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Case No: C1/2010/2635, 2635(A), 2635(B)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT (MR JUSTICE FOSKETT)
REF NO: C022412009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2011

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division
and
LORD JUSTICE STANLEY BURNTON

Between:

THE QUEEN (on the application of) SHARON SHOESMITH **Appellant**
- and -
OFSTED & ORS **Respondent**

Mr James Maurici and Mr David Blundell (instructed by Beachcroft LLP) for the Appellant
Mr James Eadie QC and Mr Clive Sheldon (instructed by The Treasury Solicitor) for the Secretary of State for Education
Mr Tim Ward and Mr Ben Lask (instructed by The Treasury Solicitor) for OFSTED
Ms Ingrid Simler QC and Mr Akash Nawbatt (instructed by Legal Services) for Haringey London Borough Council)

Hearing dates: 28, 29, 30 March 2011

**Judgment Approved by the court
for handing down
(subject to editorial corrections)**

Lord Justice Maurice Kay :

1. There is nothing more disturbing than the death of a child resulting from the criminal acts and omissions of those with responsibility for his care. There is a growing list of the names of such children which are ingrained in the national consciousness. The list now includes Peter Connolly – “Baby P” – who died on 3 August 2007 when he was only 17 months old. For some months he had been the subject of a child protection plan devised by the London Borough of Haringey (“Haringey”) and was accordingly on the child protection register because of concerns about neglect and abuse. Following his death, Tracey Connolly (his mother), Steven Barker (her boyfriend) and Jason Owen (Barker’s brother) were charged with a number of offences. They were tried in the Central Criminal Court. The trial ended on 11 November 2008. Although they were acquitted of murder and manslaughter, they were convicted of causing or allowing Peter’s death contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004. Indeed, Tracey Connolly had pleaded guilty to such an offence at the outset of the trial.

2. A public and media outcry followed the convictions. Much of it was directed at Haringey. Sadly, it was in the same Borough that Victoria Climbié had met her tragic death but a few years earlier. Her death had led to the Laming Report and eventually to the Children Act 2004 which changed the way in which children’s services are to be provided by local authorities. One of the changes was the creation of the statutory post of Director of Children’s Services (DCS) for each children’s services authority. Essentially, a DCS is responsible for the education, social work and some other services referable to children. Ms Sharon Shoesmith became the first DCS in Haringey. Immediately before that she had been Director of Education in Haringey since April 2003. She was held in high regard in that post. As Foskett J (“the Judge”) said in the judgment that has given rise to this appeal (“the Judgment”) (at paragraph 14):

“She was plainly very highly thought of within the Borough and continued to be highly thought of by her colleagues within Haringey until the events with which this case is concerned.”

3. Prior to her appointment as DCS, she had no background in social work. She had been a successful teacher and one of Her Majesty’s Inspectors of Schools before becoming Director of Education. It is a feature of the scheme under the 2004 Act that a DCS is likely to be inexperienced in either education or social work. Because Ms Shoesmith’s experience was in education, day-to-day management responsibility for child safeguarding was delegated to a Deputy DCS, Ms Cecilia Hitchen, whose expertise and experience was in social work.

4. This case is concerned with events which began to unfold on 11 November 2008 immediately after the criminal trial. In his thorough and formidable Judgment, which contained 548 paragraphs, the Judge described the events with meticulous care: [2010] EWHC 852 (Admin). He also produced a Summary of the Judgment. In these circumstances, it is not necessary for me to rehearse the factual background in detail.

Accordingly, at this stage I shall simply describe the background with brevity. I shall have to delve further into the facts in the course of this judgment.

A brief description of the facts

5. On 12 November 2008, the day after the conclusion of the criminal trial, the Secretary of State, then the Rt Hon Mr Ed Balls MP, requested the Office for Standards in Education, Children's Services and Skills (OFSTED), together with the Healthcare Commission and Her Majesty's Chief Inspector of Constabulary, to produce an urgent report into child safeguarding arrangements within Haringey. His request was made pursuant to section 20 of the 2004 Act. OFSTED produced a final draft of its report on the evening of 30 November. In accordance with OFSTED practice, it did not name individuals but it was very critical and it identified a number of serious concerns. On the morning of 1 December, leading members of the OFSTED team had a meeting with the Secretary of State. Within hours, the Secretary of State made a direction pursuant to section 497A (4B) of the Education Act 1996 appointing Mr John Coughlan (seconded from another local authority) as DCS in Haringey until 31 December 2008. The Secretary of State held a press conference on the afternoon of 1 December at which he said that, as Ms Shoesmith was employed by Haringey, it would be considering the employment relationship (as opposed to the statutory position of DCS from which he had removed her) "this afternoon and immediately". He made it clear that his view was that Ms Shoesmith "should not be rewarded with compensation or pay offs" but that "that's a matter for Haringey". There was also reference to a petition which had been organised by *The Sun* newspaper in the aftermath of the criminal trial and which had called for the sacking of Ms Shoesmith and others.
6. Haringey immediately suspended Ms Shoesmith on contractual pay. She was called to a disciplinary hearing on 8 December which resulted in a decision to dismiss her summarily and without payment in lieu of notice or compensation of any kind. The reasons given for her dismissal were the Secretary of State's direction and a fundamental breach of trust and confidence. Ms Shoesmith pursued an internal appeal but it was rejected on 12 January 2009.
7. Meanwhile on 19 December 2008, the Secretary of State had made a further direction pursuant to section 497A (4B) appointing Mr Peter Lewis to be DCS for three years from 1 January 2009.

These proceedings

8. On 6 March 2009, Ms Shoesmith issued an application for permission to apply for judicial review against OFSTED, the Secretary of State and Haringey. In a nutshell, her case is that the OFSTED report was prepared without compliance with relevant procedural arrangements and/or in breach of common law requirements of fairness; that the Secretary of State's directions under section 497A (4B) were unlawful because of a failure to observe the requirements of procedural fairness and because he

impermissibly had regard to *The Sun*'s petition; and that her dismissal by Haringey was unlawful because it was founded on the unlawful directions of the Secretary of State and/or it, too, was procedurally unfair. At the same time, Ms Shoesmith commenced proceedings in the Employment Tribunal but these are currently stayed pending resolution of the judicial review proceedings.

The Judgment and Order of Foskett J

9. Following six days of oral argument and later written submissions, the Judge dismissed all of Ms Shoesmith's applications. He did so with "a lurking sense of unease" (Judgment, paragraph 540). As regards OFSTED, he concluded that the requirements of procedural fairness were less than those which would apply to a disciplinary process and that its duty of fairness:

"was simply derived from a duty to carry out a *bona fide* and open-minded inspection into what they found and to report accordingly." (Judgment, paragraph 483).

OFSTED had discharged this obligation in very difficult circumstances.

10. The case against the Secretary of State failed because he was not engaged in "a true disciplinary process"; the issue had a local and national dimension that affected vulnerable children; he was entitled to view the situation as urgent; and, accordingly:

"the traditional safeguards concerning the rights of an individual to a fair hearing and/or a fair opportunity to put his or her case, whilst not removed totally, of necessity assumed a considerably lower profile than it might otherwise have done." (Judgment, paragraph 387).

11. The Judge considered that the requirements, having been reduced by the context, were satisfied. He rejected the ground of challenge based on the Secretary of State's alleged reliance on the petition in *The Sun* as "far too simplistic" (Judgment, paragraph 405). In addition he concluded that, even if Ms Shoesmith had been accorded an opportunity to make representations to the Secretary of State, the outcome would have been no different.
12. In the case of Haringey, the Judge rejected a submission that its decisions were not amenable to judicial review but concluded that, because of the alternative remedy in the Employment Tribunal, he should not rule on the application. However, he made it clear that, if he had thought it appropriate to rule, he would have allowed Ms Shoesmith's application.

This appeal

13. The Judge granted Ms Shoesmith permission to appeal in relation to the Secretary of State and Haringey but he refused permission in relation to OFSTED. Permission in relation to OFSTED was granted by Stanley Burnton LJ on consideration of the papers. I now turn to the issues arising on appeal.

1. OFSTED

14. On the morning of 11 November 2008, the trial of the three defendants responsible for the death of Peter concluded at the Central Criminal Court. Some 30 hours later, the Secretary of State wrote to OFSTED, the Commission for Healthcare Audit and Inspection and the Chief Inspector of Constabulary to set in motion a Joint Area Review pursuant to section 20(1)(b) of the Children Act 2004. The political and media frenzy of those 30 hours is described in paragraphs 109 to 147 of the Judgment. The letter referred to:

“an urgent Joint Area Review of safeguarding and promoting the welfare of children in Haringey”

and added:

“The Review will need to undertake an urgent and thorough inspection of the quality of practice and management of all services which contribute to the effective safeguarding of children in the local area. It will be important to ensure rigorous scrutiny of the quality of practice and decision-making by front-line workers and their managers and of the effectiveness of management practice and performance management systems in all relevant agencies ... Given the importance of urgency of these matters, I request that a first report should be submitted to me by 1 December 2008.”

The usual time frame for a JAR is five months. However, there is no challenge to the decision of the Secretary of State to request a JAR on his stated terms.

15. The statutory framework for a JAR is set out in section 20 as follows:

“(1) Any two or more of the persons and bodies to which this section applies must, at the request of the Secretary of State –

- (a) conduct, in accordance with a timetable drawn up by them and approved by the Secretary of State, a review of children’s services provided in

–

- (i) the area of every children's services authority in England;
 - (ii) the areas of such children's services authorities in England as may be specified in the request;
 - (b) conduct a review of such children's services provided in the area of such children's services authority in England as may be specified in the request.
 - (2) Any two or more of the persons or bodies to which this section applies may conduct a review of any children's services provided in the area of a particular children's services authority in England.
 - (3) The purpose of a review under this section is to evaluate the extent to which, taken together, the children's services being reviewed improve the well-being of children ... (and in particular to evaluate how those services work together or improve their well-being).
 - (4) The persons and bodies to which this section applies are –
 - (a) the Chief Inspector of Schools;
 - ...
 - (d) the Commission for Healthcare Audit and Inspection ...;
 - (f) the Chief Inspector of Constabulary ...
 - (5) Reviews under this section are to be conducted in accordance with arrangements made by the Chief Inspector of Schools.
 - (6) Before making arrangements for the purposes of reviews under this section the Chief Inspector of Schools must consult such of the other persons and bodies to which this section applies as he considers appropriate.”
16. The powers and duties of the Chief Inspector of Schools are now exercised and discharged by OFSTED.

17. The JAR requested by the Secretary of State in the present case was a targeted one, limited to Haringey, pursuant to section 20(1)(b). There had been a rolling programme of JARs throughout the country pursuant to section 20(1)(a) in 2007-2008. They were carried out pursuant to arrangements promulgated by OFSTED in April 2007 (the Published Arrangements). They are the source of the five month timeline. Their features include a feedback stage at the end of the fieldwork when “the team leader will provide an oral summary of the main findings to the [DCS]” and a draft report stage at which the DCS has a two-week period in which to “coordinate written comments on its factual accuracy”. During that two-week period, senior members of the inspectorate meet with senior officers, who would include the DCS, “to discuss the draft report”.
18. It is common ground that the JAR in the present case did not comply with all the Published Arrangements. In particular, the feedback stage was omitted and Ms Shoesmith was given no opportunity to coordinate comments upon or to discuss the draft report. This gave rise to some debate within the litigation as to whether what OFSTED carried out was a JAR at all. Indeed, the Judge considered (at paragraphs 412-413) that it “could not possibly be characterised as a true or full JAR ... [and] should not really be called a JAR at all”. I do not agree with him about that. What was requested by the Secretary of State and what was delivered by OFSTED was in terms and in substance a JAR, albeit one which had not been produced entirely in accordance with the Published Arrangements. I shall return to the question whether that is of legal significance.
19. On any view the Report which was produced to the Secretary of State in draft on 30 November and in its final form on 1 December was extremely critical. Its summary was expressed in these terms:

“The inspection has identified a number of serious concerns in relation to safeguarding of children and young people in Haringey. The contribution of local services to improving outcomes ... is inadequate and needs urgent and sustained attention.”

Its ten “main findings” comprised the following:

“... insufficient strategic leadership and management oversight of safeguarding of children ... by elected members, senior officers and others within the strategic partnership;

... managerial failure to ensure full compliance with some requirements of the inquiry into the death of Victoria Climbié, such as the lack of written feedback to those making referrals to social care services ...

The local safeguarding children board (LSCB) fails to provide sufficient challenge to its member agencies. This is further compounded by the lack of an independent chairperson.

Social care, health and police authorities do not communicate and collaborate routinely and consistently to ensure effective assessment, planning and review of cases of vulnerable children ...

Too often assessments of children ... , in all agencies, fail to identify those who are at immediate risk of harm and to address their needs.

The quality of front-line practice across all agencies is inconsistent and not effectively monitored by line managers.

Child protection plans are generally poor.

Arrangements for scrutinising performance across the council and the partnership are insufficiently developed and fail to provide systematic support and challenge to both managers and practitioners.

The standard of record keeping on case files across all agencies is inconsistent and often poor.

There is too much reliance on quantitative data to measure social care, health and police performance, without sufficiently robust analysis of the underlying quality of service provision and practice.”

There is no challenge to the rationality of these findings.

20. Two features of the findings are readily apparent. First, they are critical across the board – social care, health and police; management and front-line practitioners. Secondly, and entirely in accordance with JAR practice, they do not identify culpable individuals. OFSTED was and is at pains to point out that a JAR is not a disciplinary process. The aim is to see the picture in the round. As Ms Heather Brown, the Lead Inspector, states in her first witness statement:

“Our concern was how the system worked *as a whole*. We were involved in a wide ranging evidence-gathering exercise in order to try to reach an overall assessment of the way in which the different children’s services in Haringey were working, and working together. We were looking across the board at the quality of safeguarding practice at all levels of the relevant organisations. We were not seeking to make, or test, allegations against any particular individuals.”

21. That is borne out by the report which does not name Ms Shoesmith or anyone else. Its main recommendations say nothing of discipline or dismissal but are in terms such as:

“assure the competence of leadership and management in all areas of children’s services and develop clear and effective accountability structures.”

22. On the morning of 1 December, members of the OFSTED team met with the Secretary of State, a junior minister and Departmental officials. On this occasion, Ms Shoesmith was named by the OFSTED team, Ms Brown saying “There was a lot of ‘finger-pointing’ at the deputy by the DCS” (Ms Cecilia Hitchen) and Ms Gilbert opining that the DCS “has got no grip and relied on No. 2 who couldn’t hack it”. The view expressed by the OFSTED team was that Haringey was “exceptionally bad” in the nature of “management and systemic failing”.
23. Immediately after that meeting, there was a further meeting between OFSTED and Haringey representatives (but not Ms Shoesmith who had been excluded by her superiors who were concerned about her state of mind). The Haringey representatives persuaded OFSTED to amend the draft report by changing a criticism of “members and senior officers” in relation to a failure to secure full compliance with the Climbié Inquiry recommendations to simply “managerial failure”.
24. Once the final report was delivered, the role of OFSTED came to an end. The inspection team had begun and completed their fieldwork on the basis that the report requested by the Secretary of State for 1 December was to be of an interim nature, it having been referred to as a “first report” in the letter of request. Only later were they informed that the inspection was no longer to be regarded as interim. However, Ms Brown states that that did not affect the way in which they had carried out their work. One other change occurred in the course of the inspection. On or about 19 November, the Secretary of State’s officials persuaded OFSTED that “the report should make specific comment on the Baby P case ... although we recognise that it is not your usual practice to comment on specific cases”.
25. I now turn to Ms Shoesmith’s case against OFSTED. It is essentially put on two bases: (1) failure to comply with the requirements of the statute; and (2) breach of the common law requirement of procedural fairness.

The requirements of section 20

26. The submission on behalf of Ms Shoesmith is that OFSTED was obliged to carry out a JAR in compliance with the Published Arrangements. Section 20(5) requires compliance with “arrangements made” by OFSTED and the Published Arrangements are the only such arrangements. They were not complied with, in particular because OFSTED omitted the feedback stage and the opportunity to see, digest and comment upon the draft report. Ms Shoesmith was therefore denied the requisite procedural right to answer the criticisms contained in the report.

27. I do not accept this submission. Although, as I have said, I am satisfied that there was a JAR pursuant to section 20(1)(b), I do not consider that it was governed by the Published Arrangements in their entirety. Section 20(5) does not refer to published arrangements but simply to “arrangements”. The evidence submitted on behalf of OFSTED is to the effect that the Published Arrangements “did not anticipate the kind of urgent and narrowly focused JAR that took place in this case”; as opposed to “the original JAR programme [which] took place over a period of approximately five months” (Mr Philip Pullen). Accordingly, the Published Arrangements were used as a starting point but needed “to be adapted to suit the particular circumstances of this inspection”. On any view, this accurately describes what occurred, at least up to the submission of the draft report.
28. The question then arises: were the adapted arrangements the subject of consultation pursuant to section 20(6)? I consider that they were. The consultation requirement in section 20(6) is, as Mr Ward submits, a “soft” requirement. It is limited to section 20 “persons and bodies”. In the context of the present case, that meant the Commission for Healthcare Audit and Inspection and the Chief Inspector of Constabulary who were the bodies, along with OFSTED, to whom the Secretary of State had addressed the section 20(1)(b) request. The obligation to consult is also qualified by the words “as [OFSTED] consider appropriate”. What in fact happened? In her first witness statement, Ms Brown states:
- “On Friday 14 November, we held a meeting with representatives of the other inspectorates (HMIC and the Healthcare Commission). We agreed both the scope of the inspection and the processes that we would use. This included the key judgments against which the evidence would be assessed, the methodology to be deployed, and the inspection timeline and the team composition.
- There was some debate about the specific role of each inspectorate in the JAR, and it was agreed which aspects of the inspection process each of the inspectorates would focus on. We also discussed the approach that OFSTED proposed to take in relation to feedback. None of the other inspectorates disagreed with this.”
29. Further detail was provided in the witness statement of Mr Roger Shippam of OFSTED. In my judgment, all this amounted to compliance with the section 20(6) consultation obligation. The three inspectorates were under an obligation to conduct a section 20(1)(b) JAR at the request of the Secretary of State. Although they were placed under abnormal pressure of time by the request to provide a “first” report by 1 December, they felt able to comply. I do not consider that they should have felt obliged to ask for more time. In the circumstances, there was no statutory obligation to include a feedback stage or to allow a response to the draft report, which had been forbidden by the Secretary of State because there was a fear of leaks in the febrile climate that existed.

Procedural fairness

30. In assessing what fairness required of OFSTED at common law, it is important to keep in mind the nature of a JAR. I refer again to the description provided by Ms Brown (at paragraph 20, above). It is not a disciplinary procedure. It is not targeted at individuals. It is a general review of how the system worked as a whole. On the other hand, it was obvious from the terms of the Secretary of State's request that, as the Judge put it (at paragraph 417(i)), "the role of everyone in the 'management systems' would come under scrutiny, including that of [Ms Shoesmith] as the DCS". Moreover, as the JAR proceeded, it was communicated to the inspection team by the Secretary of State's officials that the report should be "clear in its judgments and attribution of responsibility" and that there should be "definitive evidence on which the Minister can act". At the very least, Ms Shoesmith was at risk of being found accountable for the failings of her Department. On this basis, the Judge "approached the evaluation of the evidence about what was or was not communicated to [Ms Shoesmith] on the basis that there was an obligation to tell her of the gist of the concerns that drove the main findings in the report" (Judgment, paragraph 480). He carried out a detailed analysis of the ten main findings and the evidence about the extent to which the inspection team had disclosed the gist of their concerns to Ms Shoesmith in the course of the inspection. He found that in relation to all but one of them (the exception being a failure to implement the Victoria Climbié inquiry recommendations), the gist of the concerns had been raised with her "or at least were raised with Haringey personnel (largely, in the form of Ms Hitchen) in a way that enabled comment to be made" (Judgment, paragraph 478). He concluded (*ibid*):

"OFSTED was engaged to look into the workings of a department of which [Ms Shoesmith] was head and to report on what they found. [She] was, within the limits of the very truncated process, kept abreast of what was being revealed during the inspection. For my part, I cannot see what else, realistically, could have been done."

31. Mr Ward submits, with some justification, that even the Judge's exception (the Victoria Climbié inquiry requirements) could be said, on the evidence, to have been raised with her, if not under that precise appellation.
32. In oral and written submissions, Mr Maurici and Mr Ward have invited us to revisit the task which the Judge carried out with great care. Having considered their rival contentions, I am satisfied that the Judge's analysis is substantially sustainable and that we ought not to interfere with it.
33. The next and main submission on behalf of Ms Shoesmith is that OFSTED was under a more onerous obligation than that of "gisting" which was considered to be sufficient by the Judge. It is common ground that the requirements of procedural fairness are variable and case-specific. Mr Maurici submits that the present case called for more protection than was implicit in "gisting". He seeks to rely on, in particular: *Mahon v Air New Zealand* [1984] AC 808.

34. I have no hesitation in agreeing with the Judge (Judgment, paragraph 482) that *Mahon* was a significantly different kind of case concerning an inquiry into a tragic air crash. The case turned on the question whether those identified by the Royal Commissioner (a High Court judge) as being parties to “an orchestrated litany of lies” had been given a proper opportunity to answer the criticisms made against them. In giving the Opinion of the Privy Council, Lord Diplock referred to “a decision to make a finding of this gravity” (at page 820F). Even after the prompt from the Secretary of State’s officials to be “clear in its judgments and attribution of responsibility”, OFSTED produced a report that stopped short of findings which targeted or named Ms Shoesmith or anyone else. The only finding that could be said to have been directed at her was the one criticising the lack of independence in the chairperson of the LSCB (Ms Shoesmith). This was an unfortunate finding when baldly stated because departmental guidance was to the effect that the DCS was the appropriate chairperson. However, there were far more damning findings which were expressed in the more general, unpersonalised manner habitually deployed in JARs. All this simply goes to accentuate the differences between the present case and other authorities such as *Maxwell v Department of Trade and Industry* [1974] QB 523, which counsel subjected to detailed dissection (but in which no unfairness was found).
35. There is a passage in the Judgment to which Mr Maurici draws particular attention. It states (at paragraph 484):
- “What I do not think any individual truly had, because of the limited timescale for the inspection and the media presence surrounding it, was a full, fair and considered opportunity to say something about their personal involvement in the system that operated within Haringey.” (Judge’s emphasis)
36. I shall have to return to this passage when I address the appeal in relation to the Secretary of State. So far as OFSTED is concerned, it did not produce personalised findings or recommendations. It did not advise the Secretary of State to invoke his statutory powers of intervention. It recommended:
- “immediate appropriate support and challenge to the local authority to ensure that comprehensive and effective safeguarding arrangements for children ... are established.”
- And in its recommendations to Haringey it made no reference to the fate of Ms Shoesmith.
37. The Judge referred (Judgment, paragraph 485) to “the unique nature of the inspection”. In my view, he was justified in so doing. Having regard to all the features I have mentioned, I do not consider that he erred in interpreting the common law requirements of procedural fairness as he did. He stated (Judgment, paragraph 483):

“OFSTED’s duty of fairness was simply derived from a duty to carry out a *bona fide* and open-minded inspection into what they found and to report accordingly.”

38. As he showed elsewhere, fairness required “gisting” but, in view of the nature and style of the report, I consider that more formal and demanding standards were not obligatory. The more difficult questions relate to the ways in which the Secretary of State and Haringey used the report.

2. The Secretary of State

39. In the course of the events with which this case is concerned, the Secretary of State exercised two important statutory powers pursuant to the Children Act 2004. The first in time was his request to OFSTED to conduct a JAR pursuant to section 20(1)(b). I have dealt with that. The second was his direction of 1 December 2008 which was made pursuant to section 497A(4B) of the Education Act 1996 (which was introduced by later amendment and subsequently applied to a children’s services authority by section 50(1) of the Children Act 2004). The relevant provisions of section 497A, as amended, are as follows:

- “(2) If the Secretary of State is satisfied ... that a local education authority are failing in any respect to perform any function to which this section applies to an adequate standard (or at all), he may exercise his powers under subsection (4), (4A) or (4B).
- (4) The Secretary of State may under this subsection give the authority or an officer of the authority such directions as the Secretary of State thinks expedient for the purpose of securing that the function is performed on behalf of the authority by such person as is specified in the direction; and such directions may require that any contract or other arrangement made by the authority with that person contains such terms and conditions as may be so specified.
- (4A) The Secretary of State may under this subsection direct that the function shall be exercised by the Secretary of State or person nominated by him and that the authority shall comply with any instructions of the Secretary of State or his nominee in relation to the exercise or function.
- (4B) The Secretary of State may under this subsection (whether or not he exercises the power conferred by subsection (4) or (4A) in relation to any function) give the authority or an officer of the authority such other directions as the Secretary of State thinks expedient for

the purpose of securing that the function is performed to an adequate standard.”

40. Directions may be for an indefinite period until revoked or for a specified period unless revoked earlier (section 497A(6)). The Secretary of State is empowered to enforce a direction by application for a mandatory order (section 497A(7)).
41. The Secretary of State’s direction of 1 December was made pursuant to section 497A(4B) rather than the more intrusive (4A). The material parts of it were as follows:
- “(a) pursuant to [section 497A(4B)] ... he directs that:
 - (i) the Council shall appoint until 31 December 2008 and on such terms and conditions as the Secretary of State agrees John Coughlan as their Director of Children’s Services, in accordance with section 18(1) of the Children Act 2004 for the purpose of the functions conferred on or exercisable by the Council which are specified in section 18(2) of the Children Act 2004; and
 - (ii) the Council shall appoint Libby Blake as Mr Coughlan’s Deputy on such terms and conditions as the Secretary of State agrees; and
 - (b) pursuant to section 7A of the Local Authority Social Services Act 1970 ... that the Council shall appoint Graham Badman to chair the LSCB.”
42. Until then, Ms Shoesmith had chaired the LSCB. In its report OFSTED had criticised her so doing on the ground that the DCS lacked independence. However, the statutory guidance actually recommended that the DCS should chair the LSCB.
43. It is clear that the direction to appoint Mr Coughlan was conceived as a short-term measure. On 19 December the Secretary of State made a further direction under section 497A(4B) requiring Haringey to appoint Mr Peter Lewis as DCS for a period of three years from 1 January 2009.
44. The direction of 1 December was announced not in Parliament but by the Secretary of State at a press conference. One of the things he said in his introductory statement was:
- “In their summary judgment, the inspectors say that there [is] ... insufficient management oversight of the Assistant Director of Children’s Services by the [DCS] and Chief Executive .”

45. The Judge correctly observed (at paragraph 303) that the “summary judgment” did not say that. Indeed, it would have been contrary to OFSTED policy and practice to criticise named individuals in that way. He inferred that the origin of the personalised criticism was not the OFSTED report but what had been said by Ms Brown and Ms Gilbert to the Secretary of State when they met earlier that morning. He added:

“Whether the opinion represented the reality of the position within Haringey or not ... , it is unfortunate (and, one has to say, intrinsically unfair) that it was repeated in such a public setting without [Ms Shoesmith], or indeed her Deputy, having had a full and fair opportunity to refute it. It went to their respective abilities and competence. Indeed, it was a public comment such as this, taken along with comments about ‘fitness for office’, that is arguably more likely to have affected the future careers of [Ms Shoesmith] and her Deputy than the actual decision to replace them because of weaknesses found in the system within Haringey for which they held ultimate responsibility.”

46. In his statement to the press conference, the Secretary of State went on to describe the OFSTED findings as “devastating”. When asked by a journalist from *The Sun* to comment on that newspaper’s petition and the question of compensation, he said:

“I undoubtedly recognise the force of the petition from your newspaper, and right across the country many, many people, millions of people have been affected ... the result of my direction today to Haringey is that the [DCS] will be removed immediately from her post. Her employment relationship is with Haringey and so the normal employment and legal procedures will take place; but I have to say, I think most people will look at this report, look at the clear evidence of management failures and say that this kind of failure should not be rewarded with compensation or payoffs ... That’s a matter for Haringey. I have to say I would be astonished if elected members in Haringey chose to do that, but it’s a matter for them. ”

47. In answer to a journalist from *The Guardian*, the Secretary of State said that he had not sacked anybody, adding:

“I have removed ... that official from her post, from her statutory responsibilities, and I’ve directed ... a new person to go in and take over those responsibilities. The employment relationship ... is for Haringey and that’s something I know they will [be] considering this afternoon and immediately.”

48. Ms Shoesmith first heard of the Secretary of State’s direction when she saw coverage of the press conference on television news. During it, she also received a telephone

call from Haringey to tell her that she had been suspended. That was confirmed in a letter from the Chief Executive on 2 December. I shall refer later to subsequent events within Haringey which resulted in her dismissal without notice or compensation.

49. What, then, is Ms Shoesmith's case against the Secretary of State? The primary submission is that the Secretary of State accorded her no procedural safeguards whatever before making the directions of 1 and 19 December which effectively ended her career. Secondly, it is said that he impermissibly took into account *The Sun's* petition. Thirdly, she takes issue with the conclusion of the Judge that, even if there was procedural unfairness, the Secretary of State would have come to the same conclusion and made the same directions if it had been absent.

(1) Procedural fairness

50. The Judge's conclusions on procedural fairness are to be found in two passages in the Judgment. The first was expressed as follows (at paragraph 387):

“At all events, my ultimate conclusion is that (a) since what the Secretary of State was engaged in was not a true disciplinary process, (b) the issue had a real local and national dimension that affected vulnerable children, and (c) since he was entitled to adjudge it to be urgent, the traditional safeguards concerning the rights of an individual to a fair hearing and/or a fair opportunity to put his or her case, whilst not removed totally, of necessity assumed a considerably lower profile than it might otherwise have done ... I do not consider that what was understood by the Secretary of State to have occurred during the OFSTED inspection rendered the process adopted unfair. That the whole process became subverted by the personalisation of the issues was unfortunate. It would have been better had it not. As I have already observed, it is, to my mind, very doubtful if [Ms Shoesmith] really did have a true opportunity to put her point of view persuasively to the inspectors because of the distractions caused by the media interest in what was going on in Haringey, particularly in relation to her, during the inspection week. Threats made to her and her family cannot have helped either. However, the OFSTED inspection team were there to investigate and report, not to formulate allegations and obtain a specific response to them.”

51. The second relevant passage is at paragraph 398 of the Judgment:

“I cannot leave this aspect of the case without repeating and amplifying one comment I made earlier. It appears that no arrangements had been made to communicate the effect of the

Secretary of State’s decision to [Ms Shoesmith], or even the gist of the final version of the OFSTED report, before the directions were issued ... This means that the first she knew that she had been removed from her office was when she saw the announcement to that effect on the television. She also heard the Secretary of State say that the inspectors had said that she had displayed ‘insufficient management oversight’ in relation to her deputy and that she was ‘not fit for office’. I have concluded that, subject to the question of whether the OFSTED report itself was flawed, the decision to make the directions the Secretary of State made was not itself made as a result of an unfair process according to law. Whether the way matters were announced was fair must be a matter for others to judge ... One question the Secretary of State was asked at the press conference was why [Ms Shoesmith] had not resigned ‘given the damning findings of OFSTED’. He had to draw attention to the fact that she had not yet seen the report. I do not think that any fair-minded person could think that this was a satisfactory state of affairs.”

52. When one deconstructs all this it becomes apparent that the Judge had in mind – rightly – that the requirement of procedural fairness varies according to the context: *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, 560 (per Lord Mustill). On this basis, the present context called for less protection than “the traditional safeguards”. And what was done was sufficient to satisfy the requirement. On the other hand, he was plainly discomforted by the way in which matters had been handled. I should also explain what the Judge had in mind when referring at various points to a “misunderstanding” between OFSTED and the Secretary of State. OFSTED had omitted the feedback stage of the JAR because it interpreted the terms of the Secretary of State’s statutory request to have precluded it. The Secretary of State and those advising him “may apparently have thought” that there would be feedback during the inspection process. The Judge described this misunderstanding as “unfortunate” and said that it had caused him some concern (Judgment, paragraph 380).
53. A substantial part of the Judgment and of the oral and written submissions in this Court took the form of an exploration of the extent to which Ms Shoesmith did or did not have the opportunity to comment on concerns of OFSTED and/or the Secretary of State. In the end, however, it seems to me that a clear picture emerges. During the JAR, matters of concern were raised with her and she was able to comment upon them. The Judge concluded that she was able to comment on those sorts of issues, save for concern about failure to implement the Victoria Climbié inquiry recommendations (as to which, see paragraph 31, above). It is equally clear that, following the delivery of the OFSTED report to the Secretary of State, in which she was not personally criticised, she was provided with no further opportunity to comment. She was not present when Ms Brown and Ms Gilbert met with the Secretary of State on 1 December and made personal criticisms of Ms Shoesmith, for example that she “has got no grip and relied on No 2 who couldn’t hack it” and, more generally, that Haringey was “exceptionally bad” as regards “management and

systemic failing”. The Judge said that, in relation to the OFSTED inspection (at paragraph 484):

“What I do not think any individual truly had, because of the limited timescale for the inspection and the media presence surrounding it, was a full, fair and considered opportunity to say something about their personal involvement in the system that operated within Haringey.” (Judge’s emphasis).

If this was true at the inspection stage, it certainly remained true in relation to Ms Shoesmith at all material times thereafter. The directions of the Secretary of State on 1 and 19 December were made without any further attempt to engage with Ms Shoesmith.

54. Thus, Ms Shoesmith’s opportunities to comment were confined to the inspection process which “was not of itself designed to look at the roles of individuals” (Judgment, paragraph 378). Moreover, the Secretary of State “assumed that the individuals concerned would have the opportunity to ‘put their case’ to the inspection team” (Judgment, paragraph 380), when in fact they did not, at least in relation to personal responsibility. Moreover, at no point was Ms Shoesmith permitted to comment on the more personal allegations which were communicated orally to the Secretary of State on 1 December. Later that day he told the press conference that Ms Shoesmith was judged by him to be “not fit to hold ... office”.
55. The Judge concluded (at paragraph 378) that, notwithstanding “unfortunate” aspects of the case:

“... standing back from the process envisaged, it cannot, in my judgment, be said to have been intrinsically unfair in its conception in relation to any individual concerned.”
56. It is this conclusion that is sought to be impugned on the ground that, in relation to her personal accountability, Ms Shoesmith was accorded no procedural protection whatever.
57. The case for the Secretary of State emphasises the context - the protection of vulnerable children, the urgency, the exceptional seriousness of the situation in Haringey and the statutory responsibility of the DCS. It is also submitted on his behalf that, even if Ms Shoesmith had been accorded the procedural opportunities contended for on her behalf, the outcome would have been the same – as indeed the Judge had gone on to find.

Discussion

58. The Judge’s conclusion that the approach of the Secretary of State was not “intrinsically unfair”, was predicated on a finding that what transpired at the meeting between the Secretary of State and the OFSTED representatives on the morning of 1 December was effectively irrelevant because the decision of the Secretary of State to act as he did “was almost certainly taken the day before” (Judgment, paragraph 293).
59. In these circumstances, the more personalised and extreme views imparted to the Secretary of State on 1 December did not influence his decision and it is of no consequence that Ms Shoesmith had no opportunity to comment upon them. I find this to be a surprising analysis. For one thing, it was never the Secretary of State’s case. His case was that on 30 November he had not progressed beyond a “minded to” decision. Also, the way in which he expressed himself at the press conference on 1 December suggests that what he had gleaned from the meeting with Ms Brown and Ms Gilbert a few hours earlier was well in his mind. The references to “insufficient management oversight by ... the [DCS]”, to her unfitness for office and to the exceptionality of the seriousness of the situation had their origin not in the draft OFSTED report but in the meeting. These were important matters, as the Judge acknowledged (at paragraph 303), “arguably more likely to have affected the future careers of the [DCS] and her Deputy than the actual decision to replace them because of weaknesses found in the system ... for which they held ultimate responsibility”. In my view, the Judge was wrong to conclude that the requirement of fairness had ceased to bite by the end of 30 November.
60. I accept that the context – the protection of vulnerable children – is important and, together with a degree of urgency, may impact on the requirement of procedural fairness. On the other hand, Ms Shoesmith was the holder of a statutory office who was very highly thought of in Haringey (Judgment, paragraph 14) and the Secretary of State must have realised that his decisions would be likely to have catastrophic consequences for her. The question is whether the circumstances were such as to justify a standard of fairness which the Judge held (at paragraph 387) “of necessity assumed a considerably lower profile than it might otherwise have done”.
61. Whilst I accept that there was a degree of urgency, I do not accept that it was such as to necessitate a truncation of the requirements of fairness to the extent that occurred here. The question one has to ask is how much delay would have been occasioned by according Ms Shoesmith an opportunity to answer the charge. It seems to me that, as at 1 December, the delay need not have been more than modest and, in relation to 19 December, it may have been non-existent. This is not a case of a front-line social worker who may cause damage to individual children. It is one of a DCS, more than a year after the death of Peter, in circumstances where, one way or another, the position could have been safeguarded for sufficient time for fairness to be observed.
62. The fact that the Secretary of State wrongly assumed that Ms Shoesmith had had the opportunity to put her case, including her case on personal responsibility, to the

OFSTED team does not avail him. The question is whether the procedure, taken as a whole, was objectively fair, not whether the Secretary of State honestly believed that it was fairer than in fact it was.

63. The more important question is whether Ms Shoesmith's accountability as DCS was such as to erode the demands of fairness. The Judge said (at paragraph 386):

“... a substantial factor in [Ms Shoesmith] being replaced by the Secretary of State was because, as head of the department that was assessed to be inadequate, she was held ‘accountable’. To that extent, the normal conceptions of ‘fairness’ to the individual do not really apply.”

64. This passage is heavily relied upon by the Secretary of State. At the hearing of the appeal, his case was put in this way:

“The OFSTED inspection did not consider personal blameworthiness for the failings found. However, they did consider the systems operated at Haringey. As part of that, and as the person responsible/accountable under the statutory scheme, OFSTED did inevitably consider her position. It was for her to ensure that the systems were in place and operating effectively. It would be no answer to say ‘I delegated’. The whole point of the new scheme was to have a single point of responsibility. So this was not about, and therefore did not need to be about, her personal blameworthiness. The Judge was correct to find that accountability was at the heart of it. In [Ms Shoesmith's] case personal blameworthiness did not need to be considered (and no opportunity to address it needed to be given) in order to ensure fairness ... The confidence issues were of considerable importance for obvious reasons.”

Thus, the Secretary of State's case is pitched very high – as it must be in view of the denial of normal protections.

65. In my judgment, it is put too high. The fact that the 2004 Act, in creating the singular post of DCS, identified as a matter of policy one individual with ultimate responsibility and accountability in relation to children's services does not mean that that person is to be denied the protections that have long been accorded to responsible and accountable office-holders. Nor does the fact that the Secretary of State is not the employer of a DCS relieve him of the obligation to be fair. As he well knew (and made clear at the press conference) his direction under section 497A(4B) would have the immediate and consequential effect of the DCS' removal and her dismissal by Haringey. All the reasons which lead to the requirement of procedural fairness on the part of the employer of an office-holder apply when the effective decision-maker is empowered to give directions to the employer which have the same effect.

66. I find it a deeply unattractive proposition that the mere juxtaposition of a state of affairs and a person who is “accountable” should mean that there is nothing that that person might say which could conceivably explain, excuse or mitigate her predicament. “Accountability” is not synonymous with “Heads must roll”. I do not consider it likely that Parliament when creating the position of DCS, intended those who may be attracted to such an important and difficult position to be volunteering for such unfairness in their personal position. Accountability requires that the accountable person is obliged to explain the state of affairs to which it attaches. The corollary is that there must be a proper opportunity to do so. If the explanation is unacceptable, then consequences will follow.
67. For these reasons, I have come to the conclusion that the Judge was wrong to hold that the procedure leading to the directions of the Secretary of State was not intrinsically unfair. In my view, it was. He relied on a report in respect of which Ms Shoesmith had had an opportunity to contribute but, as the Judge said, the report was not designed to look at the roles of individuals. The Secretary of State wrongly assumed that Ms Shoesmith had had more opportunity “to put her case” than in fact she had. He then relied on more personalised or further allegations imputed in the meeting on the morning of 1 December which were never put to Ms Shoesmith. I do not consider the fact of her “accountability” is such as to disentitle her to elementary fairness.

(2) The Sun’s petition

68. I have little to say about the Secretary of State’s regard to *The Sun’s* petition. For my part, I do not consider that it was necessarily unlawful for the Secretary of State to have taken it into account. The context is different from the quasi-judicial context in *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407. He was legitimately concerned about public confidence and the petition may have had some modest value in that respect. However, it is unlikely that many of its signatories were aware of the complexities of employment law when they demanded dismissal without compensation. I now turn to the more important matter of the Judge’s “no difference” finding.

(3) No difference

69. The Judge went on to find that if, contrary to his primary holding, there had been unfairness, a fair procedure would not have produced a different outcome. He said, (at paragraph 388):

“the law is clear that if it would not have done so, [Ms Shoesmith] has lost nothing ‘of substance’. Unfairness does not exist in a vacuum.”

70. The “nothing of substance” formulation is a paraphrase of what Lord Wilberforce said in *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1595. Indeed, the Judge

faithfully cited the well-known line of authorities on this issue, including *R v Chief Constable of Thames Valley Police, ex parte Cotton* [1998] IRLR 344, *R v Broxtowe Borough Council, ex parte Bradford* [2000] IRLR 329 and *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315. In the latter case, May LJ, summarising the authorities, said (at page 3321A):

“Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision.”

These words echo those of Bingham LJ in *ex parte Cotton* (at page 352).

71. Applying these principles, the Judge concluded that, given the opportunity, Ms Shoesmith could have said “a good deal” but that “anything [she] said in this case would not have made any difference to the Secretary of State’s decision” (paragraph 395).
72. Prior to his decisions, the Secretary of State was provided with written advice about “options for next steps on Haringey following publication of the OFSTED report.”. It detailed a number of options, one of which was a direction of the kind eventually made. At one end of the scale was the “Armageddon option” which would involve the appointment of a nominee of the Secretary of State who would run children’s services on his behalf rather than on behalf of Haringey. At the other end were less intrusive measures such as improvement notices and specific interim support. The advice was not specific as between the various options. It was a fact – accepted by the Judge – that, as Ms Shoesmith’s background was in education rather than in social work, day-to-day management responsibility for that post of children’s services was delegated to and undertaken by her Deputy whose expertise and experience were in social work. On any view, the position of the DCS in Haringey was historically and currently very challenging and there were inevitably budgetary constraints and the kinds of difficulty in running a deprived inner-city local authority which are commonplace. Plainly the Judge came to the conclusion that no amount of explanation from Ms Shoesmith about such or any other matters could have had a bearing on the decision of the Secretary of State.
73. I do not feel able to reach the same conclusion. I suspect that one, perhaps the main, reason for that is that, as I have explained, I do not take the same view as the Judge did on the question of “accountability”. But nor do I share his confidence that nothing that Ms Shoesmith could have said would or could have made any difference. The well-known passage from the judgment of Megarry J in *John v Rees* [1970] 1 Ch 345, 402, is often cited, not infrequently in forlorn circumstances, but in my view it resonates here:

“As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.”

74. I confess that I have more often rejected attempts to benefit from those wise words in particular cases than I have been swayed by them. In the present case, however, they seem to me to be highly germane in relation to the challenge to the decisions of the Secretary of State. Put another way, this is not such a clear case that I feel able to say “no difference” without risking inappropriate encroachment into “the forbidden territory of evaluating the substantial merits of the decision”.

Conclusion

75. It follows that I would allow the appeal in relation to the directions of the Secretary of State which I find to have been vitiated by procedural unfairness.

3. Haringey

76. It was not, and could not have been, the Secretary of State who terminated Ms Shoesmith’s employment. That was done by Haringey, summarily and without compensation or payment in lieu of notice, following a disciplinary hearing on 10 December 2008, an appeal panel hearing on 7, 8 and 12 January 2009 and a dismissal letter dated 19 January 2009. On 6 March 2009, Ms Shoesmith issued her application for permission to apply for judicial review against OFSTED, the Secretary of State and Haringey and at the same time commenced proceedings against Haringey in the Employment Tribunal. In a nutshell, Haringey’s substantive case in response to both claims is that it had no alternative but to act as it did in the light of the OFSTED report and the Secretary of State’s statutory intervention. Two threshold issues were raised before the Judge: (1) Is Haringey’s treatment of Ms Shoesmith amenable to judicial review? (2) If so, ought the application to be entertained in view of the alternative remedy available in the Employment Tribunal?

(1) Amenability to judicial review

77. Common law did not have a concept of unfair dismissal. Its usual concern was with whether a dismissal was wrongful, that is in breach of contract. The statutory concept of unfair dismissal, which gives rise to a remedy exclusively in the Employment

Tribunal, was first introduced by the Industrial Relations Act 1971 and is now governed by the Employment Rights Act 1996. Its protection extends to both substantive and procedural unfairness. However, even before 1971 some employees were accorded a degree of procedural protection. These included “office-holders”. The leading modern authority was *Ridge v Baldwin* [1964] AC 40 which concerned the dismissal of a chief constable who fell within the concept of office-holder. Lord Reid said (at page 66):

“There is an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation.”

78. The word “officer” was not being used only in a police context. The line of authority, going back to *Bagg’s case* (1615) 11 Co Rep 93b, embraced local authority representatives, parish clerks and many other public officials. Although the nomenclature has changed, the cause of action and the proceedings were of a public law nature akin to modern judicial review. It is perhaps salutary to recall that it was in *Ridge v Baldwin* that Lord Reid famously said (at page 72):

“We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it.”

79. In the event, the chief constable succeeded in establishing his right to procedural fairness, both by reference to natural justice and under the relevant disciplinary regulations.

80. The chief constable in *Ridge v Baldwin* was not treated as an employee in the strict sense. However, in *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 a teacher who undoubtedly worked under a contract of employment, was treated as an office-holder. Lord Reid said (at page 1582G):

“An elected body is in a very different position from a private employer. Many of its servants in the lower grades are in the same position as servants of a private employer. But many in higher grades or ‘offices’ are given special statutory status or protection.”

81. Lord Wilberforce added (at page 1594H):

“The appellant’s challenge to the action taken by the respondents raises a question, in my opinion, of administrative law. The respondents are a public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, though no doubt including it. They are, in my opinion, to be tested

broadly on arguments of public policy and not to be resolved on narrow verbal distinctions.”

82. These statements were approximately contemporaneous with the enactment of the Industrial Relations Act.
83. By the time of *Reg v East Berkshire Health Authority, ex parte Walsh* [1985] QB 152 the statutory remedy for unfair dismissal had become well established and modern judicial review had become governed by Order 53 of the Rules of the Supreme Court, the predecessor of CPR Part 54. The case concerned the dismissal of a district nursing officer for misconduct. He applied for judicial review. Sir John Donaldson MR reviewed *Ridge v Baldwin*, *Malloch v Aberdeen Corporation* and the earlier case of *Vine v National Dock Labour Board* [1957] AC 488. He said (at page 162G):

“None of these three decisions of the House of Lords ... was directly concerned with the scope of judicial review under RSC, Ord 53.”

And (at page 164B):

“In all three cases there was a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff ... As Lord Wilberforce said [in *Malloch*, at pages 1595-1596], it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law. Employment by a public authority does not *per se* inject any element of public law. Nor does the fact that the employee is in a ‘higher grade’ or is an ‘officer’. This only makes it more likely that there will be necessary statutory restrictions upon dismissal, or other underpinning of his employment ... It will be this underpinning and not the seniority which injects the element of public law.”

84. May LJ also referred to “ordinary” master and servant cases with no element of public law involved and considered that earlier decisions “must now be read in the light of the employment protection legislation”, (at pages 169G-170A):

“The concept of natural justice involved in many of the cases is clearly now subsumed in that of an ‘unfair dismissal’. To the extent that such cases laid down any principle of law, then of course they must be followed. As always, however, to the extent that they were really decided upon their own facts they provide no precedent for later cases.

Further, I think that at the present time in at least the great majority of cases involving disputes about the dismissal of an employee by his employer, the most appropriate forum for their

resolution is an industrial tribunal. In my opinion the courts should not be astute to hold that any particular dispute is appropriate for consideration under the judicial review procedure ... ”

85. He expressed himself similarly in *Reg v Civil Service Appeal Board, ex parte Bruce*, [1988] ICR 649, at page 660.
86. Purchas LJ explained (at page 178D) the importance of focusing on the precise remedy sought: “If the remedy sought is a purely contractual remedy, then it is difficult to see how such a remedy could attract the supervisory powers of the court”. All three members of the Court considered judicial review to be inappropriate in the circumstances of the case.
87. It seems to me that *Walsh* is concerned with the separate issues of justiciability and discretion or, as I have described them here, amenability to judicial review and alternative remedy, respectively. It is now obvious that in the great majority of cases proceedings in the Employment Tribunal will be the better, if not the only, remedy. But there will still remain cases which are amenable to judicial review and in relation to which the alternative remedy in the Employment Tribunal will be inappropriate or less appropriate. This may be because the remedy available in the Employment Tribunal is inadequate because of the statutory cap on compensation (currently just over £60,000) or because the case raises significant issues falling outwith the inquiry which could take place in the Employment Tribunal. The superimposition of the statutory remedy for unfair dismissal has more to do with alternative remedy than with amenability.
88. In the present case, the Judge concluded that the dismissal of Ms Shoesmith was amenable to judicial review but that the alternative remedy in the Employment Tribunal should prevail. His reasoning on amenability seems to have been based on the consideration that an office-holder (which he held Ms Shoesmith to be) might in some circumstances not be an eligible applicant to an Employment Tribunal, for example because of inability to satisfy the requirement of twelve months’ qualifying service, and, more importantly in my view, because:

“Sufficient statutory underpinning would be afforded by the dual position of a contract of employment and an office specifically provided for by statute.” (Judgment, paragraph 510)
89. In this Court, Miss Ingrid Simler QC, on behalf of Haringey submits that the Judge was wrong to find this to be anything more than a straightforward dispute arising out of a contract of employment, remediable by way of either unfair dismissal proceedings or, presumably a breach of contract claim which would also fall within the extended jurisdiction of the Employment Tribunal. It is a private law matter with no public law content.

90. It is first necessary to refer to the statutory context. Haringey is a children's services authority within the meaning of section 11(1)(a) of the Children Act 2004. By section 18, every children's services authority is required to appoint a DCS for the purposes of the functions specified in section 18(2), which include the functions conferred on or exercisable by the authority in its capacity as a local education authority and the functions conferred on and exercisable by it which are social services functions so far as those functions relate to children. By section 18(7), the children's services authority must have regard to any guidance given by the Secretary of State. Statutory guidance has been given. It describes the DCS as having three key roles:

- “(a) professional responsibility and accountability for the effectiveness, availability and value for money of local authority children's services;
- (b) leadership both within the local authority to secure and sustain the necessary changes to culture and practice, and beyond it so that services improve outcomes ... ;
and
- (c) building and sustaining effective partnerships with and between those local and out-of-area bodies ... who also provide children's services ... ”

91. I have emphasised the word “accountability” and shall have to return to it. It is obvious from the words of the statute and of the guidance that a DCS is the person within a children's services authority with ultimate executive responsibility and accountability for children's services. It is a position created, required and defined by and under statute. It falls comfortably within the circumstances referred to in *Ridge v Baldwin*. Moreover, it seems to me that if one focuses on “statutory underpinning” in accordance with *Walsh*, one is driven to the same conclusion. Stepping aside from the details of the present case and the multiplicity of parties, if a local authority were to dismiss a DCS in total disregard for the rules of natural justice, I am in no doubt that, whatever alternative remedy might be available in the Employment Tribunal, the dismissal would be amenable to judicial review. Miss Simler suggests that such an analysis only arises when the power to dismiss is itself circumscribed by statutory provision. I disagree. Indeed, in *Ridge v Baldwin* itself the application succeeded not only by reference to regulations made pursuant to statute but also on the basis of a common law requirement of natural justice: see Lord Reid at pages 79-80; Lord Morris of Borth-y-Gest at page 121; and Lord Hodson at pages 127 and 135. I consider that the Judge was correct on the issue of amenability.

(2) Alternative remedy

92. The axiomatic principle is well-known. As Lord Bingham referred in *Kay v Lambeth London Borough Council* [2006] 2 AC 465 (at paragraph 30) to:

“the principle that if other means of address are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review.”

93. Here the issue in relation to Haringey (but not the other respondents) concerns the remedies available in the Employment Tribunal.

94. The Judge resolved the issue in favour of Haringey stating (at paragraph 512):

“... the alternative remedy should, in accordance with normal principles, be exhausted before consideration is given to any relief within the public law jurisdiction. Since, in the circumstances, that relief would probably only amount to a declaration that her dismissal was unfair on procedural grounds (if that is established), it is plainly an issue that is best considered by the Employment Tribunal which ... can look at the matter more broadly and with all the specialist expertise at its disposal.”

95. Nevertheless, the Judge went on to consider at some length facts and matters which “might have persuaded me to say that the ... judicial review claim would have succeeded against Haringey” (paragraph 515). Miss Simler, with justification, refers to the conclusions expressed in this part of the Judgment, as “tentative”. They culminated in this passage (at paragraph 531):

“The overall impression gained of Haringey’s approach ... was that the sooner [Ms Shoesmith] was dismissed with no compensation, the better, and that everyone could ‘move on’ once that had happened. However, simply because the OFSTED report was in the terms it was, and the Secretary of State acted as he did and he, others and various national newspapers called for ... summary dismissal was no proper justification for taking such an approach and it created an appearance of an unfair process.”

96. To put it at its lowest, the Judge appears to have come to at least the tentative conclusion that there was procedural unfairness in Haringey’s treatment of Ms Shoesmith.

97. Regardless of his tentative view of the merits, I consider that the Judge came to a wrong conclusion on the question of alternative remedy. His observation that “any relief within the public law jurisdiction ... would probably only amount to a declaration that her dismissal was unfair on procedural grounds” pays scant regard to the way in which Ms Shoesmith’s case is put. The relief claimed against Haringey in the judicial review proceedings includes a quashing of the decision to dismiss her. The case against Haringey is that she was dismissed in circumstances of unfairness such that the decision to dismiss her was a nullity. Whilst she does not expect to be

reinstated, she claims entitlement to her contractual pay and other benefits until such time as her employment is lawfully terminated. She relies on *McLaughlin v Governor of the Cayman Islands* [2007] 1 WLR 2839 in which Lord Bingham, giving the judgment of the Privy Council, said (at paragraph 14):

“It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal.”

98. This was Ms Shoesmith’s case in the Administrative Court: see for example Amended Statement of Facts and Grounds, paragraph 163. The case for Haringey was that *McLaughlin* is to be distinguished by reference to its unique statutory context. However, if Ms Shoesmith’s case on this point is well-founded, the consequences would be far more valuable to her in both financial and reputational terms than any decision of the Employment Tribunal could ever be, given the low cap on compensation.
99. The Judge does not seem to have had regard to this aspect of the case. Moreover, it seems to me that in the unusual circumstances of this case there was much to be said for keeping the claims against the three public authorities within one set of proceedings, which could only be the judicial review proceedings. Part of Ms Shoesmith’s pleaded case against Haringey relates to the alleged unlawfulness of the Secretary of State’s intervention. There is also the question of the duplication and recoverability of costs. From the standpoint of the Judge, Ms Shoesmith was pursuing an application for judicial review, permission having been granted in terms which expressly addressed the “alternative remedy” point. The Employment Tribunal proceedings were always said to have been commenced “on a protective basis” and they stood stayed. If Ms Shoesmith is driven to revive them it will be in circumstances where, whatever the strength of her case may be, the most successful outcome might mean that her capped compensation would be greatly diminished, if not entirely swallowed up, by irrecoverable legal costs. In this difficult legal case it would be unreasonable to expect her to instruct inexperienced, inexpert or apparently inexpensive lawyers and the case would be unlikely to be short. In these circumstances, it seems to me that everything pointed to the justice of the case requiring a decision on the merits in the application against Haringey, whatever that decision should be. I consider that the Judge was wrong to defer to the Employment Tribunal proceedings. The alternative remedy was not “equally convenient and effective”: *R v Essex County Council, ex parte EB* [1997] ELR 327, at page 329, per McCullough J. Put simply, in the circumstances as they stood, Ms Shoesmith was entitled to a decision on her application against Haringey for which permission had been granted.

(3) The consequences

100. It is necessary to refer to a little more of the factual background. On the afternoon of 1 December 2008, Haringey held a live televised press conference. The Leader of the Council, councillor Meehan, announced his resignation. Councillor Lorna Reith immediately assumed the role of Acting Leader. She spoke at the press conference, as did Dr O'Donovan, the Chief Executive. Dr O'Donovan referred to the direction of the Secretary of State adding:

“We suspended [Ms Shoesmith] immediately and will follow the legal process as speedily as possible.”

101. She also said words to the effect that there would be “no compensation package”.

102. On 2 December Dr O'Donovan wrote to Ms Shoesmith to confirm her suspension. She stated:

“The suspension will be on normal contractual pay and it will operate until there has been time to fully investigate the direction of the Secretary of State ... in relation to the position you hold and the allegation that the relationship of trust and confidence in you has been fundamentally breached following receipt of the [OFSTED Report].”

103. By another letter of the same date, Ms Shoesmith was required to attend a meeting under the statutory dismissal procedure on Monday 8 December. Its terms were similar to those in Dr O'Donovan's letter.

104. The panel which assembled on 8 December included councillor Reith. Ms Shoesmith was accompanied by Mr Richard Penn, a freelance consultant on employment matters for senior local authority employees. The outcome of the meeting was a decision to dismiss Ms Shoesmith with immediate effect without any compensation package or payment in lieu of notice. This was confirmed to Ms Shoesmith in a letter from Mr Young dated 9 December, which included these passages:

“(1) The panel found that the effect of the direction of the Secretary of State ..., which it had no reason to suppose was not valid and lawful, was to remove responsibility for all duties and functions for your post as [DCS]. The panel further found that no significant elements of that post could be exercised outside the effects of that direction.

(2) The panel found that the relation of trust and confidence in you had been fundamentally breached as a consequence of the summary judgment and the main findings of the [JAR] ...

(3) The panel took no account of the statement by the Chief Executive at the press conference on 1 December ... in reaching its decision.”

105. Ms Shoesmith appealed against that decision and her appeal was heard by a Dismissal Appeal Panel on 7, 8 and 12 January 2009. The Panel consisted of three councillors who had been uninvolved in the panel on 8 December. This time Ms Shoesmith was represented by Mr Tony Child, a partner in Messrs Beechcroft LLP, the firm representing her in the current proceedings.

106. Mr Young represented the Council (as he had on 8 December). He stated that there was “some other substantial reason” for the dismissal within the terms of unfair dismissal law and that Haringey had little option other than to consider dismissal in the light of the direction of the Secretary of State. He said that “firstly and primarily” the ground for dismissal was the direction of the Secretary of State which made Ms Shoesmith’s continued employment in the role of DCS untenable. Secondly, and “very much a secondary part of it”, was that the OFSTED report “in its totality calls into question the management of the service ... [and was such as to] undermine the relationship of trust and confidence that the council would ordinarily expect to have with [Ms Shoesmith] as an employee in the role of [DCS]”.

107. Mr Child submitted that the direction of the Secretary of State was unlawful. The Panel, having taken legal advice, declined to rule on that submission, considering that it was “more appropriate for a court of law”. In due course the Panel dismissed the appeal stating, among other things, that it had no reason to suppose that the direction of the Secretary of State was not valid and lawful and that “trust and confidence had been lost due to the summary judgment and the main findings of the JAR”.

108. Although the Judge had concluded that he should not rule on the application in relation to Haringey because of the alternative remedy, he added (at paragraph 515):

“It seems to me that, for the benefit of the Court of Appeal should this aspect of the case find its way there, I need to set out ... the features of the case that, in the absence of an alternative route to relief and subject to argument about the precise terms of any relief granted, might have persuaded me to say that the ... judicial review claim would have succeeded against Haringey.”

He made it clear that nothing he said was intended to or should influence any subsequent proceedings in the Employment Tribunal.

109. The Judge made the following observations (at paragraph 517 and following):

“... the starting point for a responsible and considerate employer (acting as an employer) would be to be concerned

that a respected and loyal employee who is the subject of a critical comment, whether by a government minister, a national newspaper or any other commentator, is treated fairly in any ensuing consideration of his or her position within the Council.

Haringey should, in my view, have striven not merely to be fair in what it did so far as [Ms Shoesmith] was concerned, but to be seen unequivocally to have been fair ...

I can well understand the difficulties involved. It will have been a difficult balance to strike between accepting (and being obliged to accept) the Secretary of State's decision and acting upon it immediately and yet maintaining a firm line that fairness to [Ms Shoesmith] ... needed to be displayed. However the law expects and demands that such a balance is to be shown.

... as a crucial document in any consideration of the employment position of [Ms Shoesmith] ... , [the OFSTED report] demanded, in my view, rather further investigation before steps were taken pursuant to it.

... there is the question of whether there was to be any 'investigation'. ... The allegation that was to be made ... was that the OFSTED report evidenced a failure ... to maintain the relationship of trust and confidence between her and the council ... One would have thought that ordinarily some more precise particulars of what it is that she did or did not do would be provided to her. It does seem to me at least to be arguable (although this would really be a matter for the Employment Tribunal) that some rather more precise particulars were required of that assertion.

[As regards councillor Reith] having said what she said about 'payout' at the press conference, or having associated herself with something like that, there will clearly be an appearance of bias because it suggests a pre-disposition towards the conclusion that the ... dismissal was inevitable ... and indeed, not merely that there should be a dismissal, but one of a summary nature without compensation. For my part, I would have had no reservations about saying that that hearing was sufficiently flawed for any decision based upon it to be set aside unless it could be shown that the decision was so inevitable that it simply did not matter ...

At all events, for the reasons I have given I have very considerable doubts as to the validity of the process that led to the decision on 8 December ...

[as regards the appeal hearing] ... the question from a public law perspective, if the matter fell to be dealt with by way of

judicial review, is whether it was a hearing that could be seen to be fair. If so, arguably it would ‘cure’ the defects in the earlier hearing. There are three matters that cumulatively have persuaded me ... that the hearing did not reach a fair procedural threshold. They are as follows:

- (i) The continued non-disclosure of the communications between Haringey and OFSTED over the evidence base for the report’s findings.
- (ii) The quite open statements of Dr O’Donovan, apparently on behalf of the council, that [Ms Shoesmith] had been dismissed with no compensation without referring to the proposed appeal ... dismissing [Ms Shoesmith] was, of course, one thing: dismissing her summarily with no compensation is another.
- (iii) The approach of the Panel to the evidence given by [Ms Shoesmith] questioning the validity of parts of the OFSTED report is unusual ... it may indeed be correct that they had no opportunity of questioning the inspectors or others involved in writing the report, but where evidence cannot be challenged at a hearing by other evidence, and where, as here, the evidence of [Ms Shoesmith] was essentially unchallenged in any questioning of her, it is very unusual effectively to reject what a witness has said. ...

For my part, therefore, I would have been persuaded that this hearing was also flawed and, accordingly, could not have ‘cured’ the defects in the first hearing ...

The overall impression gained of Haringey’s approach (perhaps understandable given all the external pressures) was that the sooner [Ms Shoesmith] was dismissed with no compensation, the better, and that everyone could ‘move on’ once that had happened. However, simply because the OFSTED report was in the terms it was, and the Secretary of State acted as he did and he, others and various national newspapers called for ... summary dismissal was no proper justification for taking such an approach and it created the appearance of an unfair process.”

110. The Judge repeated his reticence about proceedings in the Employment Tribunal. Although the submission on behalf of Haringey is that the Judge’s conclusions were no more than “provisional” or “tentative”, there is no doubt in my mind that, if he had reached a different decision about alternative remedy, he would have allowed the application for judicial review against Haringey. The question now is whether he would have been right to have done so.

Discussion

111. I share the Judge’s view that Haringey was put in a very difficult position by the direction of the Secretary of State and the comments made by him at his press conference. The situation was factually and legally complex and it was all the more so if, as I have held, the direction of the Secretary of State was unlawful. In that eventuality, the case for Ms Shoesmith is that the unlawfulness of the Secretary of State’s direction impacts upon the lawfulness of Haringey’s decision to dismiss. This raises a familiar legal problem: to what extent can Haringey rely or continue to rely on a decision of another which is now held to be unlawful? Such questions have troubled the courts for many years, but the modern jurisprudence really begins with *Boddington v British Transport Police* [1999] 2 AC 143.
112. Although the factual matrix of *Boddington* was very different (raising the illegality of a byelaw as a defence to a criminal prosecution), Lord Irvine of Lairg LC deliberately expressed himself in more general terms. He said (at page 155B-C):
- “Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities ... In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognized as never having had any legal effect at all.”
113. In a later passage (at page 160), he referred to the importance of the statutory context in a particular case.
114. Lord Steyn (at page 172) preferred to adopt the formulation of Dr (now Professor) Christopher Forsyth:
- “... it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether the second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determinedly an analysis of the law against the background of the familiar proposition that an unlawful act is void.”
115. Lord Hoffmann (at page 176) agreed with Lord Irvine and Lord Steyn, Lord Browne-Wilkinson (at page 164) took a different view:

“I am far from satisfied that an *ultra vires* act is incapable of having any legal consequence during the period between the doing of that act and the recognition of its invalidity by the court. During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its validity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity.”

116. Lord Slynn (at page 165) preferred to express no general view. In these circumstances, it is difficult to identify a single principle as authoritative, although it is fair to say that Lord Brown-Wilkinson’s approach was unsupported by his colleagues.
117. There is a more recent authority to which I should refer: *Mossell (Jamaica) Limited v Office of Utilities Regulation and others* [2010] UKPC 1. There Lord Phillips referred to *Boddington* and cited the passage from the speech of Lord Irvine set out above. He rejected a submission that the principle only applies in the context of criminal prosecutions. He added (at paragraph 44):

“What it all comes to is this. Subordinate legislation, executive orders and the like are presumed to be lawful. If and when, however, they are successfully challenged and found *ultra vires*, generally speaking it is as if they had never had any legal effect at all: their nullification is ordinarily retrospective rather than merely prospective. There may be occasions when declarations of invalidity are made prospectively only or are made for the benefit of some but not others. Similarly, there may be occasions when executive orders or acts are found to have legal consequences for some at least (sometimes called ‘third actors’) during the period before their invalidity is recognised by the court – see, for example, *Perry v Hall* [1997] QB 924. All these issues were left open by the House in *Boddington*. It is, however, no more necessary that they be resolved here than there.”

Again, the context was different from the present case, miles away from the complex relationships of Secretary of State, local authority and DCS.

118. The case that Mr Maurici now puts on behalf of Ms Shoesmith (which was not determined by the Judge in the light of his finding that the Secretary of State’s direction was lawful) is that the Secretary of State’s direction of 1 December, being unlawful, could not and cannot be relied upon by Haringey. It should be seen, as against Haringey, as (in Lord Irvine’s words) “never having had any legal effect at all”. This, he submits, is, in relation to Haringey, a *McLaughlin* case (see paragraph 98, above). Ms Shoesmith was dismissed primarily because of an unlawful direction; the Secretary of State’s unlawful direction vitiates the decision of Haringey to dismiss her; accordingly, her dismissal is “null, void and without legal effect” (*McLaughlin*,

paragraph 14) unless and until Haringey makes a lawful decision to dismiss. In these circumstances, she is entitled to the *McLaughlin* remedy, namely arrears of salary and pension contributions from December 2008 until today and continuing until her employment is lawfully terminated.

119. This is an attractive submission but I do not feel able to accept it. It seems to me that there is an area, admittedly ill-defined but left open by Lord Steyn in *Boddington* and Lord Phillips in *Mossell*, in which the act of a public authority which is done in good faith on the reasonably assumed legal validity of the act of another public authority, is not *ipso facto* vitiated by a later finding that the earlier act of the other public authority was unlawful. I consider the present case, which involves the termination of an employment relationship, is within that ill-defined area. Although, at least by the time of the internal appeal hearing in January 2009, Haringey knew that Ms Shoesmith did not accept the lawfulness of the Secretary of State's direction, it was not for an internal disciplinary panel to rule on that. Haringey was entitled to take the direction at face value. Whilst it would have been open to Haringey to challenge the direction by way of judicial review, it is not suggested that it was obliged to do so. Nor had Ms Shoesmith yet commenced proceedings in the Administrative Court, so no question of adjourning the internal proceedings pending determination of an application for judicial review arose. For all these reasons, I do not consider that the application for judicial review against Haringey succeeds simply because it acted on an unlawful direction. However, that is not the end of the matter. As I have related, the Judge was contingently well-disposed to the application on other grounds. This part of his judgment is challenged by Haringey.
120. In considering this aspect of the case, it is important to keep in mind the difference between Haringey's public law and private law obligations and, as regards the latter, the difference between obligations arising out of the contract of employment and those which result from statute, in particular the protection against unfair dismissal now enshrined in the Employment Rights Act 1996 which, as the Judge rightly observed, is a matter falling within the exclusive jurisdiction of the Employment Tribunal. Like the Judge, I enter the *caveat* that nothing I say should be taken as expressing any view, one way or another, about the currently stayed unfair dismissal proceedings.
121. Having said that, there is a sense in which the contractual position at common law was closely bound up with the decision to dismiss. It was based not only on the effect of the Secretary of State's decision but also on the view that summary dismissal was appropriate because Ms Shoesmith was in breach of the implied term as to trust and confidence. Indeed, it seems to me that that was the purported justification for the absence of notice or payment in lieu. It remains Haringey's case as explained by Miss Ingrid Simler QC. I am bound to say that I consider it to be wrong. It results from a misuse of the concepts of trust and confidence. Whilst in one sense it may be said Haringey lost confidence in Ms Shoesmith's abilities and felt that, as a result of the OFSTED report and the Secretary of State's direction that she could no longer be trusted to be an effective DCS, that is not the sense which attaches to the implied duty. Its concern with trust and confidence is more closely connected with those terms in the sense in which they are used in a fiduciary or quasi-fiduciary context. It

is broken and the breach is repudiatory when the employee evinces an intention no longer to comply with it, whereupon the employer may accept the repudiation and dismiss summarily. In the present case, although Haringey seek to disavow it, the concern was as to Ms Shoesmith's competence and capability rather than as to trust and confidence in the correct sense. That would make it far more difficult to justify summary dismissal, as opposed to dismissal on three months' contractual notice, at common law. That is no doubt why, from the outset Haringey has sought to put its case on the "trust and confidence" basis.

122. That contractual analysis and, as I see it, Haringey's legal error in relation to it, was not the basis for the Judge's view that the decision to dismiss was judicially reviewable. His view was based on the following concerns:

- “(1) Haringey acted in reliance on the findings in the OFSTED report when it ‘demanded ... rather further investigation before steps were taken pursuant to it’.
- (2) Haringey knew, through the Chief Executive, that at the time of the initial Panel hearing which resulted in the decision to dismiss summarily Ms Shoesmith had ‘variable ability to concentrate during this very difficult period’.
- (3) The ‘trust and confidence’ case against her was insufficiently particularised.
- (4) There was apparent (not actual) bias on the part of Councillor Reith.
- (5) The flaws in relation to the initial panel were not cured by the internal appeal in January because that was also flawed for a number of reasons, including the fact that (as the Judge was minded to infer) there was ‘the appearance of a predetermined outcome to any hearing that took place’ (Judgment, paragraph 529(ii), my emphasis).”

123. Point (5) was founded on the evidence that the Chief Executive had openly said at the press conference, apparently on behalf of the Council, that there would be “no pay-off”. The Judge inferred that she was speaking with the authority of the Council then and on 9 December.

124. All this led the Judge to the

“overall impression ... that the sooner [Ms Shoesmith] was dismissed with no compensation the better, and that everyone could ‘move on’ once that had happened.”

and that there was “no proper justification for taking such an approach [which] created the impression of an unfair process”. (Judgment, paragraph 531).

125. Can it be said that any of this analysis was impermissible or wrong? In my judgment, it cannot. Indeed, I am content to associate myself with it. There was no need for Haringey to move with such haste against a previously respected senior employee who was known to be in dire straits by reason of recent events. Someone else was already acting as DCS pursuant to the Secretary of State’s directions and Ms Shoesmith was under suspension. The appearance of a predetermined dismissal without notice or payment in lieu seems to me to be sufficient to make good the charge of unfairness. Although the summary element is of contractual significance, going to a potential claim for wrongful dismissal, it comes into the public law picture because it was part of the appearance of unfair predetermination. Whatever may be the merits of the unfair dismissal case, I am bound to observe that, notwithstanding the views of the Secretary of State, the tabloid press, the signatories to the petition or people within the Council, it seems to me that Ms Shoesmith has always had (to put it at its lowest) a strong case for payment in lieu of notice.
126. Although I do not think Haringey has ever taken this point, I have wondered whether the removal of Ms Shoesmith from the statutory position of DCS on 1 December pursuant to the Secretary of State’s direction took her out of the public law protection of an office-holder and exposed her to treatment as a mere employee without public law protection. However, that seems to me to be too schematic on analysis. I do not consider that the removal (which I have found to have been based on an unlawful direction) had that effect.

Conclusion

127. I therefore conclude that Ms Shoesmith’s application for judicial review against Haringey succeeds, as the Judge clearly thought that it should.

4. The consequences: relief

128. The success of Ms Shoesmith’s appeal in relation to the Secretary of State raises the question of what should follow by way of relief. It seems to me that the answer is straightforward: a declaration that insofar as they purported to remove Ms Shoesmith from the position of DCS, the directions were unlawful.
129. The consequences of her success in relation to Haringey are more complicated. She is not seeking to be restored to the position of DCS. She recognises that too much water has flowed under the bridge for that. However, her dismissal was the result of a decision that was unlawful in public law and not just contractual or unfair dismissal terms. The submission on her behalf is that the dismissal was a nullity and, as that has not been cured by any later lawful decision, she is entitled to her salary and other

benefits from that day to this on the *McLaughlin* basis. Because of the way he approached the case, the Judge expressed no view about relief.

130. At the very least, Ms Shoesmith is entitled to a declaration that her dismissal by Haringey was unlawful. The more difficult question is as to how much further we should go. In *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, Lord Brightman (with whom the other members of the Appellate Committee agreed) described (at page 1176B) the choice of remedy as “a difficult one” and “a matter of discretion” but concluded that, in the circumstances of that case, the police constable should have a declaration that “by reason of his unlawfully induced resignation, [he] had thereby become entitled to the same rights and remedies, not including reinstatement, as he would have had if the respondent had unlawfully dispensed with his services under regulation 16(1) of the Police Regulations 1971”. In *Jhagroo v Teaching Service Commission* (2002) 61 WIR 510, the Judicial Committee of the Privy Council, when dealing with an unlawfully dismissed teacher, said (per Lord Walker of Gestingthorpe at paragraph 43):

“Their Lordships feel great sympathy for the appellant in these grave misfortunes. But it would not be appropriate to make an order which had the practical effect of requiring the TSC to appoint the appellant (who may not be well enough to discharge his duties) to an office which is no doubt now held by another history teacher.”

131. The outcome was a declaration coupled with a remission to the High Court for an assessment of damages. In *McLaughlin*, the Judicial Committee of the Privy Council made a declaration that “the purported dismissal ... was ineffective in law to determine Dr McLaughlin’s tenure of office and that [he] is entitled to recover arrears of salary ... and to the payment of pension contributions ... until he resigns or his tenure of office lawfully comes to an end”. As at the date of the order, a period of eight years had already elapsed.
132. On the basis of the submissions we have received, I am satisfied that the relief to which Ms Shoesmith is entitled should include a formulation which extends to compensation. However, I do not consider that we have received sufficient by way of submissions for us to reach a concluded view as to the appropriate order. This involves no criticism of counsel. For good reason, they concentrated on the substantive issues and it may well be that they will be in a better position to address the question of the relief now that they know how we have dealt with the substantive issues. It seems to me that the outer limits are, at the low end of the scale, a sum equivalent to three months’ salary and pension contributions (reflecting the contractual notice period) and, at the high end of the scale, a *McLaughlin*-type order. In the last resort, I would remit the case to the Administrative Court for this remaining issue to be resolved. However, I would at least encourage the parties to seek to resolve this aspect of the case by negotiation or, if necessary, by mediation. Although compensation is a matter between Ms Shoesmith and Haringey, it would be entirely appropriate for Haringey to seek a voluntary contribution from the Secretary of State whose unlawful directions gave rise to the problems.

Summary and final observations

133. It follows from what I have said that I would dismiss the appeal in relation to OFSTED but allow the appeals in relation to the Secretary of State and Haringey, making declarations as indicated in paragraphs 129 (Secretary of State) and 131 (Haringey). I would remit the case to the Administrative Court for consideration of further relief but impose a stay for 6 weeks to enable negotiation and, if necessary, mediation to take place.
134. I cannot leave this case without commenting on the way in which Ms Shoesmith was treated. In another case, Sedley LJ was moved to say:
- “It seems that the making of a public sacrifice to deflect press and public obloquy, which is what happened to the appellant, remains an accepted expedient of public administration in this country. (*Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, (at paragraph 42)”
135. In my view, it is also what happened in the present case. Those involved in areas such as social work and healthcare are particularly vulnerable to such treatment. This is not to say that I consider Ms Shoesmith to be blameless or that I have a view as to the extent of her or anyone else’s blameworthiness. That is not the business of this Court. However, it is our task to adjudicate upon the application and fairness of procedures adopted by public authorities when legitimate causes for concern arise, as they plainly did in this case. Whatever her shortcomings may have been (and, I repeat, I cannot say), she was entitled to be treated lawfully and fairly and not simply and summarily scapegoated.

Lord Justice Stanley Burnton:

136. I read the judgment of Lord Justice Maurice Kay in draft with admiration. I agree with his conclusions and his reasons, with one important exception. I take issue with the conclusion, reached by him in paragraph 120, that this case is “within that ill-defined area” in which the act of a public authority, on the basis of the assumed lawfulness of a prior act of another public authority, is not itself vitiated by the unlawfulness of the prior act. This case raises in an acute form the question whether a public authority that acts on what is subsequently found to have been an unlawful and legally void executive act itself acts unlawfully, and if so whether its own act is itself void.
137. In my judgment, the answer must depend on the circumstances. In the present case, Ms Shoesmith’s contention that the Secretary of State’s direction was unlawful and void because he had acted unfairly and in breach of the rules of natural justice was expressly and clearly raised on her behalf before the Dismissal Appeal Panel: see paragraph 8 of her Grounds of Appeal and the Outline Legal Submissions presented on her behalf. The facts on which her contention was based were not controversial. The Panel had the benefit of legal advice. Faced with this contention, in

circumstances in which there was no genuine urgency in the Panel reaching a conclusion, in my judgment the least that Haringey should have done was to have put Ms Shoesmith to her election: to begin judicial review proceedings against the Secretary of State to challenge his direction, or for the hearing to continue on the basis that it was valid. As it was, the Panel proceeded on the basis that the direction was lawful and took the risk of its subsequently being held to be void.

138. In my judgment, therefore, Haringey's decision to dismiss Ms Shoesmith was itself unlawful and void.
139. I would point out that Haringey could have protected its position if it had served a contractual notice terminating Ms Shoesmith's contract of employment, and it might have done so without prejudice to its contention that it was entitled to dismiss her summarily. It did not do so.

The Master of the Rolls:

140. Subject to one point, I agree with Maurice Kay LJ's admirable judgment, to which I cannot usefully add anything. The one point on which I take a different view, which does not alter the outcome of this appeal, is that discussed in paragraph 120 above.
141. I am prepared to accept, without deciding, that there is a principle that, in "ill-defined" circumstances, the act of a public body ("the public body"), acting in good faith and in reliance on the reasonable assumption that an earlier act of another public body ("the other public body") was lawful, will not be vitiated as a result of a subsequent finding that the earlier act was in fact unlawful. The existence of such a principle is supported by what was said by Lord Browne-Wilkinson in *Boddington v British Transport Police* [1999] 2 AC 143, 194 and, arguably, by Lord Phillips in *Mossell (Jamaica) Ltd v Office Utilities Regulation* [2010] UKPC 1, para 44.
142. However, like Stanley Burnton LJ, I do not consider that it is open to Haringey to rely on such a principle on the facts of this case. I rest that conclusion on a combination of a number of factors; it is unnecessary, and I think it could be unhelpful, to seek to identify whether the absence of one or more of these factors would justify a different conclusion.
143. First, it is Haringey, not Ms Shoesmith, who are seeking to invoke the principle. It seems to me that, at least in general, it should be easier for the principle to be invoked against the public body by a third party who has done something in reliance on the validity of the act, than against a third party by the public body.
144. Secondly, by the time that Haringey dismissed Ms Shoesmith, she had put them on notice in terms that the direction of the Secretary of State, on which they were relying, was unlawful. Indeed, she had advanced that contention on the very ground which we

have found to be made out, namely that he had acted unfairly and in breach of the rules of natural justice. Accordingly, this is not a case where, at the time that it carried out the act in question, the public body was unaware of the contention that the earlier act of the other public body was unlawful. Further, at the time that this notice was given, Haringey, through the appeal panel which considered Ms Shoesmith's appeal (following the disciplinary hearing) in January 2010, had the benefit of legal advice, and the facts on which her contention was based were not in issue.

145. Thirdly, there was no requirement for particularly urgent action on the part of Haringey. They obviously wanted to get things sorted out, but Ms Shoesmith was not a front-line social worker, there was no particular need for her to leave forthwith, she was already suspended, and Mr Lewis had been appointed DCS from 1 January 2009.
146. Fourthly, as mentioned by Stanley Burnton LJ, there was no reason why Haringey could not have suggested to Ms Shoesmith that she should choose between (i) promptly beginning judicial review proceedings against the Secretary of State to challenge his direction, or (ii) letting the disciplinary hearing and any appeal hearing proceed on the basis that the direction was valid.
147. Finally, this is not a case where the consequences of holding the act of the public body to be invalid should have caused any particular prejudice to the public body. Quite apart from the points considered above, there was nothing to prevent Haringey serving appropriate notice determining Ms Shoesmith's employment, after her dismissal, expressly without prejudice to Haringey's contention that her dismissal had already been validly effected. The service of such a notice would have not have prejudiced the dismissal if it was valid, and, if the dismissal was invalid, the notice would have protected Haringey's position without prejudicing that of Ms Shoesmith.
148. Whether or not this is right, I consider that Haringey's decision to dismiss Ms Shoesmith was itself unlawful and void.
149. In these circumstances, Ms Shoesmith's appeals against the Secretary of State and against Haringey are allowed, but against OFSTED her appeal is dismissed.