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by Oliver Hyams

APART FROM THE EDUCATION AND Inspections Act 2006 (EIA 2006), which contains 191 sections and 18 Schedules, the main developments in the law of education during 2006 have come in the form of reported cases. The EIA 2006 received Royal Assent on 8 November 2006 and contains many developments of (and alterations to) the law of education. It deserves an article in its own right, and one will be published in *Solicitors Journal* as soon as possible.

Human rights and related issues

The most prominent judgments of 2006 were those of the House of Lords in *Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14; [2006] 2 AC 363 and *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15; [2006] 2 WLR 719.

The *Lord Grey School* case was brought on behalf of a pupil who had been excluded from a maintained school while a police investigation was carried out into an arson attack on the school. The arson had left a classroom so damaged by fire that it could not be used. The police eventually decided not to prosecute the pupil, but for various reasons he did not return to the school, and only later was admitted to another maintained school.

The *Denbigh School* case concerned a pupil who, as a result of her religious beliefs, insisted on attending her maintained school in a jilbab, and who was not allowed to do so since the wearing of the jilbab was contrary to the school's uniform rules.

The effects of the rulings of the House in those cases concerning the right to education conferred by Art 2 of the First Protocol to the European Convention on Human Rights are described in detail elsewhere in *Solicitors Journal* ((2006) 150 SJ 415, 07.04.06), and attention is drawn here only to the cogent doubts about the applicability of the statutory régime concerning exclusions on disciplinary grounds from maintained schools to the circumstances of those cases which were expressed by Lord Bingham in para 21 of his speech in *Lord Grey School*, Lord Hoffmann in paras 37 and 40 of his speech in that case, Lady Hale in para 74 of her speech in that case, and Lord Scott in para 63 of his speech in that case and para 82 of his speech in *Denbigh School* . In para 43 of his speech in *Lord Grey School*, Lord Hoffmann said the government "may wish to consider whether the question of precautionary exclusion needs further clarification". In para 74 of her speech in *Lord Grey School*, Lady Hale said that the "School Standards and Framework Act 1998 and guidance (and, as I understand it, their replacements [ie, s 52 of the Education Act 2002 and subsequent guidance]) are inapt to cater for this situation and require urgent reconsideration by the Department for Education and Skills."

If there was such reconsideration, it did not lead to a change in the EIA 2006 to the effect of the current régime concerning exclusions from maintained schools, despite that Act addressing a number of questions arising in relation to exclusions from maintained schools.

Other case law developments

Other salient developments in the case law (ie, those which involve the development of principles rather than interesting applications of existing principles) are as follows (with cases concerning education in schools described first).

Special educational needs (SEN) and disability discrimination

In *R (Ms K) v SENDIST* [2006] EWHC 622 (Admin); [2006] ELR 488, Mitting J held (in paras 16-25) that "the provision of educational and associated services did not include the cleaning and changing of a child after a bowel accident". It was "personal care, not education or services associated with education" (para 17). Thus, not only would it not be properly placed in Part 3 of a statement of SEN, but it was also not an "educational [or associated service]" within the meaning of s 28C(1)(b) of the Disability Discrimination Act 1995 (DDA 1995).

In *Governing Body of Olchfa Comprehensive School v IE and EE* [2006] EWHC 1468 (Admin); [2006] ELR 503, Crane J rejected the submission that the "lack of knowledge defence" in s 28B(3) and (4) of the DDA 1995 "only bites if the responsible body establishes that it would not have taken the step [in question] if it had known of the disability" (para 41).

SENDIST procedure

In *JR and AR v Hampshire County Council* [2006] EWHC 588 (Admin); [2006] ELR 335, McCombe J, in para 16: (1) lamented the absence of "an authoritative transcript of [the] proceedings before" the Special Educational Needs and Disability Tribunal (SENDIST); (2) admitted evidence as to what occurred during those proceedings in the case before him; and (3) declined to admit evidence that had come into existence since the end of those proceedings. Since the appeal was on a point of law, the latter approach was surely correct.

The proper approach to take where it was alleged that there was no evidence before the SENDIST to support one of its conclusions was also in issue in *R (London Borough of Hammersmith & Fulham) v Pivcevic* [2006] EWHC 1709 (Admin); [2006] ELR 594. There, Stanley Burnton J held (in para 49) that in order to justify the High Court ordering the production of a chairman's signed notes of evidence, it would not be sufficient "merely because they would be 'useful' or 'beneficial' for the parties to see them. It must be shown that the notes of evidence are required fairly to determine grounds of appeal or of review which (subject to seeing those notes) appear to have a reasonable prospect of success". He also said that where there is "an apparently substantial allegation that there was no evidence to support a significant finding made by the tribunal, the notes should be produced, and in such circumstances the court will normally if necessary make an order for their disclosure". In addi-

tion, he said: "There may also be cases where procedural impropriety or unfairness is alleged, which the court cannot properly determine without the chairman's notes of evidence."

Although both parties in *Pivcevic* accepted that it was open to the High Court to take into account on a challenge to the insufficiency of the original reasons of the SENDIST what the SENDIST said in determining an application for a review, Stanley Burnton J (consistently with his approach in *VK v Norfolk County Council* [2004] EWHC 2921 (Admin); [2005] ELR 343) held in para 55 that the court "should approach the reasons given by a tribunal on a review with caution, having regard to... the risk of subsequent (otherwise known as *ex post facto*) justification of the earlier decision".

In *Essex County Council v SENDIST* [2006] EWHC 1105 (Admin); [2006] ELR 452, Gibbs J implicitly held that educational factors may be irrelevant when considering a parent's wish, expressed pursuant to para 8 of Sched 27 to the Education Act 1996 (EA 1996), to have his or her child educated at a different maintained school from that at which the child is currently being educated. Thus, he held (see most clearly in para 31), a difference in costs may fall to be considered without reference to the educational advantages of the preferred school as compared with those of the existing school. It is difficult to understand why he thought that to be Parliament's intention.

Although technically only a decision on its facts, *Jones v Norfolk County Council* [2006] EWHC 1545 (Admin); [2006] ELR 547 is worth noting because Crane J there quashed a decision of the SENDIST where the latter's decision had failed to refer at all to the evidence of the appellant's three expert witnesses on the issue of whether a specialist school for dyslexia was required, and therefore to give any indication as to why it had rejected that evidence.

Adjudicator's procedure

The proper approach to take by an adjudicator appointed under s 25 of the School Standards and Framework Act 1998 when considering whether to approve the discontinuance of a maintained school which the relevant body (in this case the governing body of the school) proposed on the basis that the school would be replaced by an Academy (within the meaning of s 482 of the EA 1996) was in issue in *P v Schools Adjudicator* [2006] EWHC 1934 (Admin); [2006] ELR 557. There, Wilkie J dismissed a challenge to the decision of the adjudicator to approve the proposal where the approval was subject to several conditions, including that an agreement would be entered into by the promoters of the proposed Academy with the Secretary of State pursuant to s 482 by a certain date.

Independent schools

In *Gray v Marlborough College* [2006] EWCA Civ 1262; [2006] ELR 516, the Court of Appeal analysed the impact of an implied contractual duty, imposed on the proprietor of an independent school, to act fairly when excluding a pupil from the school. As Auld LJ put it (para 56): "Where fairness arises for consideration as an incident of a contractual obligation, as here, the nature of the bargain is relevant. Parents have a choice whether to commit their children to the particular regime and ethos of an independent school. They do so in the light of their expectations of what the school will provide and their understanding of what it requires from its pupils and their parents. That is what they pay for and the commitment they give. These are circumstances for which allowance may have to be made in applying notions of fairness and of what is required by consultation in the independent sector, which may or may not, depending on the circumstances, militate against reading across too readily the more prescriptive aspects of statutory provisions governing exclusion of pupils in the state sector."

School attendance

In *London Borough of Bromley v C* [2006] EWHC 1110 (Admin), [2006] ELR 358, the Divisional Court held (para 17, per Sullivan J, with whose reasons Auld LJ agreed) that "leave" for the purposes of s 444(3)(a) of the EA 1996 meant "leave granted by the school, not leave which the magistrates consider might have been justified". Further, the absence of a pupil "for the equivalent of nine days on unauthorised holidays could [rationally] lead to only one conclusion; that is to say, that there had not been regular attendance" (para 21).

Higher education

In *R (Interchange Trust) v London Metropolitan University and the Quality Assurance Agency for Higher Education* [2005] EWHC 2841 (Admin); [2006] ELR 308, Calvert-Smith J held (in para 44) that "in a proper case the relationship between a university and its provider should be the subject of supervision and control, if necessary by [the Administrative Court]".

The decision of Gray J in *Van Mellaert v Oxford University* [2006] EWHC 1565 (QB); [2006] ELR 617 that the choice by a university of examiners for a doctoral thesis involved the exercise of academic judgment with which it would be inappropriate to interfere, was based upon earlier authorities, including *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988. However, Gray J commented (para 25) that there might be aspects of the examination "into which it would not be inappropriate for the court to intervene", such as "if it were shown that there had been a procedural irregularity or if actual bias on the part of one tribunal or another were demonstrated, or if it could be shown that there was some procedural unfairness to the claimant".

Right of residence under Art 18 of the European Community (EC) Treaty

In *Ali v Secretary of State for the Home Department* [2006] EWCA Civ 484; [2006] ELR 423, the Court of Appeal held (para 27) that Art 18 of the EC Treaty did not entitle a child who was a citizen of a member state of the EC to remain in the UK merely because the child was at a primary school in the UK. Nor (para 28) could the child's parent obtain any "derivative right" to do so.

New regulatory obligation in respect of employees in schools

Finally, mention should be made of an amendment made to the School Staffing (England) Regulations 2003 (SI no 1963). As from 12 May 2006, there has (as a result of SI no 1067) for the first time been an express regulatory obligation to obtain an "enhanced criminal record certificate issued [in fact by the Criminal Records Bureau (CRB)] pursuant to Part V of the Police Act 1997... in respect of any person appointed" under reg 11 or reg 20 of SI 2003/1963, or in respect of "any person appointed by a local education authority for the purpose of working at a [maintained school] in the temporary absence of a member of staff of the school". This protection was enhanced by SI no 3197, which, as from 1 January 2007, further amended SI no 1963 by substituting replacement provisions even for those which were inserted by SI no 1067. The substituted provisions filled a gap that had been left by SI no 1067. It is of interest that there is currently no equivalent obligation in relation to Wales, where, as was the situation in England before 12 May 2006, the employers of staff in maintained schools are obliged only by ministerial guidance to obtain CRB checks before appointing staff to work in those schools.

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