

## LL1022C - The Denbigh High School Case

*R (on the application of SB) v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199; [2005] 2 All ER 396; [2006] UKHL 15; [2006] 2 WLR 719 - The main question was whether a school was entitled to insist on a particular form of uniform which prevented a Muslim student from wearing a full *jilbab*. The Court of Appeal found against the school. It had attempted to justify its policy in the context of the different groups of Islamic students with varying demands. The House of Lords overturned the decision of the Court of Appeal.

It came down to deciding whether the limitation on the claimant's religious freedom under Article 9 was justified. Rather than comment directly on the school's policy Brooke LJ in the Court of Appeal suggested that the school should have taken the decision: by first establishing if the claimant had a relevant convention right; assessing if the right had been violated; was the interference with her convention right prescribed by law in the convention sense; did the interference have a legitimate aim?; What are the considerations that need to be balanced against each other when determining whether the interference was necessary?; was the interference justified under 9(2)? In other words it was up to the public authority to apply a proportionality test.

This approach by the Court of Appeal has been strongly criticised.

'First and foremost, it rests on a basic mistake. Proportionality is a test that judges are required to apply in cases that involve Convention rights (the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck ... It is clear ... that proportionality is a test to be applied by the court when reviewing decisions by public authorities after they have been made. It is not a test which ought to mean that public authorities should themselves adopt a proportionality approach to their decision-making *ex ante*' T. Poole *PL* [2005] p.690. It is pointed out that the obligation is rather in relation to the substance of their policies.

Lord Bingham at para 29, 30, 31: I am persuaded that the Court of Appeal's approach to this procedural question was mistaken, for three main reasons.

(1) The purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts of this country and not only by recourse to Strasbourg e.g. *Aston Cantlow* [2003] UKHL 37, [2004] 1 AC 546 etc. *But the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated.* In considering the exercise of discretion by a national authority the court may consider whether the applicant had a fair opportunity to put his case, and to challenge an adverse decision ... But the House has been referred to no case in which the Strasbourg Court has found a violation of Convention right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal. This pragmatic approach is fully reflected in the 1998 Act.

(2) 'It is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting (See Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532.' But his Lord Bingham then stresses: 'There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time. Proportionality must be judged objectively, by the court (*Williamson*, above, para 51). As Davies observed in his article cited above, "The retreat to procedure is of course a way of avoiding difficult questions". But it is in my view clear that the court must confront these questions, however difficult. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so'.

(3) He then added that: 'as argued by Poole., I consider that the Court of Appeal's approach would introduce "a new formalism" and be "a recipe for judicialisation on an unprecedented scale". The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it'.

'On the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the rules were acceptable to mainstream Muslim opinion.'

A point which is emphasized by their Lordships is that the school is best placed to decide upon its school uniform policy, and, in doing so, it must be in the general interests of the school and must satisfy as many mainstream religious groups as possible. Moreover, it was apparent that when SB's parents selected the school they had been aware of the uniform requirements and there was nothing to prevent her from attending a school which her allowed her to wear a jilbab.

Their Lordships also rejected the claim that SB's right to education under article 2 of the first protocol had been denied. This right would only be infringed if she was denied education from the system as a whole.

Lord Hoffman stated at para. 64 'In my opinion a domestic court should accept the decision of Parliament to allow individual schools to make their own decisions about uniforms. The decision does not have to be made at a national level and national differences between Turkey and the United Kingdom are irrelevant. In applying the

principles of *Sahin v Turkey* the justification must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school. That is the way the judge approached the matter and I think that he was right.' He later points out at para 68 that: [The Act] confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9.2?

Baroness Hale and Lord Nichols took the view that there had been an interference with SB's right to manifest religious belief but that the interference was justified as it had the legitimate aim of protecting the rights and freedoms of others.

E.g., Baroness Hale at para 97: 'The school's task is also to promote the ability of people of diverse races, religions and cultures to live together in harmony. Fostering a sense of community and cohesion within the school is an important part of that. A uniform dress code can play its role in smoothing over ethnic religious and social divisions.'

This case illustrates the respective roles of a school and the courts under the Human Rights Act 1998. The school as a public body is required under section 6 not to act in a way which is incompatible with a person's rights under the European Convention on Human Rights, while the court is exercising a general oversight function in deciding whether to grant a remedy by ascertaining whether a convention right has been breached. This decision by the House of Lords appears to confirm that the courts must discharge this function without stepping into the shoes of the decision-maker, and it makes clear that the school does not need examine the issues in a legal way in order to act lawfully.

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