Judicial Communications Office

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COURT FINDS THAT RELIGIOUS EDUCATION AND COLLECTIVE WORSHIP ARE "NOT CONVEYED IN AN OBJECTIVE, CRITICAL OR PLURALIST MANNER" IN NI

Summary of Judgment

The Court of Appeal[1] today upheld a High Court finding that religious education and collective worship are not conveyed in an objective, critical or pluralist manner in Northern Ireland. It observed that such findings were capable of constituting evidence that the forbidden line of indoctrination had been crossed. It stated that policy makers in this area are clearly minded to consider a refresh to the NI curriculum that will inevitably include consideration of religious instruction to take into account the complexion and changing needs of our society.

Background

In 2022, judicial review proceedings were brought on behalf of JR87, a whose parents describe themselves as 'broadly humanist', after she had attended a controlled primary school in Belfast ("the school") in years 1 to 3 (P1-P3) and, as part of the curriculum, had participated in non-denominational Christian religious education ("RE") and collective worship ("CW"). The judicial review application challenged the legality of the relevant provisions of the governing legislation, namely: the Education and Libraries (NI) Order 1986 ("the 1986 Order"), the Education (NI) Order 2006 ("the 2006 Order") and the Education (Core Syllabus for Religious Education) Order (NI) 2007 ("the 2007 Order") – collectively known as 'the impugned legislation'.

The applicants contended that the impugned legislation providing for mandatory RE and CW in controlled primary schools in Northern Ireland breached the rights jointly afforded by: Article 9 ECHR (the right to freedom of thought, conscience and religion); and, Article 2 of Protocol 1 ECHR ("A2P1") which requires the State in its provision of public education to 'respect the right of parents to ensure such education … is in conformity with their own religious and philosophical convictions'. The Department of Education contended, in response, that the core curriculum is in line with Convention requirements and with the case law of the European Court of Human Rights ("ECtHR").

In *JR87* [2022] NIQB 53 Mr Justice Colton decided the case in favour of the applicants at first instance finding that RE and CW are not conveyed in an 'objective, critical and pluralist manner' in Northern Ireland, being the test ("the objectivity test") laid down by the Grand Chamber of the ECtHR in *Folgerø* v. *Norway* (2008) 46 EHRR 47 (see first instance judgment, paras [74] and [83]). He went on to find that both applicants had established a breach of their rights under A2P1 read with Article 9 ECHR in respect of the arrangements for the provision of RE and CW under the impugned legislation and, in an addendum judgment, made a declaration to that effect but in light of a current review of the legislation declined to make any quashing order.

The Department of Education appealed against this judgment.

[1] The panel was Keegan LCJ, Treacy LJ and Horner LJ. Treacy LJ delivered the judgment of the court.

The Appeal

The Department appealed against the entirety of the decision on a number of grounds. In particular, it challenged:

i. The conclusion that the provision of RE and CW breached JR87's and her father's rights under A2P1 read with Article 9 ECHR;

ii. The alleged failure separately to analyse and determine the claims made by both the parent and the child;

iii. The conclusion that both the parent's and the child's rights under A2P1 read with article 9 ECHR had been breached; and

iv. The decision to make the declaration noted above.

After setting out, at paras [18]-[39]: 1. the key provisions of the impugned legislation; 2. the relevant portions of the core curriculum; 3. the text of both Article 9 ECHR and A2P1; and, 4. certain provisions in other unincorporated international treaties (to which the court would have regard under the Strasbourg jurisprudence), the court noted the Department's core arguments to be that; the first instance court erred in finding that the provision of RE and CW in controlled primary schools breached A2P1, because it did not amount to 'indoctrination' as it is understood in the Strasbourg jurisprudence and there is no clear case where the European Court has ruled that the provision of RE and CW as it stands in Northern Ireland would be a violation; and secondly, the unfettered right of withdrawal from RE and CW provided to parents under Article 21(5) of the 1986 Order protected the impugned legislation from being found to violate Convention rights.

It was argued on behalf of the respondents in the appeal that the trial judge had been correct to apply the 'objective, critical and pluralistic' test as set out by the Grand Chamber in *Folgerø* v. *Norway* (2008) 46 EHRR 47 and that the content of the core syllabus taken with the obligation to teach it in full amounted to 'indoctrination' as it required teaching children to believe *in* Christianity, rather than teaching them *about* it and the right of exemption was simply indicative of a lack of pluralism thereby entitling the court to make the declaration.

Consideration

The court noted at para [47] that what was in dispute between the parties was the proper test to be deduced from the Strasbourg jurisprudence. The court followed the established principle that "courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court" (*R (Ullah) v Special Adjudicator* [2004] UKHL 26, *per* Lord Bingham at para 20) with the corollary that domestic courts were required "to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." Observing at para [52] that the Strasbourg jurisprudence made clear that, in the first place, the State should be afforded a 'margin of appreciation' when setting the curriculum, the court went on to rehearse, at para [61], what it described as 'the classic statement' of the Strasbourg court concerning A2P1 (subsequently endorsed by the Grand Chamber in *Folgerø*) in *Kjeldsen, Busk Madsen & Pedersen v Denmark* (1976) 1 EHRR 71, at para 53:

> "The second sentence of Article 2 implies … that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded."

As regards the proper test then, while accepting the trial judge's finding of facts, the court held, at paras [64] and [65], that he had incorrectly analysed the 'limit which must not be exceeded' when, at paragraph 60(viii), he stated: "It [the State] must accord equal respect to different religious convictions and to non-religious beliefs." The court found rather that the case law makes it clear that the limit that must not be exceeded is expressed thus: *The state is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious or philosophical convictions.* More succinctly, the limit is indoctrination. Significantly, the court noted that in *Yalçin & Ors v. Turkey* (Application No 21163/11) the ECtHR held that the fact that a syllabus gave greater prominence to one religious belief could not *in itself* be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination (*Yalçin*, para 71). It further noted that departure from compliance with the principles of pluralism and objectivity inevitably 'feeds into and is relevant to' the determination of whether what is impugned amounts to indoctrination, thus crossing the limit that must not be exceeded. The trial judge's findings were capable of constituting evidence supporting an inference that the forbidden line had been crossed but they did not dispose of the issue.

The court carried out a detailed analysis of the specific nature of the exemption from RE and CW provided for by Article 21(5) of the 2006 Order noting that the 'exemption' cases successfully impugned before the ECtHR concerned only partial rights of withdrawal and that the right under Art 21(5) was 'a total unqualified non-discriminatory statutory right vested in the requesting parent with a concomitant obligation on the State to comply in full with the request for exemption - an obligation enforceable as a matter of public law.' (para [102]). Accordingly, given the unqualified nature of the exemption – which made it capable of being a safeguard against indoctrination in the school setting – and that the school had engaged with JR87's parents in good faith, the court was satisfied that the requirements of the ECHR caselaw have been met. It further considered that in light of the limits of Strasbourg jurisprudence, and applying the *Ullah* principle, it could not reliably anticipate how the European Court might be expected to decide such a case, on the basis of the principles established in its case law.

Conclusion

The court upheld the trial judge's finding that the curriculum at issue in the present case is not conveyed in an objective, critical and pluralistic manner. However, it held that no breach of A2P1 has been established because of the existence of the unqualified statutory right of the parents to have their child excused wholly or partly from attendance at religious education or collective worship, or both in accordance with their request. It noted that the parents, in this case, chose not to exercise this right. The court allowed the appeal from which it follows that the declaration made by the High Court was wrong in law. In light of this conclusion, it was unnecessary to deal with the remaining grounds save to say that it did not consider that the trial judge erred when considering the applicants' claims together.

In concluding this case the court also noted that this subject matter has been subject to an overarching review. It said that policy makers in this area are clearly minded to consider a refresh to the NI curriculum and that will inevitably include consideration of religious instruction to take into account the complexion and changing needs of our modern society.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

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