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Human Rights and Education Law: An Update

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1. Introduction

1.1 This short paper presents an update on human rights decisions from a number of different jurisdictions in the field of education law.

1.2 The primary focus relates to the following areas of regulation:

1.2.1 school uniforms;

1.2.2 exclusion from school;

1.2.3 discriminatory treatment.

2. School Uniforms and Article 9

2.1 Four cases have been heard recently in England: R (Begum) v Denbigh High School [2006] 2 WLR 719; R (X) v Head teacher of Y School EWHC 298 Admin; R (Playfoot) v Governing Body of Millais School [2007] EWHC 1698 Admin and R (Watkins Singh) v Governing Body of Aberdare Girls' High School and Rhondda Cynon Taff Unitary Authority [2008] EWHC 1865 Admin. In the first three the human rights arguments failed, only in the fourth case did the claimant succeed; but on the basis of domestic discrimination law provisions.

2.2 In R (ota Begum) v Denbigh High School [2006] 2 WLR 719 the claimant wished to wear the jilbab rather than the shalwar kameeze. For two years she had worn the shalwar kameeze and then contended it did not comply with her required religious observance. Three other schools within the claimant's catchment area permitted the wearing of the jilbab. The claimant spent two years out of school

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before she was admitted to a different school. The House of Lords rejected the claim. They set out the following: i. the wearing of the jilbab was a sincere manifestation of religious belief, therefore Article 9 (1) was engaged; ii. Article 9 (1) did not, however, require that people should be allowed to manifest their religion at any time and place of their choosing; iii. on the facts of this case, an interference could be not established because of Ms Begum's voluntary acceptance of a role which did not accommodate her right to practice or observe her religion and there were other means open to her to do so without undue hardship or inconvenience; and secondly because the claimant's parents had chosen for her to attend a school outside their catchment area in full knowledge of the school's uniform policy and there was no evidence to demonstrate another school which permitted the wearing of the jilbab was inaccessible to her. For similar reasons the A2P1 challenge also failed.

2.3 In X v Y the facts in issue were more sharply focused. The claimant was denied the right to wear the niqab although her three sisters had worn it before at the school with the full knowledge of the head teacher. X argued Begum could therefore be distinguished as she had not voluntarily accepted an accommodation of her religious beliefs and further she had a legitimate expectation of being permitted to wear the niqab. The court once again rejected the claim. Article 9 (1) was engaged, however, since she could have accepted an offer of a place at another school, which was easy for her to travel to, where she could wear the niqab, the manifestation of her religious belief had not been interfered with by the head teacher. Silber J took the view that "voluntary acceptance" was not required, it was sufficient an alternative school placement was available. Further, he went on to hold that even if there had been an interference, it would have been lawful because: a. it was prescribed by law; b. it was for a legitimate purpose and c. it was proportionate.

2.4 The sending of a letter home which laid out the prohibition was deemed to be sufficient to satisfy the 'prescribed by law' test. Silber J concluded the following

amounted to legitimate purposes: a. encouraging pride in the school; b. enabling students to feel comfortable; c. ensuring students of different faiths felt welcome; d. encouraging a sense of cohesion; e. outlawing social pressures to conform to religious codes; e. security. The judge rejected the argument the wearing of the niqab could harm X's education, as this was out with "the protection and freedom of others".

2.5 In Playfoot the claimant, a 16 year old girl, insisted in wearing a purity ring to symbolise her commitment, as a Christian, to celibacy before marriage. Michael Supperstone QC, sitting as a deputy high court judge, concluded Article 9 was not engaged. The school argued it was only those practices required or necessary by the belief which would be protected by Article 9. The judge had some difficulty with this, and relying on Begum, took the view practices had to be "intimately linked" to the belief. The claimant was "under no obligation, by reason of her belief, to wear the ring, nor does she suggest she was so obliged". The deputy judge went to hold even if he were wrong on this issue, there was no interference (there being no evidence the claimant could not find another school where she could wear the ring) and further, that if there had been an interference, it would have been justified.

2.6 In Watkins-Singh the claimant's advisers changed tack and relied upon obligations under the Race Relations Act 1976 (as amended) and the Equalities Act 2006, newly brought into force. The claimant was taught in isolation at school because of her insistence on wearing the Kara, a Sikh bangle. The school stated wearing the Kara contravened their uniform policy of only permitting wrist watches and stud earrings. The Claimant was then the subject of several fixed term exclusions, before being told she could not attend school wearing the Kara. She moved to another school where she was permitted to wear the bangle. She applied for judicial review asserting *inter alia* that uniform policy and the decisions to require her not to wear the Kara were unjustified race discrimination under the Race Relations Act 1976 and religious discrimination under the

Equality Act 2006 and further that by being taught in isolation her rights under Article 8 and Article 8 taken together with Article 14 had been violated. Again the human rights arguments failed. Article 8 was not engaged, despite a prolonged period of teaching in isolation. Silber J, however, concluded the school had acted unlawfully by subjecting the claimant to unlawful race and religious discrimination (indirect discrimination) and had failed to have in place a racial equality plan as required under section 71 of the Race Relations Act.

2.7 Under both Article 9 (2) and under the defence of justification the courts were required to carry out something of a balancing act in determining whether it was acceptable for the schools to act as they did. The same judge decided X and Watkins-Singh and at the heart of his judgment in Watkins-Singh appears to be the fact of the "unobtrusive nature of the Kara, being 50 mm wide and made of plain steel":

> *There is a very sharp distinction between those cases* [Begum and X v Y] *and the present case, as many aspects of justification relied on in those cases are related to extremely clearly visible and very ostentatious nature of the religious dress sought to be worn by the claimants in those cases. For example the niqab (which is a large veil which covers the pupil's face except for her eyes) in the X v Y School cases was clearly at the other end of the spectrum from the Kara which is not only 50 millimeters wide but is only visible if the claimant is not wearing long sleeves. By the same token the jilbab (which is a long coat-like garment) in the Begum case is infinitely more visible than the Kara.*

2.8 The courts have been influenced by employment law cases; if an employer's working practices and the employee's religious convictions are incompatible an employee is free to resign in order to manifest his religious beliefs without the employer necessarily being found to be in violation of the Convention: Ahmad v UK (1981) 4 EHRR 128, Konttinen v Finland (1996) 87 DR 68 and Stedman v UK (1997) 23 EHRR CD168. There must be a fairly direct correlation between

the view that a pupil can transfer schools to manifest their beliefs and an employee resigning to pursue their beliefs elsewhere. It is evident the scale and extent of the religious manifestation is highly important to the outcome the court will take.

2.9 A recent further case decided in Europe on this subject is Dogru v France [2009] ELR 77. Ms Dogru, a Muslim, was a pupil at school who refused to remove her headscarf during PE. She was expelled as result and continued her education through correspondence classes. She claimed her rights under Article 9 and A2P1 had been breached. The ECHR unanimously held there had been no breach of Article 9; wearing a headscarf was a manifestation of religion and the ban on the headscarf in PE and the related exclusion were "restrictions" on D's right to exercise her right to freedom of religion - the interference however was prescribed by law (however the Court was perhaps a little concerned as to whether the 'case by case' approach adopted by the Conseil D'Etat complied with the Court's requirement of foreseeability); having regard to the circumstances of the case, the interference pursued a legitimate aim – i.e. protecting the rights and freedoms of others and protecting public order. The court was also satisfied the approach of the French authorities was necessary because:

2.9.1 There were 'delicate relations between the churches and the state'; secularism was a founding constitutional principle in France and margin of appreciation would be left to contracting states;

2.9.2 A headscarf was a health and safety hazard (or rather the French's authorities views were not unreasonable);

2.9.3 The necessary balancing of interests was undertaken through the exclusion process (D had refused to remove her scarf on 7 occasions and the authorities had entered into a long dialogue with her to no avail).

2.9.4 Exclusion was a severe penalty but it was not for the ECHR to substitute its own views for that of the disciplinary authorities.

2.9.5 The applicant was able to continue her education by way of correspondence classes (this was explicitly not a breach of A2P1 as disciplinary measures are 'an integral part of the process…").

2.9.6 No decision was taken on the basis of the Applicant's religious beliefs.

3. Absence/Exclusion From School: A2P1 and Article 8

3.1 Human rights arguments in this field have focused on two Convention articles: 6 and Article 2 of Protocol 1. Article 6 has had a difficult and to some extent confused treatment by the courts. In R (S) (A Child) v Brent London Borough Council [2002] EWCA Civ 693 the Court of Appeal appeared to accept Article 6 was engaged in the school exclusion process (Schieman LJ: "….the perfectly tenable assumption that domestic human rights law, and arguably the ECHR's jurisprudence too, will today at least regard the right not to be permanently excluded from school without good reason as a civil right for Article 6 purposes"). This appeared to overturn Newman J's decision in R (ota B) v Alperton School and others [2001] EWHC Admin 229 where he held "[I]n my judgment Article 6 (1) is not applicable to IAP exclusion proceedings because: (1) the civil law right to enjoyment of reputation if not infringed in the course of (a) proceedings not directly decisive of reputation and (b) where the potentiality of damage has been recognised by proper procedural protection being accorded in those proceedings".

3.2 In R (ota S) v Governing Body of YP School [2003] EWCA Civ 1306 the Court of appeal decided against considering whether the fixed term exclusion regime was incompatible with the HRA on the basis of a violation of Article 6 because of the lack of access to an independent and impartial tribunal. It was a point that "will have to wait for another day" said Laws LJ.

3.3 Yet, in R (ota B) v Head teacher of St Michael's Church of England School and others and the Secretary of State for Children, School and Families [2007] EWHC

2052 the court refused permission to challenge the compatibility of the fixed term exclusion regime on the basis of an alleged breach of Article 6. Beatson J held "*I have concluded that here too it is not arguable that Art 6 is engaged in relation to this 14-day exclusion. Mr McKendrick has assembled an impressive array of authority but, as he recognised, none of it is precisely in point. As far as Art 6 is concerned, the crucial point is that the right in question must be the object of the dispute. I accept Mr Sheldon's submission, based on the decision in Albert and Le Compte v Belgium (1983) 13 EHRR 415, that it is not enough that a right to reputation is affected by a proceeding. The right to reputation must be an object of the proceedings.*"

3.4 Beatson J was able to dismiss Schieman LJ's remarks in S above as "*anticipating what might happen if the matter came before the Strasbourg Court*" and no more.

3.5 The most recent case on this is R (ota LG) v The IAP for Tom Hood School and Others [2009] EWHC 369 (Admin). The Claimant in this case argued Article 6 was engaged either or both as a civil or criminal right in relation to a permanent exclusion which arose out of circumstances in which the Claimant's son, V, was found to have been in possession of a knife. The civil right under Article 6 was this time based upon V's right to "*continue the studies he had begun at the school*" following the ECHR decision in the case of Emine Arac v Turkey (Application # 9907/02-23). In that case the ECHR held Article 6 was engaged when the applicant applied to study at university because:

> *Given the importance of the applicant's right to continue her higher education…the Court does not doubt that the limitation in question, imposed by the regulations in issue, fell within the scope of the applicant's personal rights and was therefore civil in character.*

3.6 Silber J rejected the contention this authority assisted the Claimant. He held Arac to be distinguishable on the basis in Turkey there was a constitutional right to

education in Turkish law. In fact the judge took the view Arac confirmed the long held EHCR position that the right to education is a public law right, see Simpson v UK(1989) 64 DR 188.

3.7 Silber went on to hold there was "overwhelming and clear authority" that any A2P1 rights were unaffected by the Panel's decision to uphold the permanent exclusion. Likewise he comprehensively rejected the applicability of Article 8 in this context.

3.8 The Claimant also unsuccessfully argued a criminal charge was being determined during the exclusion process. Engel v Netherlands [1976] 1 EHRR 647 laid out three criteria for determining whether proceedings should be classed as criminal for the purposes of Article 6: i. classification of the proceedings in domestic law; ii. nature of the offence; and iii. severity of the penalty. Despite the fact possession of a knife is a criminal offence the judge was wholly un-persuaded Article 6 was engaged, in part because he took the view exclusion were a "regulatory" part of the education system (and relied upon authority which took the same approach in rejecting the applicability of Article 6 in director disqualification proceedings).

3.9 Cases which have considered to what extent exclusions have infringed Article 2 of Protocol 1 have faired little better. The first sentence of A2P1 states "[No] person shall be denied the right to education". A breakthrough in the successful application of human rights in the education law field appeared to be heralded by the Court of Appeal's decisions in Ali v Lord Grey [2006] 2 WLR 690 and R (ota Begum) v Denbigh High School [2006] 2 WLR 719. In Ali the claimant was excluded from school between March and June 2001 following an allegation of arson. He was provided with work at home between these dates. In June criminal proceedings were discontinued and he was invited to return and a meeting was organised which his parents failed to attend. In October he wished to return but by then he had been removed from the school roll. He filed a claim for damages

under the Human Rights Act 1998. The Court of Appeal found in his favour, reasoning that: the initial period of exclusion was unlawful as it was indefinite, however, when more than 45 days had passed (the maximum period of fixed term exclusion under English law) the Claimant's right to education was denied him. This reasoning sat uncomfortably with the fact before and after the 45 days the Claimant was being provided with the same level of education – i.e. work sent home.

3.10 The House of Lords took a radically different and simpler approach. Lord Bingham said:

> *"… the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil … The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?"*

3.11 This approach leaves little content to A2P1. Lord Bingham's approach (and particularly that of Lord Scott) was to challenge the agreed position between the parties - the unlawfulness of the exclusion, ignoring as it had the statutory guarantees at that time found in the Schools Standards and Framework Act 1998. As Lord Scott said: *It seems to me clear that the management powers of a head teacher enable him or her to keep a pupil temporarily away from the school for reasons that have nothing to do with discipline."* This would appear to turn the

facts of the case on its head: can arson really have “nothing to do” with discipline?

3.12 Human rights arguments also failed in the Begum. The Court of Appeal held the claimant had been unlawfully excluded for her failure to comply with the school’s dress code and as such her A2P1 and Article 9 rights had been infringed. The House of Lords overturned the Court of Appeal. There was no infringement of A2P1. Lords Bingham, Scott and Hoffman refused to accept Begum had ever been excluded; B had absented herself from school.

3.13 The effect of these decisions appears to effectively limit the scope and effectiveness of A2P1. The Court of Appeal revisited the matter in A v Essex County Council [2008] EWCA Civ 354. This case involved a child with severe special educational needs which, in part, manifested itself in challenging behaviour. Between 2001 and January 2002 the Claimant’s statement of special educational needs named a school for children with severe learning difficulties. Eventually the school notified the claimant’s parents it could not meet their son’s needs and he was sent home pending further assessment. Some work was sent home. He did not take up another school placement until July 2003 and as a result claimed damages for the 19 months of education he had missed and on the basis his exclusion from his school was unlawful. Sedley LJ concluded there had been no unlawful exclusion and that following Ali this was simply “unarguable”. Further he said in relation to A2P1 that:-

> *All the speeches [in Ali] recognized that [Article 2 of the First Protocol] confers or recognizes only a right of access to such system of education as each member state provides. Lord Bingham (para 24) spoke of a right under A2P1 of “effective access to such educational facilities as the state provides for such pupils [as the claimant]”. Lord Hoffmann (para 57) considered that a breach must involve denial of “the basic minimum of education available under the domestic system”. There is a possible tension between these two formulations, but it is not a tension*

which affects the present case because [the claimant's] case is that [he] was subjected, either literally or substantively, to "complete exclusion from the system".

3.14 It conforms with the earlier House of Lords decision in L v J School [2003] ELR 309. In this case the school did not fully reintegrate the claimant after a successful exclusion appeal because of the threat of industrial action on the part of school staff. The House held the statutory construction of reinstatement meant no more than the end of the exclusion and the status quo ante need not be fully rearranged. The Claimant spent several months being educated in isolation alongside the head teacher's office. A parallel human rights challenge also failed as this treatment did not amount to a breach of A2P1.

3.15 Similarly in X v C Local Education Authority, unreported, 28 November 2005, the Court extended the principle found in L v J. The pupil in this case had been excluded and then reinstated following a successful appeal to the IAP. He remained out with the normal classroom environment two years after he was reinstated. He claimed this amounted to a breach of A2P1 and Article 8. The Article 8 claim was based upon the need for the pupil to fully integrate to aid his psychological development with his peers. The judge dismissed both human rights claims. The education on offer was sufficient and the child's rights had sufficiently been taken into account, held the judge.

4 Different Treatment in Education

4.1 In DH V Czech Republic the applicants were 18 Roma children. They were all educated out with mainstream schools in varying types of special schools. Some of the children's parents had requested they be placed in special schools and all had consented to the transfers. Statistics demonstrated that in the Ostrava area of the Czech Republic, 56 % of children in special schools were Roma, whilst the Roma only made up 2.26 % of the Ostrava population. The Grand Chambers of

the ECHR concluded there had been no direct discrimination of A2P1 when read with Article 14 but that the state was guilty of indirect discrimination by placing the children in special schools. Such discrimination could not be justified, in large part because there was a risk of bias against the Roma in the tests used to determine school placement and also because parental consent was insufficient as the court did not believe "*the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent*". Consent to racial discrimination was contrary to public policy in any event.

4.2 The Court was fully prepared to rely upon statistical evidence (which was from an official source and the contents of which was not disputed by the Czech Government) to make findings in relation to indirect discrimination.

4.3 Some members of the Court were however, appalled. Judge Borrego Borrego in his dissenting opinion trenchantly stated:

> How cynical: the parents of the applicant minors are not qualified to bring up their children, even though they are qualified to sign an authority in favour of British and North American representatives whom they do not even know!
>
> …
>
> [18] Any departure by the European court from its judicial role will lead it into a state of confusion and that can only have negative consequences for Europe. The deviation from the norm implicit in this judgment is substantial and the fact that all Roma parents are deemed unfit to educate their children is, in my view, insulting. I therefore take my place alongside the victims of that insult and declare: '*Jsem cesky Rom*' (I am a Czech Roma)."

4.4 Despite some validity in this criticism, the principle established in DH is likely to be used before the UK courts some time soon (it was referred to in Watkins Singh and also in R (E) v Governing Body of JFS and Others [2008] EWHC1535).

4.5 DH undoubtedly caused some waves and a similar point came before the ECHR in Orsus v Croatia (Application Number 15766/03). The applicants were children who were educated in Roma only classes when in primary school. They claimed a variety of different forms of education, social and psychological harm backed up by professional reports and statistics. They claimed a breach of Article 3, Article 6 and A2P1 taken together with Article 14.

4.6 The claim in relation to Article 3 was robustly dismissed, given the individual circumstances of the case. The Court did say however:

> *The Court does not in principle exclude that treatment based on prejudice against an ethnic minority may fall within the ambit of Article 3. In particular, the feelings of inferiority or humiliation triggered by discriminatory segregation based on race in the field of education could, in the exceptional circumstances of an individual pupil, amount to treatment contrary to the guarantees of Article 3 of the Convention.*

4.7 The Court went on to hold that Article 6 was engaged because of the applicants' right not to be discriminated against on the grounds of race (this was guaranteed in the Croatian constitution). A breach of Article 6 was found on the basis of the length of time the proceedings took before the Croatian Constitutional court.

4.8 A claim was also made that A2P1 was violated on its own account because the applicants were educated in Roma only classes which resulted in them having lower chances of educational success because of their initial years in the segregated classes. This was rejected because the Court took on board the fact the applicants were educated apart because of their poor command of Croatian, the fact that regular transfer took place from Roma only classes to mixed ones and the fact the Applicants' parents in these cases never complained or sought a transfer.

Further the Court was clear there was no denial of the parents' respect for their philosophical or religious convictions.

4.9 The Court observed the A2P1 with Article 14 claim look at first glance as if it were similar to DH but rejected this contention and distinguished the two cases because: Roma children were not placed in schools for the mentally challenged but were taught separately because of their poor Croatian language skills. ("In the Court's view placing a disproportionate percentage of children belonging to a specific ethnic minority in schools for the mentally retarded bears no comparison with placing Roma children in separate classes on the ground that they lack adequate knowledge of the Croatian language"). The Court also observed in DH the discrimination was based upon race whilst in Orsus the discrimination was based upon language skills, and as such the actions of the state were justified.

4.10 The Court also observed:

> *The Court wishes to reiterate with regard to the States' margin of appreciation in the sphere of education that the States cannot be prohibited from setting up separate classes or different types of school children with difficulties, or implementing special educational programmes to respond to special needs. The Court finds it satisfying that the authorities invested themselves in addressing that sensitive and important issue, and that the placement of the applicants in separate classes was a positive measure designed to assist them in acquiring knowledge necessary for them to follow the school curriculum.*

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