

## Education Law Update<sup>1</sup> Karen Steyn

### RELIGIOUS DISCRIMINATION

#### *(1) Dress Code*

1. In ***R (Watkins-Singh) v Governing Body of Aderdare Girl's High School & Rhondda Cynon Taf Unitary Authority*** [2008] EWHC 1865 (Admin), [2008] ELR 561 Silber J granted an application for judicial review of the defendant school's refusal to allow a Sikh pupil to wear a Kara bangle. It was sufficient that wearing the Kara was exceptionally important to her racial or religious identity (though not required), the claimant suffered particular disadvantage or detriment due to the ban. The arguments advanced by the school by way of justification were inadequate to address the exceptional importance of wearing the Kara given its limited visual impact (which differentiated the case from the recent high-profile cases involving the niqab and jilbab). The school had indirectly discriminated against the claimant contrary to the Race Relations Act 1976 and on religious grounds contrary to the Equality Act 2006. Article 8 of the ECHR had, however, not been breached.

#### *(2) School Closure*

2. In ***R (McDougal) v Liverpool City Council*** [2009] EWHC 1821 (Admin), [2009] ELR 510 the claimant applied for judicial review of the Council's decision to close a non-faith comprehensive school, whilst keeping open one other non-faith comprehensive and two Catholic voluntary-aided schools. The claimant contended that the closure discriminated, contrary to article 14 ECHR, against parents and pupils who were not Catholics, in the enjoyment of the right to education under art.2 of protocol 1. Silber J rejected the claim. He held that art.2 of protocol 1 was not even engaged because the claimant's children did not have a right to be educated at any particular school. But in any event, the school closure had a legitimate aim, namely to ensure a reduction of surplus places and that education was provided at more successful and sought after schools and it was justified.

#### *(3) Admissions Policy*

3. More recently, in ***R (E) v JFS Governing Body*** [2009] UKSC 15, [2010] 2 WLR 153, the Supreme Court ruled that a Jewish school giving admission priority to orthodox Jews, as recognised by the Office of the Chief Rabbi, was directly discriminating on grounds of ethnic

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origin, contrary to s.1 of the Race Relations Act 1976. The issue was not a simple one, as evidenced by the fact that the nine judge Supreme Court were divided five:four over the result. E was Jewish by descent and his wife (W) had converted to Judaism before their son (M) was born, but her conversion was through a non-orthodox synagogue. JFS's admissions policy gave priority to children whose status as Jews was recognised by the Office of the Chief Rabbi. As orthodox Judaism defines its membership by reference to the maternal line, and W's conversion had not been through an orthodox synagogue, M was not regarded as Jewish by the Office of the Chief Rabbi and so was not offered a place at the school.

4. The majority (Lord Phillips PSC, Baroness Hale and Lords Mance, Kerr and Clarke JJSC) considered that M was rejected because of his lack of descent from a particular ethnic group. However benign JFS's motives, the law admitted of no defence to direct racial discrimination. It was accepted that the motivation for the admissions criteria was religious, but motive was not relevant where the criteria adopted are *inherently* discriminatory on ethnic grounds.<sup>2</sup> The majority took the view that a criterion which required an applicant to be descended in the maternal line from an Orthodox Jew was a test that discriminated on ethnic grounds.
5. The minority (Lord Hope DPSC and Lords Rodger, Walker and Brown JJSC) observed that the decision of the majority meant that there could in future be no Jewish faith schools which give preference to children who are, according to Jewish religious law and belief, Jewish. The admissions policy that JFS had been required to adopt following the Court of Appeal's decision, which followed the Christian model of giving priority according to religious observance, required JFS to apply a "non-Jewish definition" to the question of who is Jewish.
6. It is also noteworthy that the interim hearings in this case resulted in a significant ruling – [2009] UKSC 1 – about the Legal Services Commission's power to cease to fund a case at the appellate level.

## **DISABILITY DISCRIMINATION**

(1) SEND/IAP

7. The Court of Appeal judgment in ***R(N) v London Borough of Barking & Dagenham London Independent Appeal Panel*** [2009] EWCA Civ 108 arose in the context of an exclusion from X school of a child, N, who was diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD).

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<sup>2</sup> Where the criteria are not inherently discriminatory, a discriminatory motive may be relevant to establish direct discrimination.

8. N's ADHD was sufficiently severe to amount to a disability under the DDA. N was subjected to a number of fixed term exclusions. Her mother complained to SENDIST which upheld her complaint finding that N's behaviour was more likely than not a result of her ADHD, that the school was aware throughout the relevant period that N was disabled, and that the exclusions were for reasons that related to N's disability. SENDIST concluded that a 16 day exclusion in November 2005 could not be justified and that, as it considered that reasonable adjustments in the form of contacting the consultant treating N or an educational psychologist for advice had not been made, other lesser exclusions also could not be justified. N had been unlawfully discriminated against.
9. In ***Governing Body of X School v SP & SENDIST*** [2008] EWHC 389 (Admin), [2008] ELR 243 Michael Supperstone QC (sitting as a Deputy High Court Judge) rejected the school's appeal, applying the (then current – see further below) test identified by the Court of Appeal in *Lewisham London Borough Council v Malcolm* [2007] EWCA Civ 763.
10. Events had, however, moved on and N was permanently excluded on 9 November 2006, a decision that was upheld by the governors on 17 November 2006 and by the IAP on 2 February 2007. The IAP declined to admit SENDIST's decision in evidence. It concluded that N was disabled but was not treated less favourably and the school had not failed to make reasonable adjustments as the school had (by then) put in place a number of strategies to help N to cope with her condition.
11. In ***R (N) v Independent Appeal Panel for London Borough of Barking & Dagenham*** [2008] EWHC 390 (Admin), [2008] ELR 280 the ground of challenge essentially was that the IAP erred by not taking account of the SENDIST decision. The Deputy Judge rejected that argument because the IAP was considering different incidents, different evidence, different school years, the evidence of different witnesses and exclusions before N's statement took effect.
12. N appealed to the Court of Appeal (***R(N) v London Borough of Barking & Dagenham London Independent Appeal Panel*** [2009] EWCA Civ 108). The appeal raised two points: first the point that the IAP should have taken the SENDIST decision as its starting point; and secondly that the IAP gave inadequate reasons for rejecting the complaint of disability discrimination. The Court of Appeal rejected both contentions. As to the first, Toulson LJ stated that there "was no necessary or indeed logical basis for taking SENDIST's decision as a starting point for deciding issues which the IAP had to determine upon which it had heard different evidence". As to the second, the Court of Appeal ruled that the House of Lords' decision in the housing context, in *Lewisham LBC v Malcolm* [2008] AC 1399, that the proper comparator was someone who had behaved in the same way as the person concerned, but did not suffer from that person's disability, applied.
13. The Court of Appeal gave three reasons for applying *Malcolm* to school education. First, there is a strong presumption that where the same formula is used in different parts of the same Act it is intended to bear the same meaning. Secondly, the fundamental reason which caused the House

of Lords to overrule the construction adopted by the Court of Appeal in *Clark v Novacold* [1999] ICR 391 applies equally to the educational provision in s.28B(1) of the Disability Discrimination Act 1995. This was that on the *Novacold* construction, whenever the reason for a person's treatment related to his disability he would be logically bound to be able to satisfy the requirement that his treatment was less favourable than would be accorded to others to whom the reason did not apply. The comparative test would not be a test at all if N could compare herself to someone who had not committed serious breaches of the school's behaviour policy. Inevitably, N would have been able to show that by being excluded she was treated less favourably than such a comparator. Thirdly, there was less reason to be concerned in the context of section 28B of the DDA that the *Malcolm* construction gave a narrow meaning to discrimination because there is the alternative form of discrimination based on failure to make reasonable adjustments.

(2) *Excluded conditions*

14. In *X School v SENDIST* [2009] EWHC 1842 the appellant school governing body appealed against a decision of the f tribunal that a ten-year-old school pupil (J) had been the subject of disability discrimination. J had ADHD which caused him behavioural difficulties at school, culminating in his exclusion following his assault on a member of staff. The tribunal decided that J's assault on the staff member was consistent with the behaviour of a child with ADHD and therefore that he had been excluded by reason of his disability. The tribunal further found that the governing body had failed to make a reasonable adjustment under s28C of DDA by failing to enlist the advice and support of a specialist team to implement measures for the management of pupils with ADHD. The governing body argued that under reg. 4(1) of the Disability Discrimination (Meaning of Disability) Regulations 1996 a tendency to physical abuse of other persons was not to be treated as a disability under the DDA and there could be no obligation to make a reasonable adjustment for an impairment that was not a disability. The parents submitted that the correct interpretation of reg.4(1) was that it applied only to free-standing conditions and not to consequential symptoms or manifestations of an already protected impairment, and that J's behaviour was related to an underlying protected disability.
15. Lloyd Jones J dismissed the appeal. He said that the scope of the protection conferred by the DDA was to be decided on the basis of the interrelationship of s. 1 of the 1995 Act and reg. 4(1) of the 1996 Regulations having regard to the legislative purpose of those provisions. There was evidence that each of the impairments identified in reg. 4(1) was capable of existing either as a free-standing condition or as a derivative symptom from another disorder. The natural meaning of the word "condition" was wide enough to include both a free-standing condition and symptoms or manifestations of an underlying impairment, just as the word "impairment" in schedule 1 to the DDA was appropriate to include both an illness and its manifestations. The protection of the legislation was not intended to extend to the excluded conditions whether or not they were manifestations of an underlying protected impairment. J's conduct amounted to a tendency to physical abuse of other persons within the meaning of reg. 4(1) and so was excluded. But it then

became necessary to consider whether the discrimination found by the tribunal related to the excluded condition or to the protected disability, or both. The tribunal had been correct to find that the failure to make a reasonable adjustment had related to a protected disability. The measures suggested by the tribunal were not limited to controlling a tendency to physical abuse; they included measures for the general management of pupils with ADHD. There had been unlawful discrimination arising from the failure to take reasonable steps to ensure that J was not placed at a substantial disadvantage by comparison with pupils who were not disabled.

*(3) School Transport*

16. The question of whether school transport was an “auxiliary aid or service” and hence falling outside the scope of the duty to make reasonable adjustments under the DDA 1995 s.28C(2)(b) and 28G(3)(b) was considered in ***D v Bedfordshire County Council & SENDIST*** [2008] EWHC 2664 (Admin), [2009] ELR 1.

17. Section 28G of the DDA provides, so far as is material, that:

“(2) Each authority must take such steps as it is reasonable for it to have to take to ensure that, in discharging any function to which section 28F applies—

...

(b) disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled.

(3) That does not require the authority to—

...

(b) provide auxiliary aids or services.”

18. D suffers from Asperger’s Syndrome. He was transported to school and back for free in a bus with other children. The bus was provided by the local authority free of charge pursuant to its duties under s.508B of the 1996 Act as it was considered necessary to secure suitable home to school travel arrangements for the purpose of facilitating his attendance at the relevant educational establishment. The school day would finish at 3pm. D developed an interest in ‘Tech Club’, an after-school theatre production club. This would mean D staying at school till 4.30pm one day a week, more if a production was coming up. D’s parent’s asked the local authority to adjust the time of the school transport pick-up on Tech Club days. In reality this would have meant a taxi being used specifically for D. The authority refused and D’s parents made a complaint under the DDA to SENDIST alleging that the failure to adjust the transport times placed D at a substantial disadvantage and was an unlawful failure to make reasonable adjustments. SENDIST dismissed the claim holding that the transport was an auxiliary aid or service. D’s parents appealed to the High Court.

19. Sir George Newman considered that the provisions were “labyrinthine” and “particularly challenging” [39] but the tribunal had erred in its approach. His Lordship considered that it was “plainly wrong” for SENDIST to treat ‘the provision of transport’, a function of an LEA under s.508B of the 1996 Act, as ‘an auxiliary aid or service’ [27]. Tech Club and other after-school club

activities were activities at an educational establishment which must be available to all [28]. Since D could not be prevented by the school from attending Tech Club, the correct question was whether he could be prevented from attending by the way in which the LEA discharged its transport function and the duty which it owed to him [29]. So far as D was concerned, what he sought was not something additional or new, but an adjustment to the time at which transport was provided to him on certain afternoons [35]. If that was what he was entitled to, being a disabled child, and the alteration amounted to an adjustment, it did not cease to be an adjustment and become an auxiliary aid or service because the LEA was under an obligation to provide transport for three other children whose needs required them to travel at a different time. The tribunal was wrong to conclude that the step requested as a reasonable adjustment amounted to a request for an 'auxiliary aid or service' [36].

20. As to the reasonableness of the requested adjustment, the Judge considered (at [37]) that the tribunal's consideration had been based on the existence of a policy to provide for all pupils in an efficient and inclusive manner and the 'implications and consequences' of departing from it. The existence of a well thought out policy would not necessarily constitute a substantial factor. Care had to be taken not to settle upon a policy for all children (including disabled children) which left disabled children at a disadvantage. There had to be a substantial reason for the failure to make the adjustment in the particular case. In any one case, there might be issues as to whether the implication or consequences of departing from the policy could amount to a substantial reason for not adjusting the arrangements when, on one view, the direct consequences were, in financial terms, relatively insubstantial. The reasonableness of the failure to adjust also had to be taken into account, paying regard to the consequences of the failure in the particular case.
21. The Judge concluded that the matter had to be remitted as the tribunal's erroneous conclusion on 'auxiliary aid and service' had meant that not all relevant areas of fact had been considered in relation to justification, which was the local authority's alternative position [38].

## **ADMISSIONS**

22. In ***R (M) v Independent Appeal Panel of Haringey*** [2009] EWHC 2427 (Admin), Lord Carlisle granted judicial review of the IAP's refusal of a school place, on the grounds that the IAP had incorrectly applied the two stage test set out in the Code of Practice. The parent had applied for her child to be placed in a popular and oversubscribed secondary school. In accordance with the admissions criteria, the child's social need for a place at the school, rather than a school nearer her home where there was reason to believe she would suffer from violence, threats and bullying, was supported by an appropriate independent professional.

23. The judge held that the IAP had misdirected itself in failing to apply the correct test at the first stage. The first stage was not a comparative stage in which selection could be made between the parental choice and named other schools, but was a process in which the parental choice of school alone was tested against the mandatory requirements of the code ie (i) have the admissions arrangements been correctly applied in the individual's case and (ii) would 'prejudice' arise if the child was admitted. It was not sufficient to say that the child's admission would take the school over its set limit. Consideration had to be given to how, if at all, this would in fact cause prejudice.
24. The IAP had also misdirected at the second stage by imposing a burden on the parent to show exceptional reasons such as to compel the school to admit the child. The Court held that the second stage required a balancing of the arguments, and the true evidential burden was for the parent to show that their grounds for admission of the child outweighed any prejudice to the school. In addition, the IAP was not entitled to take into account the suitability of other schools that had not actually been offered.

## **EXCLUSIONS**

### *(1) Disability Discrimination and Exclusion*

25. Given the number of exclusion cases that involve some element of alleged disability discrimination the ***Barking & Dagenham*** case referred to above is plainly of great significance in the exclusion context.

### *(2) Article 6 and Standard of Proof*

26. Regulation 7A of the Exclusion Regulations provides that:

"Where it falls to

- (a) the head teacher, in exercise of the power conferred by section 52(1) of the 2002 Act,
- (b) the governing body, in exercise of functions under regulation 5 or
- (c) an appeal panel constituted in accordance with paragraph 2 of the Schedule, in exercise of functions under regulation 6,

to establish any fact, any question as to whether that fact is established shall be decided on a balance of probabilities."

The naive might think that this fairly straightforwardly established the standard of proof for IAP hearings. However in ***R (V) v Independent Appeal Panel for Tom Hood School & Others*** [2010] EWCA Civ 142 reg.7A came under scrutiny.

27. V was permanently excluded after a fight in which he was verbally abusive (something he accepted) and was in possession of a knife (something he disputed). The governors, and then the

IAP, upheld the permanent exclusion finding that V had been in possession of a knife. V sought to challenge the IAP's decision by way of judicial review, primarily on the basis of the standard of proof and in particular the alleged application of Article 6 of the ECHR (right to a fair hearing). Silber J dismissed the application ([2009] EWHC 369 (Admin)) and the Court of Appeal dismissed the appeal.

28. V's first line of argument was that Article 6 applied on the basis that the IAP had determined his civil right not to be excluded from the school without good reason. The Court of Appeal held that V lacked a civil right to be educated at the school, and so the IAP had not determined such a right. The reliance on Article 2 of the First Protocol, together with s.6 of the Human Rights Act 1998, as demonstrating that a right to education was recognised under domestic law did not assist V. The right to education does not guarantee education at a particular institution: *Ali v Lord Grey School* [2006] UKHL 14, [2007] AC 363.
29. V's case was next put on the basis that the IAP was determining a criminal charge so as to engage Article 6(2). Applying the Strasbourg and domestic authorities on what constituted a criminal charge, The Court of Appeal rejected this argument concluding that exclusion is a disciplinary matter. In deciding whether the IAP had determined a criminal charge, the focus had to be on the nature of the offence and the degree of severity of the penalty risked. The sanction of V's permanent exclusion was insufficiently severe to render the charge against him criminal..
30. The Court of Appeal observed that even if Art.6 had applied, V's contention that the criminal standard of proof applied would have been rejected. In *obiter* remarks, the Court of Appeal observed that the decision in *R (S) v YP School* [2003] EWCA Civ 1306, [2004] ELR 37 that the appropriate standard in deciding to uphold an exclusion was the criminal one was not a robust authority in relation to the requirements of Art.6, and was inconsistent with the more recent House of Lords authority of *In re B (Children) (Sexual Abuse: Standard of Proof)* [2009] 1 AC 11 in which Lords Hoffmann, Rodger of Earlsferry and Walker of Gestingthorpe and Baroness Hale of Richmond agreed that there was only one civil standard of proof – balance of probabilities.
31. Finally, the Court of Appeal rejected V's argument that regulation 7A was ultra vires in that a rule about standard of proof was one of evidence and not procedure, and therefore not permitted to be made pursuant to s.52 of the Education Act 2002. The Court of Appeal held that it was intra vires. The procedure on appeals was synonymous with the processing of appeals. A necessary part of the processing was to apply a particular standard of proof in reaching an answer.

### (3) IAP Reasoning

32. In ***R (RW) v Independent Appeal Panel of Harrow London Borough Council*** [2008] EWHC 2433 (Admin) W suffered from ADHD and there were a number of incidents involving his behaviour. The head teacher decided to exclude W as he presented a danger to himself and

others. The IAP decided that as the head teacher witnessed W's behaviour she did not have to investigate incidents. HHJ Inglis (sitting as a Deputy High Court Judge) accepted that normally the Guidance would require the child to give an account and that a decision should not be taken in the heat of the moment, but the IAP had been entitled not to overturn the exclusion where it found that the head teacher had witnessed the behaviour herself and was justified from previous incidents in not talking to W. As the fact of the behaviour had not been disputed before the IAP it was too late to question the head teacher's account of events in the Administrative Court. The Deputy Judge further held that while the IAP had erred in concluding that W's conduct was not related to his ADHD, nonetheless the panel had gone on to conclude that W was not less favourably treated and had considered that reasonable adjustments had been made.

33. The case is a reminder of two important points – guidance is guidance and can be departed from if there is good reason, and it is prudent for an IAP (if it can) to make findings in the alternative on reasonable adjustments and justification if it is not persuaded that behaviour is disability-related, lest that conclusion be overturned.

*(5) Privacy and IAP proceedings*

34. A sadly not that unusual set of circumstances gave rise to an unusual question for the Court of Appeal to consider in ***H v Tomlinson*** [2008] EWCA Civ 1258, [2008] ELR 14. B suffered from Asperger's Syndrome, Obsessive Compulsive Disorder and behavioural difficulties which resulted in him behaving violently. He was placed in a mainstream school, Campus School. He was permanently excluded by the head teacher. That decision was upheld by the governors. On appeal to the IAP the panel overturned the exclusion decision but refused to reinstate him. In his written report to the IAP the head teacher stated that "the police had to arrest B at his father's house for violent and dangerous behaviour" and at the hearing said that "two very reliable parents had seen him led away in handcuffs". B and his parents considered these two statements to be untrue. It was however the case that there had been a number of other incidents of violence.
35. B, through his mother Mrs H, sued the head teacher, Mr Tomlinson, for defamation and was given permission to amend his claim to allege breach of the Human Rights Act 1998 through use of private information. On the defendant's application to strike out the claim the defamation claim was struck out as the sting of the untrue words was the same as the remaining allegations which were true. The claim alleging breach of Article 8 of the ECHR was allowed to proceed.
36. Mr Tomlinson appealed against the refusal to strike out the Article 8 claim. The Court of Appeal (Ward LJ giving the judgment of the Court) allowed the appeal and struck out the Article 8 claim, although directing some fairly trenchant criticism at the school for its failure to offer an apology until it was before the Court of Appeal. Ward LJ considered that as the panel referred to B on several occasions showing violence to his mother he could not reasonably expect that his being

arrested for violent disorder at his father's house would not be made public to the statutory panel considering his exclusion (Ward LJ incorrectly refers to "suspension") [21]. B's mother, Mrs H, "confuses the evidential question of relevance to the panel's deliberations with the different question of whether B could reasonably expect that his headmaster would not be at liberty to reveal that in addition to his history of violence at school he been violent at home" [22]. B's real complaint was that what was said was untrue, but the defamation claim had been struck out (see [23]).

37. Further, the alleged misconduct at his father's house and B's removal by the police were not private matters – "These were matters in the public domain reasonably capable of being deployed in an inquiry to decide what to do with an unruly boy" [27].

### **SCHOOL ATTENDANCE ORDER**

38. In ***Oxfordshire CC v L*** (3 March 2010) the Divisional Court allowed the Council's appeal by way of case stated against a decision of a magistrates' court acquitting a parent of an offence of failing to comply with a school attendance order made in respect of her child. The magistrates had acquitted the parent because they considered that the authority had not proved beyond reasonable doubt that the child was not receiving suitable home education. The Divisional Court held that the magistrates had erred in imposing the burden of disproving the defence on Oxfordshire. Section 443(1) was straightforward and it provided a defence to a parent, who would otherwise be guilty of an offence of failing to comply with a school attendance order, through that parent proving that the child had been able to receive a suitable education otherwise than at school. The burden of establishing the defence was firmly on the parent and not on the authority.

### **SPECIAL EDUCATIONAL NEEDS**

#### *(1) Procedure*

39. In ***R (JW) v Learning Trust*** [2009] UKUT 197 (AAC), the Upper Tribunal (Administrative Appeals Chamber) considered an application for judicial review of the Trust's refusal to make interim provision for the claimant pending the hearing of his appeal. The claimant suffered from an autistic spectrum disorder and associated social communication difficulties. He was also an Orthodox Jew and wanted an independent Orthodox Jewish special school as the named school. The Trust decided, for reasons of cost, that his placement should be at a local authority maintained special school. As the First-tier Tribunal would not hear his appeal until two months into the new school term, the claimant brought this application for interim provision. The Upper Tribunal held that although neither the Education Act 1996 nor the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 provide for the granting of interim relief pending a tribunal decision, the Upper Tribunal, as a court with a judicial review

jurisdiction, had power to grant it. But such interim relief should only be granted in exceptional circumstances and there were no exceptional circumstances in the instant case.

40. In ***R (TW) v Kent County Council*** [2009] EWHC 1790 (Admin), [2009] ELR 536 Silber J rejected a claim that the decision of the council to refuse to amend the claimant's statement of special educational needs so as to name the school he was attending, Summerhill School, could be challenged by way of judicial review. It was a complete answer to this claim that the parents could have requested re-assessment pursuant to s.382(2) of the 1996 Act and, if they were dissatisfied with the re-assessment decision, they would have been entitled to appeal to the First-tier Tribunal. The court also rejected the argument that the council's failure to take attendance proceedings against the parents showed that they had accepted that Summerhill was suitable for their child. The council's reasons for not pursuing proceedings in the magistrates' court were perfectly understandable and did not indicate that the council regarded Summerhill as suitable to meet the child's special educational needs.
41. In ***R (MG) v London Borough of Tower Hamlets*** [2008] EWHC 1577 (Admin), [2008] ELR 523, Langstaff J held, on an application for judicial review, that SENDIST was entitled under reg.24(1) of the SEND Regulations to direct that a local authority make a child available for examination by a psychologist and a speech and language therapist. The local authority was not entitled to decline to implement such a direction in purported compliance with its obligation under s.22 of the Children Act 1989 ("CA 1989") to safeguard and promote the welfare of the child – compliance with such a direction was a way to discharge its obligations under s.22 of the CA 1989.
42. A rather spectacular example of SENDIST getting the procedure wrong is found in ***London Borough of Islington v LAO & SENDIST*** [2008] EWHC 2297 (Admin). L was a child with special educational needs in a mainstream primary school. The local authority carried out a statutory assessment prior to secondary transfer but declined to issue a statement, instead issuing a 'note in lieu'. L's mother appealed to SENDIST. The hearing took place on 23 May 2008 (i.e. only shortly before secondary transfer). After 20 minutes and without hearing from the authority's two witnesses, the deputy head teacher of L's primary school and an educational psychologist, the tribunal gave an oral decision allowing the appeal. It appears that the tribunal was highly exercised by the approach of secondary transfer in circumstances where a secondary school had not been identified yet. That, of course, was not what they were being asked to consider.
43. HHJ Waksman QC (sitting as a Deputy High Court Judge) considered that the hearing "had taken an unusual course" [19]. The Deputy Judge confirmed that there are two aspects to the test for making a statement under s.324 of the Education Act 1996 ("the 1996 Act") and para.8:1 of the SEN Code of Practice:

"The first is to consider the degree of the child's learning difficulty, which of course will include an assessment of the child's present progress or otherwise in relation to any treatment he has

received so far and, secondly, what the special educational needs as a result of those difficulties are.” [6]

44. The Deputy Judge concluded that the tribunal had either not applied the test or not applied it with the thoroughness that could reasonably be expected [61]. He also concluded that the procedure adopted by the tribunal was manifestly unfair to the local authority as no witnesses were called and no submissions were invited (see [71]-[75]). The Tribunal had also failed to take into account relevant factors and had failed to give reasons that related to the underlying test [76]-[77]. The tribunal’s decision was quashed and the matter remitted to a differently constituted tribunal.
45. The SENDIST has of course been incorporated into the First-tier Tribunal (Health, Education and Social Care Chamber). The procedure is governed by the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chambers) Rules 2008 (SI 2699/2008). The 2008 Rules are supplemented by the Practice Direction: Health, Education and Social Care Chambers Special Educational Needs Disability Discrimination in Schools Cases 2008. Both 2008 Rules and the Practice Direction are available on the SENDIST website<sup>3</sup>.

*(2) Section 319: special educational provision otherwise than in school*

46. The correct approach to s.319 of the 1996 Act was considered in ***TM v Hounslow London Borough Council & SENDIST*** [2008] 2434 (Admin).
47. Section 319 provides that:

**“319 Special educational provision otherwise than in schools**

(1) Where a local education authority are satisfied that it would be inappropriate for—

- (a) the special educational provision which a learning difficulty of a child in their area calls for, or
- (b) any part of any such provision,

to be made in a school, they may arrange for the provision (or, as the case may be, for that part of it) to be made otherwise than in a school.

(2) Before making an arrangement under this section, a local education authority shall consult the child’s parent.”

48. T is autistic and had been educated at home on an ABA programme. The local authority considered that T should be educated in school. SENDIST concluded that a school could meet T’s needs and ordered a school placement.
49. T’s mother’s appeal raised three issues: (1) that SENDIST should have interpreted the word “inappropriate” in such a way that although a school could meet needs it would not be appropriate

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<sup>3</sup> <http://www.sendist.gov.uk/RulesLegislation/index.htm>.

to educate T in school – a comparison of the school and provision at home was required before a determination of what was appropriate; (2) the tribunal’s approach was contrary to s.9 of the 1996 Act; and (3) the tribunal had power to use s.2 of the Local Government Act 2000 (“the LGA 2000”) to order provision at home.

50. HHJ Inglis (sitting as a Deputy High Court Judge) rejected these arguments. His conclusions on s.319 are at [26]. He rejected the suggestion that the word “inappropriate” in s.319 involves drawing a balance between different types of provision. The section is aimed at directing a child into school if it can meet his Part 3 needs. He considered that Richards J’s judgment in *T v Wiltshire County Council* [2002] ELR 704 was authority that should be followed and which rejected a general balancing exercise under s.319.
51. The Deputy Judge also held at [26(v)] that Richards J’s judgement at paras.38(2) & (3) of *T v Wiltshire* meant that s.9 does not assist the parent where the choice is between education at home and education at a school which is appropriate.
52. The parent’s fallback position was that even if s.319 did not lead to the requirement to name a school in Part 4 s.2 of the LGA 2000 (the “well-being power”) could be exercised by the tribunal to specify home-based programme’s under Part 3. Again the Deputy Judge rejected this argument because the LEA and the tribunal in formulating a statement or considering it on appeal:

“... are not required independently of the framework prescribed by Part IV to consider whether to use the section 2 power to make provision for the education of the child concerned. The decision making process required by Part IV is incompatible with a general funding power the effect of which would be to subvert the outcome provided in a detailed scheme.” [30]
53. The Deputy Judge considered that the application of s.319 was not simply a resource question – “the duty is to direct the child into school unless school is inappropriate” [31]. Recognising that the exclusory effect of any prohibition, restriction or limitation on the putative exercise of s.2 powers must be clear, the Deputy Judge concluded that where s.319 provides the answer there is no power for s.2 to give a different result [32]. Alternatively, His Lordship considered that Part IV governed what must go in a statement, and even if the s.2 power is available in relation to a statemented child it cannot affect the contents of the statement or the consequent duties on an LEA.
54. TM’s parent appealed, only on the question of s.319, to the Court of Appeal (2009) 106(25) LSG 15 11<sup>th</sup> June 2009. The Court of Appeal allowed the appeal, adopting the following reasoning. In the context of the process by which a local authority promulgated a s.324 statement, s.319 required the local authority to consider whether it was inappropriate for special educational provision to be made in a school. It was not enough for a local authority to ask whether a school “could” meet a child’s special educational needs; rather, it was obliged to ask whether provision of education at a school was both suitable and proper having regard to all the circumstances of the individual case including, but not limited to: the child’s background and medical history; the

particular educational needs of the child; the facilities that could be provided at and away from a school; the costs of alternative educational provisions; and the child's reaction to education provisions. The exercise had to include consideration of the parents' wishes, but they could not be determinative except in the very rare case where there were otherwise equally balanced alternatives for the child's needs. It followed that it was wrong to conclude that once a school had been identified as meeting the educational needs of a child, it necessarily followed that, by virtue of s.319, the school had to be named in the statement of special educational needs. The matter was remitted to the tribunal for further consideration.

*(3) Section 9 of the 1996 Act*

55. A point concerning s.9 of the 1996 Act was considered by Stadlen J in ***Hampshire County Council v R & SENDIST*** [2009] EWHC 626 (Admin). Section 9, of course, provides that:

**“9. Pupils to be educated in accordance with parents' wishes**

In exercising or performing all their respective powers and duties under the Education Act, the Secretary of State and local education authorities shall have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.”

56. J has Autistic Spectrum Disorder and was educated at a mainstream school, Y school. His statement was reviewed in advance of secondary transfer and Z school, a maintained special school, was named in Part 4. Following an appeal to SENDIST the local authority was ordered to name the parent's preferred school, X School, in J's statement. The authority appealed and the parent cross-appealed. The dispute concerned the interpretation of s.9.

57. There was no material difference in cost between X School and Z School, however X school was operating at capacity. The tribunal considered that placing J at X school would affect the efficient education of other children because it was at capacity it was not obliged to place J there by virtue of para.3(3) of Sch.27 to the 1996 Act. However the tribunal considered that as there was no cost difference s.9 required it to respect parental preference and name X School.

58. The local authority contended that SENDIST had erred in considering s.9 by interpreting the words “efficient education and training” in that section to relate only to the particular child of the parents whose preference is in question.

59. Stadlen J accepted the authority's argument at [27]. He considered that “the question of incompatibility with the provision of efficient instruction is entirely general and at large and unlimited” [28]. He rejected the parent's submission that the local authority was trying to read into the provision words that the Parliamentary draftsman had not inserted, namely “...of the children with whom the child will be educated”. Rather, it was the parents who sought to add to the

wording of the provision by adding in "... of their children" [29]- [30]. Section 9 was intended to set out the limiting factors on unbridled regard for parental preference [35]. SENDIST had therefore erred in law [37].

60. Stadlen J also concluded that SENDIST had failed to exercise its discretion under s.9 by not balancing parental preference against competing factors and instead treating parental preference as determinative [40], [42].
61. However Stadlen J also allowed the parent's cross-appeal that SENDIST had erred in its approach to para.3(3) of Sch.27. The parent argued that before concluding that one of the exceptions to parental preference in para.3(3) was made out SENDIST had to find nothing short of incompatibility between naming X School and the efficient education of the children with whom J would be educated. Stadlen J accepted that the tribunal had failed to address the question of whether the impact on the efficient education of other children was so great as to cause incompatibility [50]. He provided detailed guidance at [57]-[67] on the approach that the tribunal should take when considering the appeal again on remission.
62. Note ***Slough LBC v SENDIST*** [2009] EWHC 1091 (QB) in which Plender J observed that section 9 should not be construed as requiring education to be provided in accordance with the wishes of parents when the parents were able to part-fund the placement so as to prevent the costs being regarded as unreasonable public expenditure. The general principle in s.9 did not detract from the specific rule laid down in s.348(2) that the local authority shall pay the whole of the fees payable in respect of the education provided for the child at school.

#### (4) *Reasons*

63. In the last few years the Court of Appeal has suggested an apparent relaxation on the requirements for SENDIST to give reasons (see *W v Leeds City Council & SENDIST* [2005] EWCA Civ 988, [2005] ELR 617).
64. The issue was considered again by the Court of Appeal in ***JH v East Sussex County Council*** [2009] ELR 161 in the context of the need for residential provision.
65. M suffered from Prader Willi Syndrome. It was agreed that she needed to be educated at a special school, but M's mother H considered that she needed a Waking Day Curriculum at a special boarding school, while the local authority considered a maintained day school would meet her needs. H appealed to SENDIST which endorsed the local authority's view.
66. H appealed from SENDIST. The appeal was considered by HHJ Inglis (sitting as a Deputy High Court Judge) (sub nom ***JH v East Sussex County Council*** [2008] EWHC 2418 (Admin)). The grounds of challenge were that SENDIST had not provided legally sufficient reasons for rejecting

the substantial professional support for H's case as to the need for a Waking Day Curriculum, and had applied the wrong test in asking whether a day school would provide a broadly appropriate education.

67. As to the need for a Waking Day Curriculum the Deputy Judge considered that the right question was asked, there was evidence on each side and the tribunal identified which side it preferred [34]. The conclusion was clear that educational provision could be supplied at the local authority's preferred day school with the extra therapy identified and non-educational support from the mother. So although the justification for the decision "was not spelt out... as well as it might have been" the reasons were not so inadequate as to be unlawful.
68. As to the second ground of challenge the Deputy Judge concluded that although the wording used by the tribunal was inapposite, the right question was asked [35]. Beyond that the mother's case had to be that the decision was perverse. Evidence was advanced by the local authority and it was the task of the tribunal to decide which evidence it preferred. It was not possible to say that there was no material on which they could come to the decision that they did [36]. The Deputy Judge also rejected the argument that the tribunal thought that the additional provision outside school was educational provision [40].
69. H appealed to the Court of Appeal. H contended that there was conflict between the requirements as to reasons laid down by Grigson J in *H v Kent County Council & SENT* [2000] ELR 660 and that of Wilkie J in *KW & VW v London Borough of Lewisham* [2007] ELR 11. Waller LJ (giving the lead judgment with which Scott Baker and Toulson LJ agreed) held at [14]-[15]:

"The submission, as I understand it, has elevated statements of Grigson J and Wilkie J taken on their own into propositions of law applicable in all cases and on that basis suggested there is an inconsistency. That, in my view, is an entirely wrong approach and it is right to deal with what I suggest is the proper approach at the outset. I would in so doing also suggest that despite its good intentions there are dangers in summarising what are suggested to be "requirements" identified in the authorities, as Beatson J was persuaded to do in *R (L) v London Borough of Waltham Forest and Another* [2004] ELR 161 at paragraph 14...

The trouble with such a summary is that it risks elevating into general principles what are statements by judges made by reference to the facts and circumstances of particular cases but taken out of context. That summary, for example, and indeed the mere quote from Grigson J's judgment, does not reveal that the situation in the case before Grigson J was that his comment was made where there was certain unchallenged expert evidence which the Tribunal's decision did not deal with at all. Furthermore a full citation from Grigson J's judgment would show that he was approaching the challenge in that case by reference to the general principles, to which I shall refer, and not because he thought he was laying down a rule of general application. I should add that the position before Wilkie J was that there was competing evidence and the case was one in which the Tribunal had to decide which it preferred. His comment, too, must be read in its context and not as laying down some general rule applicable in all cases."

70. Waller LJ went on at [16] to endorse the view of Wall LJ in *W v Leeds*, namely:

"53. I do not think it necessary for this court to add to the already substantial jurisprudence on this topic. Speaking for myself, I have always regarded the judgment of Sir Thomas Bingham MR (as he then was) in this court in *Meek v Birmingham City Council* [1987] IRLR 250 (even

though it substantially antedates the incorporation into English Law of ECHR) as the definitive exposition of the attitude superior courts should adopt to the reasons given by Tribunals. Whilst, of course, some aspects of the reasoning processes of different specialist tribunals are unique to the particular speciality which is engaged, I see no reason, in this context, to distinguish between Employment Tribunals and what are now SENDISTs. Sir Thomas said:

“It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal’s basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises ....”

54. The Master of the Rolls added:

“Nothing that I have said is, as I believe, in any way inconsistent with previous authority on this subject. In *UCATT v Brain* [1981] IRLR 225, Lord Justice Donaldson (as he then was) said at p 227:

“Industrial Tribunals’ reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law . . . their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given.””

71. Waller LJ also cited with approval Baroness Hale of Richmond’s dicta in *Secretary of State for the Home Department v AH (Sudan) & Others* [2008] 1 AC 678 that the decisions of expert tribunals “should be respected unless it is quite clear they are wrong”, emphasising that this was particularly important where the tribunal is being criticised for rejecting expert evidence providing opinion evidence on the very point that the tribunal has to decide (see [17]-[18]).

72. Returning to the appeal in question Waller LJ considered that it was “quite apparent” that the tribunal had weighed up the competing evidence [41]. He considered the phrase “24 hour waking curriculum” created difficulty as, in reality, this does not just include educational need but non-educational needs as well. It was clear, Waller LJ held, that H had lost the argument that only a residential school could provide the education and programme required outside school [42].

73. This is a clear statement from the Court of Appeal that the approach still being adopted by the Administrative Court towards SENDIST’s reasons following *L* is sometimes too demanding.

74. See also *Y v London Borough of Lambeth and SENDIST* [2009] ELR 347, where the Court dismissed an appeal in which parents argued that the tribunal had not explained why it had reached certain conclusions given the expert evidence before it. The Court saying that there was a difference between simply using specialist knowledge to displace a witness’s assessment of the position, by substituting one’s own views and reaching conclusions without giving anyone the

opportunity to respond on one hand, and on the other hand, using one's specialist expertise to help decide which of two conflicting courses supported by evidence should be preferred.

75. Both Waller and Scott Baker LJJ stressed the need for urgency in cases involving children [13], [51].
76. To similar effect is Plender J's decision in ***Slough BC v SENDIST*** [2009] EWHC 1091 (QB). The parties were not told how the SENDIST arrived at its calculation of the cost of the school proposed by the local authority. Neither side was able to explain the calculation. The most likely computation included a sum in respect of the total cost of the school divided by the number of pupils, which would have been inapt as a means of working out the marginal cost to the authority because it was a cost that would have been incurred in any event. Given that one of the main purposes of the requirement to give reasons is to ensure that errors such as this can be identified, it might be expected that the lack of explanation as to how the figure was calculated would be fatal. But despite this absence of reasoning, the appeal was dismissed on the basis that what was important was the tribunal's view that the difference in costing was not overly significant. It is difficult to see how it could be good enough to focus on the difference between two figures without explaining how one of those figures was reached. But this does seem to be a further example of the courts taking a relatively relaxed approach to the review of SENDIST's reasoning.

### **PROFESSIONAL MISCONDUCT**

77. More recently, Ouseley J applied the same approach to reasons in ***R (Duncan) v General Teaching Council for England*** [2010] EWHC 429 (Admin), in the context of allegations of serious professional misconduct by a head teacher. He observed that the professional conduct committee was required to give an outline of the story giving rise to the complaint, a summary of the factual conclusions, and a statement of reasons. Reasons were required to full two purposes: (a) as a matter of fairness, the parties should know why they had won or lost; and (b) a deficiency in reasoning on particular issues might conceal a legal error, irrational reasoning or lack of evidence. But it was not necessary to give explicit reasoning for every factor raised. There had been shortcomings in the committee's expression of its reasons, but it had focussed on the important points and had been entitled to come to the decision it had. The standard of reasoning was not such as to show any serious procedural irregularity, or that the decision was wrong.
78. In ***R (G) v X School Governors*** [2010] EWCA Civ 1 the Court of Appeal considered the application of art.6 ECHR to disciplinary procedures brought against a teaching assistant. The Governors brought disciplinary proceedings against the teaching assistant for alleged acts of abuse of trust with a pupil. They refused his application to be permitted legal representation at the disciplinary hearing. The matter was also referred to the Secretary of State who was notified of the circumstances of G's dismissal so that he could determine whether to place G on list 99, now

the children's barred list maintained by the Independent Safeguarding Authority. The Court of Appeal held, dismissing the Governors' appeal, that where an individual was subject to two or more sets of proceedings (or two or more phases of a single proceeding), and a civil right or obligation enjoyed or owed by him would be determined in one of them, he might (not necessarily would) by force of art.6 enjoy appropriate procedural rights in relation to any of the other proceedings or stages of the proceedings. He would do so if the outcome of the other proceedings would have a substantial influence or effect on the determination of the civil right or obligation ie the influence or effect would play a major part in the civil rights determination.

79. The question was not whether the disciplinary proceedings and the barred list procedures formed part of one and the same proceedings for the purposes of art.6, but whether there was a sufficiently close nexus between those processes. If the one proceeding would have a substantial influence or effect on the determination of the other, then the nexus was established. In this case, the disciplinary proceedings would be determinative of G's right to practise his profession. Accordingly, art.6 was engaged and, given what was at stake, required that G be afforded the opportunity to arrange legal representation.

### **OFSTED**

80. In *R (City College Birmingham) v Office for Standards in Education, Children Services and Skills* [2009] EWHC 2373, [2009] ELR 500, Burton J considered an application to restrain OFSTED from publishing a report it had produced following its inspection of the college. The college had been granted a without notice injunction, but following the inter partes hearing the judge refused an injunction. He held that the courts were less ready to grant an injunction in favour of one public body against another, particularly where, as here, OFSTED had a statutory duty to publish. Publication by a public body could only be prevented if there were the most compelling reasons. A good arguable case would not be sufficient, in this context, to be entitled to the protection of an injunction.

### **HIGHER EDUCATION**

81. In *R (McKoy) v Oxford Brookes University* the Court of Appeal dismissed the University's appeal against McCombe's judgment that it had not been entitled to make a judgment that the claimant had not been fit to practise midwifery following her failure of one practice-based module. The Court of Appeal held that it was right, of course, that matters of academic judgment generally are not ones where the courts would normally be prepared to interfere, but the power contended for by the University to require a student to withdraw from a course because of inadequate progress, in circumstances not provided for in the University's regulations, would have been a very important power. After all, there is a contractual relationship between the student and the University, and the student will normally have paid or incurred a liability for a substantial sum in fees. One would therefore expect to see such a power expressly set out somewhere in the

University's Articles or academic regulations. In this case, the regulation which expressly dealt with a student's progress contained an apparently comprehensive set of circumstances where the University had the power to require a student to withdraw from a course or module. No power had been expressly conferred on the university to require withdrawal after merely one failure in a practice-based module and the Court of Appeal refused to imply such a power.

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