1 CHANCERY LANE

# BRIEFING

## PUBLIC SECTOR & HUMAN RIGHTS: EDUCATION

May 2020

CONTRIBUTORS

Andrew Warnock QC

Jack Harding

Sarah Prager

## INTRODUCTION

SALEEM KHALID

Head of the Public Sector & Human Rights Group

One of the key issues now facing the country revolves around when and if schools should reopen. At times the debate has appeared to pit Central Government against Local Authorities, teachers against parents, and doctors against scientists.

Few people, however, have examined the legal aspect to this debate and the potential fallout from it in the Courts. Fortunately, the Public Sector & Human Rights Group at 1 Chancery Lane has analysed this subject in time for the proposed return to school.

Our Public Sector & Human Rights Group has a wealth of experience in the field of HRA claims and how they interact with the common law.

In this Briefing, Andrew Warnock QC (who has been involved in some of the leading education claims) and Jack Harding expertly analyse the elusive 'right to education'. Sarah Prager then weighs up the evidence on the advantages and disadvantages to reopening at this time.

Best Wishes

## THE RIGHT TO EDUCATION

**ANDREW WARNOCK QC** **JACK HARDING**

In the midst of the noisy debate about the health and safety issues concerning the return of children to school, it sometimes seems like there is a risk of the central purpose of schooling, namely education, being overlooked. The education of children is itself a human right, guaranteed by the European Convention Human Rights. Article 2 of the First Protocol ("A2 P1") is entitled "Right to education" and its first sentence provides:

> "No person shall be denied the right to education."

The brevity and apparent clarity of this statement belies its complexity. It is expressed negatively – a prohibition against denying the right to education – but only a right which exists can be denied. The question left unanswered by the Convention itself is what exactly that right is.

In *A v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363 Lord Bingham identified that:

> "The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states."

It must be doubtful that those who drafted the article would have envisaged a situation in which widespread, mass school closures would be implemented by member states. Schools had remained open even during the Second World War which formed the backdrop to the agreement of the Convention. The current crisis brings us into unchartered territory. What happens if the underlying premise of the right is removed?

In the *Lord Grey School* case Lord Bingham went on to say that:

> "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."

The facts of the *Lord Grey School* case were that a child was unlawfully excluded from school under domestic law. The House of Lords held that he was not denied his right to an education because he could have attended a different school within the state's education system.

In the case of *R(B) v Denbigh High School* [2007] 1 AC 100 which the House of Lords heard at the same time as the *Lord Grey School* case, the court held that a child excluded from school for wearing a hijab in breach of the school's uniform policy similarly did not have her right to an education breached because other schools were available which she could attend.

The *Lord Grey* and *Denbigh* cases concerned access to an education system which existed. The children concerned could not attend their own schools, but they could have attended others within the state system. Does the law require, however, the availability of an education in the first place – the state of affairs assumed by the framers of the article? If so, what level of education?

There are certainly comments in the case law which could be relied upon to support an argument that the article requires the availability of an education to a certain minimum standard. In the *Lord Grey* case Lord Hoffman, referring to the decision of the Court of Appeal in *R (Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359 commented that:

> "everyone is no doubt entitled to be educated to a minimum standard".

In the *Belgian Linguistic Case (No 2) (1968) 1 EHRR 252*, a leading Strasbourg authority on the content of the article, the European Court of Human Rights said:

> "For the 'right to education' to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of

> drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each state, and in one form or another, official recognition of the studies which he has completed"

The Court went on:

> "The right to education guaranteed by the first sentence of article 2 of the Protocol by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention."

In *Sahin v Turkey* (2005) 44 EHRR 99 the European Court of Human Rights held that any limitations on the right must not curtail it "*to such an extent as to impair its very essence and deprive it of its effectiveness*".

Some might argue that the widespread closure of schools with somewhat patchy and haphazard access to digital alternatives does impair the very essence of what constitutes an effective education.

The difficulty with the right to education, however, is that, uniquely among the rights set out in the European Convention of Human Rights, it is of a socio-economic nature. Defining a legal minimum content for such a right is not so much a matter of law but of political choices in a democratic society. It is a subject on which there are likely to be vastly differing, but nonetheless reasonable, views. On the other hand, a right with no substantive content is not much of a right at all. The courts have tended to reconcile this tension by finding that the minimum standard is to be judged with reference to the educational system in place in the state. That was the approach taken by the Supreme Court in *A v Essex County Council (National Autistic Society intervening)* [2011] 1 AC 280.

The facts of the *National Autistic Society* case were that a child, "A", with severe learning disabilities was unable to attend school for a period of 18 months while his local authority sought to assess his needs and find a suitable, specialist placement for him. Some minimal educational activities were provided for him at home by the local authority. A alleged that he had not received an effective or meaningful education and sued the local authority for damages. The Supreme Court by a majority rejected his claim in its entirety on the grounds that it was statute-barred.

The Supreme Court did, nonetheless, consider the claim on its merits. By a majority the court rejected an argument that A's right to an education was breached merely because A had a statutory right under domestic law to be in school during the 18 month period which had not been met.This was because article 2 P1 was to be applied in a pragmatic way which took account of the reality of the resources available and such resources were limited for children with A's very specific needs. However, by a different majority the court held that had the claim not been statute-barred, A would have had an arguable case that his human right to an education was breached on the ground that during the time that he was out of school more could have been done to educate him within the system as it existed. On this point, Lord Kerr, in the majority, said:

> "I believe it also to be at least arguable that an authority with the responsibility for providing education, if it knows that a pupil is not receiving it and engages in a completely ineffectual attempt to provide it, is in breach of the provision".

In her judgment, Lady Hale also sounded the following warning for the future:

> "I accept, therefore, that the European case law does not at present lay down any minimum standards for what must be provided. But the possibility that it will do so in future certainly cannot be ruled out. Despite the wide margin of appreciation given to member states to design and regulate their own systems of education, some failures may be so serious as to amount to a denial of the right."

In *Memlika v Greece* (2015) (application 37991/12) two children were excluded from school following a diagnosis of leprosy (which proved to be mistaken). The European Court of Human Rights held that their exclusion had pursued a legitimate aim of preventing the risk of contamination of their teachers and classmates, but found a breach of A2 P1 because there

had been a disproportionate delay in setting up a panel responsible for deciding when they could return to school. Whilst the case, like earlier cases, concerned exclusion of specific children from accessing an otherwise functioning education system, it provides a good reminder of the importance of proportionality in determining whether human rights have been breached. The aim of keeping pupils and staff safe and preventing the spread of Covid-19 in the community is plainly a legitimate one, but whether or not closing or keeping schools closed is proportionate to that aim is a different question, the answer to which is likely to turn on the evidence available to decision makers and consideration of what other options are available. A court reviewing such a decision will make its own assessment of proportionality, but give due weight to the view of the decision-maker as the person with the relevant authority and institutional competence: (*R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079).

In *R (E) v Islington LBC* [2017] EWHC 1440 (Admin), [2018] PTSR 349 the claimant, a 9 year old child, sought a judicial review of the defendant local authority's acts and omissions relating to her education. Her mother was profoundly disabled and had been the victim of domestic violence at the hands of her husband. She fled the family home and was temporarily accommodated by a charity based in the defendant borough. The charity notified the defendant that the claimant was in need of urgent educational provision and that her mother could not provide any home-schooling. The claimant attended school in Islington for a short time, but when she and her family were moved to new temporary accommodation in a different local authority (pursuant to duties arising under the Housing Act 1996) no prompt steps were taken to arrange for her education to continue. Ultimately, her family was required to return to accommodation in Islington. Over the period of changing accommodation she missed approximately 50% of the term-time schooling that should have been made available to her.

The Deputy High Court Judge (Ben Emmerson QC) said that:

*"Where a local authority fails to discharge its educational obligations to a child, a close examination of all the circumstances is necessary in order to determine whether the cumulative impact of such failures as are found to have occurred is sufficient, in the circumstances of the particular case, to cross the minimum threshold necessary to amount to a "denial" of the right. In carrying out this assessment, the court must also take into account any steps taken by the local education authority to mitigate the deleterious effects of the child's absence from school"*

and, at [45-46]

*"Clearly, a relatively short and unavoidable absence from school, where some adequate form of home support (even if not ideal) is provided or offered, will not in the ordinary course of events be sufficient to amount to a violation of a Convention right. Everything will depend on the context and circumstances.*

*[...] A non-exhaustive list of considerations to be taken into account would clearly include the age of the child and the stage of education they have reached; their educational history; the duration of the absence of educational provision; any alternative provision attempted or made available; any special resource implications particular to the case; and any circumstances particular to the child or its family that aggravate or mitigate the impact of the child's absence from school"*

On the facts, the Court held the '*aggregate*' of the acts and omissions of the Defendant had violated her right to education. It is interesting to note that the Court placed particular weight on the fact the Claimant's socio-economic status and difficult family situation meant that missing lengthy periods of schooling acquired a '*special significance in E's case that they would not necessarily have in the case of a child who did not suffer from the same underlying disadvantages*", although the judge sounded a note of caution that the Claimant's circumstances were "*grave and exceptional*" and he did not express a view on whether the same result would follow "*in a case in which similar periods of absence were suffered by a child that had a settled family background and a primary caring parent who did not suffer from serious disabilities*"

So, where does that leave children, their parents, state school governing bodies[1] and education authorities during the current crisis?

By section 37 and Schedule 16 of the Coronavirus Act

2020 the Secretary of State for education was empowered to close schools and other educational facilities and by section 37 and Schedule 17 of the same Act he may give directions requiring them to open again or to open to particular pupils. As we all know, the schools were closed. Might the UK government have breached the right to an education by closing them and thereby denying access to the education system as it existed? The fact that the article has been interpreted in a way that recognises the need for the authorities to regulate access to education for the benefit of the wider community provides grounds for a defence that it has not, particularly where those closures have had the aim of curtailing the spread of a virus which threatens life – the right to life is of course the most important right guaranteed under the Convention (article 2). The proportionality of the decision to close schools – and in particular whether lesser measures might have met that legitimate aim whilst allowing children to continue to receive an education – may prove to be contentious.

Under the Human Rights Act 1998 section 6, schools and local authorities cannot be sued for acting in a way in which they were required by primary legislation. Thus they cannot be sued for closing at the Secretary of State's direction. They do, however, need to provide an education in accordance with the system as it exists. What exactly that system currently is, however, might be thought somewhat elusive and undefined. The Department for Education has provided guidance on on-line education resources which are available for free, but given no explicit specification concerning what schools are actually expected to provide by way of education in the current circumstances. Some teaching unions are reported in the media to be resistant to teachers having to deliver on-line learning, at least in form of video lessons, from their homes to children in their own homes.

- Article 14 of the European Convention provides that the rights and freedoms set out therein must be secured without discrimination on various listed grounds, including *'social origin'* and, as a catch-all provision, an open-ended category of persons with *'other status'*. Although  the European Court itself has never defined the meaning of *'social origin'*, UK courts have observed that *"In the majority of cases, it is probably now safe to say that the need to establish status as a separate requirement has diminished almost to vanishing point."* (*Stevenson v Secretary of State for Work & Pensions* (2017) EWCA Civ 2123, per Henderson LJ).

In the context of the right to education, the Administrative Court in *R (Hurley and Moore) v Secretary of State of Business Innovation & Skills* (2012) EWHC 201 (Admin) was asked to determine whether Regulations which increased fees for Higher education had a disproportionate and discriminatory effect on the right to education of students from poorer families. The Court decided that they had not, but proceeded on the agreed basis that 'other status' in Article 14 *"would include persons from lower socio-economic groups"*.

In the current pandemic, parents and children will have had a widely differing experience of the extent of alternative arrangements for learning which have been put in place by schools as these seem to vary significantly from area to area and school to school, but a common issue raised in the media is the difficulty those in less financially advantaged households may have in accessing on-line learning. Indeed, even in relatively affluent households with a number of children access to on-line facilities may be limited, as may be the ability of parents to deliver teaching. Providing children from disadvantaged groups with laptops or other educational hardware may be a reasonable step, but of little use if they or their parents lack either the means or the knowledge to use them. Just as it did in *E v Islington* (above), this disparate experience could form the basis of an argument that the right to education in article 2 P1 has been breached in conjunction with the prohibition of discrimination in article 14. The UK government, local authorities and state schools might all face claims of this nature. The exceptional nature of the current emergency and the resources available are likely to be relevant factors in deciding them.

The UK government has signalled a desire to reopen schools in England to at least some pupils in early June. Local authorities and governing bodies of state schools considering their position when the Secretary of State directs such a reopening will rightly want to satisfy themselves that their facilities are as safe as reasonably possible for members of staff and the pupils themselves. They would also do well to bear in mind their obligations under article 2 P1. If their pupils are

denied access to what then becomes the prevailing system of public education, then they might expose themselves to claims under the Human Rights Act if they have not made adequate and suitable alternative educational provision, taking into the account the range of needs of their pupils.

The nebulous nature of the right under article 2 P1 makes it difficult to predict what the outcome of any claims, whether against central government, local authorities, or school governors might be and of course cases are usually fact specific, but a side effect of the current emergency may be further judicial consideration of what exactly it means to "deny" someone their "right" to an education.

[1] Private schools are not public authorities and so the Human Rights Act does not apply to them.

## About the Authors

Andrew Warnock QC (with Edward Faulks QC) represented the successful school in the House of Lords Lord Gray case and the successful respondent in the Supreme Court National Autistic Society case.

Jack Harding regularly advises and represents clients in claims under the Human Rights Act.

## RE-OPEN SCHOOLS: A COST/BENEFIT ANALYSIS

**SARAH PRAGER**

As part of the measures taken to contain the spread of the Covid-19 virus, schools have been closed to all pupils, except vulnerable children and the children of key workers, since 20th March, leaving 98% of pupils out of school. On 10th May Prime Minister Boris Johnson announced the government's intention to re-open schools from 1st June, albeit only partially in the first instance. Reception (age four to five), Year One (age five to six) and Year Six (age 10 to 11) will return first, followed by other years, all being well.

The announcement has caused a good deal of controversy, with half of parents in favour of the government's plans, and half against them. The National Association of Head Teachers, which represents most primary school heads in England, does not support the plan and considers the government's proposals unfeasible. It points to the risk of transmission of infection from children to their teachers, as between children, and from teachers to children.

It appears to be the case that children do catch Covid-19, but usually suffer milder symptoms than adults, with far fewer fatalities. The research around whether children are capable of transmitting the virus is unclear; there are Chinese and Icelandic studies showing no examples of child-to-adult transmission, but other studies demonstrate the possibility of this mode of transmission. We do know that there have not been any instances of outbreaks in schools or nurseries in countries where they have remained open, and none in schools educating the children of key workers. The consensus seems to be that the risk of acquiring the virus from a child is lower than from an adult; but it is thought that it remains a distinct possibility.

There is a further, more recently discovered, danger to children. The recently observed increase in children exhibiting symptoms of Kawasaki syndrome has been widely reported in the press, but it is still exceedingly rare; fewer than 100 children have been seen with these symptoms in the UK, set against the 160 to 170 child deaths in road traffic accidents we tolerate every year. The risk to children associated with re-opening schools is thought by epidemiologists and paediatricians to be extremely low, particularly when set against the risk to their physical and mental health of remaining in lockdown.

There is a further risk, that of members of school staff transmitting the virus to each other if appropriate social distancing measures are not maintained during the school day. However, in his announcement on 10th May the Prime Minister encouraged those who cannot work from home to return to work, and many employers are currently making the modifications required to allow for a staged return.

The government plan to re-open schools seeks to minimise the risks to all concerned by the introduction of a number of measures designed to prevent the spread of infection:

- individual risk assessment;

- the school day will be staggered so as to minimize the danger posed by parents gathering at the school gates;
- children will be taught in 'bubbles' of no more than 15 rather than regular classes;
- each class will be taught by the same individual in the same classroom;
- the layout of each classroom will be assessed and altered, if necessary;
- unnecessary items and items which are difficult to clean will be removed from classrooms;
- consideration will be given to holding some lessons outdoors or remotely;
- one way systems will be introduced so as to keep the flow of children regular and reduce bottlenecks;
- doors and windows will be kept open;
- assemblies, breaks and lunchtimes will be staggered so as to avoid the congregation of large numbers of children;
- more regular handwashing will be encouraged;
- more frequent cleaning, and deep cleaning, will be introduced.

Many of the teaching unions, however, remain unsatisfied that these measures go far enough, pointing out that it is impossible to enforce social distancing measures with children as young as four, and emphasising the need for testing and tracing as a priority over re-opening schools. Clearly, in the absence of comprehensive testing, any return to work will carry risks, including work in schools and nurseries; on the one hand, working with children may carry a lower risk because of the lower risk of transmission, but on the other, working in an environment where an asymptomatic carrier cannot be fully controlled is clearly more dangerous than in a workplace consisting only of adults.

The children's commissioner, Anne Longfield, has asked the teaching unions and the government to 'stop squabbling', and start working towards a return to school. Re-opening schools, even in a gradual process, has manifold advantages; socialisation of particularly younger children, protection of vulnerable children from domestic abuse, and the main purpose of educational establishments: education.

The Prime Minister's plan to re-open schools partially is an attempt to balance a child's right to an education against a teacher's right to a safe workplace. The safety measures proposed by the government are intended to minimise the risk of infection whilst maximising socialisation and educational opportunities for the children most in need of them. Whether or not the proposed measures will prove to be enough to prevent infection remains to be seen; but reports from other countries, such as Sweden and Denmark, are thought to be encouraging. Time will tell.

## About the Author

Sarah Prager has been listed in the legal directories as a Band 1 practitioner in travel and consumer law for many years. Chambers & Partners states: 'commended for her impressive advocacy skills, she handles sensitive fatal accident and catastrophic injury cases that often result in precedent-setting decisions and create new legislation...she is a popular choice among leading solicitor firms on both the claimant and defendant sides'.

**1 Chancery Lane, London, WC2A 1LF**
**Tel: +44 (0)20 7092 2900**
**Email: clerks@1chancerylane.com**
**DX: 364 London/Chancery Lane**

www.1chancerylane.com