basis of her proposal was not put before the Minister.

37. Ms Clement also complained that the Minister was not told that the number of children enrolled at the School in October 2023 (143) was substantially lower than the number predicted in the Modelling, which meant the predicted income was over-estimated by some £130,000.

38. In my judgment there is no substance in any of these criticisms. The Judge did not misapply the law. He considered *National Association of Health Stores* in some detail at [71] and posed the correct question at [72]. This was a rationality challenge. It was not a challenge on the basis that the Minister did not make the decision for herself, as she expressly said she did, but relied instead on an assessment made by her civil servants.

39. Logically, as was pointed out to Ms Clement in the course of argument, if the information which the Council says demonstrated that the School could not be made financially viable was <u>not</u> before the decision-taker, the decision could not possibly be described as irrational in the classic *Wednesbury* sense that no reasonable decision-taker could have reached it on the information before them. It could only be irrational if the decision-taker did not have sufficient information on which to make an informed assessment of viability, or left something vital out of account. The Judge

was right to identify that the essential complaint is about the decision being taken in the absence of factual information which the Council contended was legally relevant.

40. The Judge concluded that the information which the Council contended should have been put before the Minister was not legally relevant. The decision-taker did not need to know that level of detail; she knew enough to make a properly informed assessment. The issue for us was whether there is a real prospect of successfully persuading this Court that he was plainly wrong to make those findings on the evidence before him. In my judgment there is not, and those findings were not brought about by a misapplication of the principles in *National Association of Health Stores*. There is no prospect of disturbing the Judge's conclusions at [100]. That paragraph must be read as a whole. The Judge found that the Minister was given sufficient factual information to make the decision, and when he said at the end of that paragraph that she was entitled to rely on the summary provided by her officers, he was clearly referring to their summary of the salient facts which underpinned their own assessment of viability, and which he had already identified earlier in that paragraph.

41. The whole purpose of the Academy Order was to try to turn a failing school around. The SSE could only revoke the Academy Order in accordance with the policy if there were exceptional circumstances. In the circumstances of this case, that meant that the Minister had to be satisfied on the material that she considered that *there was no realistic prospect* that the School could be made financially viable *in the medium to long term* with the assistance of the experienced sponsor Academy Trust which had been selected to do just that. That is a high hurdle to surmount if the chosen sponsor already has a proven positive track record of turning round an "inadequate" school, as the Trust did, and as the Minister was told (backed by the evidence which the Minister herself had called for, to prove what it had already done to improve the performance at Hungerford).

42. As Mr Bates pointed out, far from having insufficient information before her to form her own value judgment the Minister had a wealth of material, not just the Submission. She was making that judgment against a background where two Academy trusts had competed to take on the School, each had put together detailed proposals for achieving viability, and the options on the table (including closure) had been the subject of extensive detailed consideration over many months. The expert Advisory Board had considered all the options and recommended that the Trust be selected as the sponsor. The options paper which was the material upon which the Board had recommended choosing the Trust's option, was among the documents which the Minister was sent. She also had all the Council's reasons for taking the view that the School would not be viable as an Academy.

43. The Trust itself believed that it could turn the School around; the Judge was plainly right to find that the Minister did not need to be told the detail of how it had reached that assessment, and in particular that she did not need to know the precise levels of deficit or surplus contained in its internal projections in order to be able to take the decision on viability. What she needed to be told, in broad terms, was how this Trust planned to achieve the improvements required, and what its credentials were, so that she could form her own view about whether its aspirations were realistically achievable.

44. The Trust was a highly experienced sponsor with an established track record as a specialist school operator, as well as experience of providing for children with complex SEN in a mainstream school setting. It was also financially secure with substantial reserves, which the Judge rightly regarded as a relevant consideration (see [99]). The Trust had come up with what the Minister was told *in terms* was "an innovative proposition" which depended on sharing resources with Hungerford and attracting placements for children with SEN, including those with high SEN who had been unable to obtain places in special schools and were either not in school at all or having to travel out of the Borough. Thus it was said that the proposal had the potential to increase pupil numbers and expand the special provision available locally, meeting a need identified by the Council. This much was obvious from all the material which was put before the Minister. The Submission itself accurately explained what the Trust's proposition entailed and specifically drew attention to the Council's own policy concerning the placements of children with SEN, which had been adopted at the same time as the Plan.

45. The numbers of such placements at the School and the level of funding for them that could be achieved were unknown, and there were obvious risks associated with such known unknowns, but that was inherent in the proposal. However, given the increasing cohort of children with SEN, the existing shortage of available provision for them, and the high and increasing demand for such places in Islington, all of which facts were drawn to the Minister's attention, it could not be said that the aspiration of the Trust to turn the School around by affording such placements in conjunction with all the other proposed measures was unrealistic, especially given its experience and track record. The Judge, at [97], expressly found the evidence as to demand from the cohort of SEN pupils from within and outside the Borough was credible.

46. When the Judge considered Dr Barratt's evidence, he was doing so in the context of the Council's specific critique of the Trust's internal modelling. He was not making the fundamental error ascribed to him by Ms Clement of finding that the Minister's assessment of viability was open to her on the basis of Dr Barratt's assessment, which she did not know about. On the contrary, his conclusion at [100] is squarely based on the sufficiency of the factual information which the Minister actually had. That conclusion is not just one which he was entitled to reach; in my judgment it was plainly correct.

47. I am not persuaded that the Judge's assessment of what was legally relevant is realistically open to challenge. Indeed it was difficult to understand the basis upon which Ms Clement was asserting that the Minister was bound to take these further matters into account, or why they were essential for her to know before she could rationally form a view on viability. As Mr Levy-Adophy pertinently observed in his submissions, relevance is not a matter for the Council to determine.

48. The SSE and the Minister would already know how SEN placements are funded and from what sources, and what range of funding would be available for each child depending on their individual needs. They would also be well aware of the process of placement, and that it is the local authority which decides on the school which is named in a child's EHC plan, albeit with the benefit of significant parental input. Therefore when the Minister was told that the Trust would "accept all pupils who either wanted to attend the school or who the LA choose to place at the school,

including special school overflow placements", she would have appreciated that the Trust's plans depended on how many children with SEN the Council (or other neighbouring authorities) would place at the School in future years. She did not need to know how many of such placements would be needed to enable the School to break even as an Academy in due course; the figures would be fluid, as they would depend on number of imponderables, including the impact of the Trust's efforts in improving the offering at the School on attracting both mainstream and SEN pupils to wish to enrol there instead of choosing one of its local competitors.

49. The real question for the Minister was whether, if after it came under the control of a sponsor with vast experience in delivering education to those with complex SEN, the School offered places for such children and there was a growing surplus of demand for such placements over availability, it was realistic to suppose that those places would be taken up, at least by local children, in the medium to long term. Far from it being irrational to conclude that there was a realistic prospect that the Trust's proposal would succeed, it seems to me that there would have been a strong argument that a conclusion at that stage that it had no reasonable prospect of succeeding would have been irrational.

50. As for the suggestion that the local authorities should have been asked if they would provide the funding for the numbers of SEN placements envisaged by the Trust, the Minister could reasonably assume that a local authority would act in accordance with its statutory duties, and therefore place a child with SEN at the School and provide the associated funding if the parents and child wished the child to go there, the school could meet that child's needs, and the placement was an efficient use of resources (and therefore was named in that child's EHC plan). Mr Bates told us that the Council has carried out no pre-planning for known future SEN needs. I accept his submission that there was no point in approaching the Council or indeed neighbouring local authorities to ask them whether the funding projected in the Modelling would be forthcoming. They could not possibly know at this stage how many children with SEN they would be likely to place in this new Academy in the future; that would depend on a host of imponderables including parental preference, which is an important part of the process of selection of a school to put in an EHC plan. The amount of funding is also an imponderable, as this would vary from child to child. It would be reasonable to assume in broad terms, however, that if the proposal included a means of meeting an identifiable local need, that means would be taken up. That had already happened at Hungerford.

51. The Submission to the Minister drew specific attention to the Council's evidence on the viability of the School without Academy status, to the declining numbers of pupils on the roll, and the projected budget deficit. It was entirely to be expected that the numbers on the roll would have declined further in the current intake, not least because the School had been rated "inadequate" and its future was uncertain. The Minister did not need to know the precise numbers of the 2023 intake, as a general decline in numbers was both predicted and predictable. In any event the current numbers on the roll told the Minister nothing about whether the Trust could attract more pupils in the medium to long term in consequence of its plans to turn the School around. For all those reasons Ground 1 has no real prospect of success.

52. As regards Ground 2, Ms Clement contended that there was no real dispute of fact about what inquiries were or were not made; in concluding that no further inquiries

were required in order to determine whether the School would be viable as an Academy, the Judge went wrong in law. This is simply a different way of making the same point as was at the heart of Ground 1. It does not improve in quality by being recharacterized as a *Tameside* challenge. The missing information which the Council claimed to be essential was not essential. There is no realistic prospect of persuading this Court that the SSE failed to make further enquiries which she was legally required to make before taking the decision.

53. In paragraph 54 of the Council's skeleton argument it is contended that there is some other compelling reason for this appeal to be heard. It is suggested that the outcome of the appeal will impact on the place planning for all primary schools in Islington and that it is a "point of significant public interest whether the Secretary of State can undermine and, in effect, ride roughshod over a local authority's SEN strategy and allocation of its high needs funding, by approaching decision-making on forced academisation without regard to how local authorities exercise those statutory functions."

54. Ms Clement wisely did not seek to elaborate on those submissions orally. When he refused permission to appeal, Choudhury J said of this contention that it appeared to amount to an attempt to reargue Ground 4 of the original claim, which was rejected. He observed that its prospects were not improved by putting it in terms of the SSE "riding roughshod" over the Council's SEN strategy. He said that "these points do not give rise to any compelling reason to allow an appeal with no real prospect of success to proceed. Indeed to take that course would … introduce further delay and would be contrary to the interests of the School's pupils, parents and staff."

55. I agree wholeheartedly with those observations. There is no merit in either of the proposed grounds of appeal, and this challenge turns very much on its own facts. It raises no issue of wider practice or principle. There is no compelling reason to entertain an appeal in those circumstances. On the contrary, the overriding objective is best served by putting an end to what the Judge aptly described as the deleterious effect on the School of continuing uncertainty.

Lady Justice Macur:

56. I agree.