THE LAW OF EDUCATION

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HEADLINE

After a huge amount of pre-trial fuss, not only inside a certain set of barristers' chambers, the much-vaunted High Court case about GCSE exam-marking simply fizzled out in February 2013. The case of *Lewisham v AQA, Edexcel and Ofqual* turned out to be as exciting as sitting a GCSE English exam – and then not getting the grade your school required.

Contents of this Bulletin

ACT OF PARLIAMENT AND ACTS OF THE NATIONAL ASSEMBLY FOR WALES

Protection of Freedoms Act 2012

Use of Biometric Information in Schools and Colleges

Sections 26 to 28 of the Protection of Freedoms Act 2012 are not yet in force, but they prospectively control the use of biometric information about children in schools, in 16 to 19 academies and in FE institutions. 'Biometric information' is defined (in s 28) as information about a person's physical or behavioural characteristics, including skin patterns and fingerprints, iris features and voice or handwriting features, in so far (only) as those features are obtained or recorded for the purposes of an automated person-recognition system. Schools and 16–19 academies and FE institutions must (usually but not always) obtain the consent of at least one parent before using

biometric information for the automated recognition of any child. Interestingly, every child has a right of veto, which overrides parental consent. If the school (etc) is using automated person-recognition based on biometric information and the child objects, the school (etc) must find another way of doing whatever it was that had otherwise required the use of biometric information. One supposes that a real person would then have to check the child's entitlement to enter the room or take a lunch – or whatever – instead of the machine doing it.

The School Standards and Organisation (Wales) Act 2013

This Act has been given Royal Assent and will be discussed in Bulletin 101.

STATUTORY INSTRUMENTS

Independent School Standards in England

***Education* (*Independent School Standards*) (*England*) (*Amendments*) *Regulations 2012* (*SI 2012 No 2962*)**

The Explanatory Note says:

> 'These Regulations amend the Education (Independent School Standards) (England) Regulations 2010 **LOE D [56851]**]…
>
> Regulation 2(2) amends the definition of "the National Minimum Standards for Boarding Schools" and that of "the National Minimum Standards for Residential Special Schools" in regulation 2(1) of the 2010 Regulations, to refer to the latest versions of those publications and removes the now redundant definition of "School Premises Regulations".
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> Regulation 2(3) inserts regulation 2(4) into the 2010 Regulations, which sets out the circumstances in which schools, when they are required to "provide" documents or information under a standard, can do so electronically. Consequential amendments have been made … making it clear which documents and information can be so "provided".
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> Regulation 2(4) inserts a new standard in paragraph 2 of Schedule 1 requiring a school's curriculum to meet the educational needs of any pupils below compulsory school age.
>
> Regulation 2(5) replaces paragraph 5 of Schedule 1 (the spiritual, moral, social and cultural development of pupils). The existing standards from paragraph 5 have been retained and renumbered … Paragraph 5(*a*)(vi) inserts a new standard requiring the promotion of principles which encourage pupils to respect the fundamental British values listed. Paragraph 5(*b*) is new and precludes the promotion of partisan political views through teaching. Paragraph 5(*c*) is new and requires a balanced presentation of political issues to be given when they are brought to the attention of pupils.

Regulation 2(6) amends Part 3 of Schedule 1, removing the requirements in former paragraphs 10, 11 and 12 to have regard to withdrawn Departmental guidance on anti-bullying and health and safety. These have been replaced with requirements to draw up and implement effective policies on those matters …

Regulation 2(8) replaces the standards about the premises of and accommodation at independent schools, set out in paragraph 23 of Schedule 1, with new ones …'

School and Early Years Finance in England

***School and Early Years Finance* (*England*) *Regulations 2012* (*SI 2012 No 2991*)**

The changes wrought by these Regulations for the funding year 2013–2014 are summarised in Issue 123 of the Law of Education at **LOE A [2302]** ff.

Safeguarding: Disclosure and Barring Service

***Protection of Freedoms Act 2012* (*Disclosure and Barring Service Transfer of Functions*) *Order 2012* (*SI 2012 No 3006*)**

The Explanatory Note says:

'Part 2 of this Order transfers the functions of the Independent Safeguarding Authority ("ISA") under the Safeguarding Vulnerable Groups Act 2006… to the Disclosure and Barring Service ("DBS") established under section 87(1) of the Protection of Freedoms Act 2012. The ISA was originally called the Independent Barring Board, but it was renamed the Independent Safeguarding Authority by virtue of section 81 of the Policing and Crime Act 2009.

The ISA is the body responsible for maintaining the barred lists under … the 2006 Act. The children's barred list is a list of those persons who are barred from engaging in regulated activity relating to children; the adults' barred list is a list of those persons who are barred from engaging in regulated activity relating to vulnerable adults …

Part 3 of this Order transfers the functions of the Secretary of State in England and Wales which are exercised by the Criminal Records Bureau under Part 5 of the Police Act 1997 to the DBS …

Having transferred the ISA's functions to the DBS, Part 5 of this Order dissolves the ISA under section 88(3) of the Protection of Freedoms Act 2012.'

FE and HE: Student Support

***Education* (*Student Support*) (*European University Institute*) *Regulations 2010* (*Amendment*) *Regulations 2012* (*SI 2012 No 3059*)**

The Explanatory Note says:

'These Regulations amend the Education (Student Support) (European University Institute) Regulations 2010 (SI 2010/447)… [which]… provide support for eligible students taking designated higher education courses at the European University Institute in respect of an academic year beginning on or after 1st September 2011. The amended Regulations will apply in relation to an academic year beginning on or after 1st September 2013…

Regulation 7 amends regulation 11 of the 2010 Regulations so that the period of eligibility for student support will terminate at the end of the penultimate academic year of the course. Regulation 8(a) amends the definition of "parent" to ensure it is restricted to parents, guardians and any other person with parental responsibility. Regulation 8(b) inserts a new definition of "ordinarily resident" for the purposes of Schedule 1 to the 2010 Regulations.'

Wales FE and HE: Student Support

***Education* (*Student Support*) (*Wales*) *Regulations 2012* (*SI 2012 No 3097*)**

The Explanatory Note says:

'These Regulations provide for financial support for students who are ordinarily resident in Wales taking designated higher education courses in respect of academic years beginning on or after 1 September 2013. They consolidate, with some changes, the Assembly Learning Grants and Loans (Higher Education) (Wales) (No 2) Regulations 2011…

To qualify for financial support a student must be an "eligible student". Broadly, a person is an eligible full-time student if that person falls within one of the categories listed in Part 2 of Schedule 1 and also satisfies the eligibility provisions in Part 2 of the Regulations (separate eligibility provisions apply to students undertaking distance learning, part-time and postgraduate courses and Parts 11 to 13 of the Regulations refer).

The Regulations apply to students ordinarily resident in Wales wherever they study on a designated course in the United Kingdom. For the purposes of these Regulations a person who is ordinarily resident in Wales, England, Scotland, Northern Ireland, the Channel Islands or the Isle of Man as a result of having moved from one of those areas for the purpose of undertaking a designated course is considered ordinarily resident in the place from which that person moved (Schedule 1, paragraph 1(3)). An eligible student must also satisfy any requirements elsewhere in the Regulations; in particular the specific requirements applicable to each type of financial support.

Support is only available under the Regulations in respect of "designated" courses within the meaning of regulations 5, 78, 95, 121 and Schedule 2.

The distinction between old system eligible students and new system eligible students (introduced by the Assembly Learning Grants and Loans (Higher Education) (Wales) Regulations 2006) in relation to financial support to students for full-time courses is retained (regulation 2(1))…' [and explained in fascinating detail in the Explanatory Note].

Part 4 of these Regulations provides for fee support, in the form of grants for fees and fee loans. Regulation 13(5) provides that an eligible student will only qualify for fee support in relation to a full time distance learning course if they are undertaking the course in Wales on the first day of the first academic year. Regulation 13(6) also provides that an eligible student will no longer qualify for fee support in relation to a full time distance learning course if they are undertaking that course outside the United Kingdom. Similar provision is made later in the Regulations in relation to eligibility for grants for disabled students' living costs (regulation 29), support for distance learning courses (regulation 80), grants for disabled distance learning students' living costs (regulation 83) and support for part-time courses (regulation 93).

Regulation 20 provides for the payment of a new fee grant to 2012 cohort students. Regulation 23 provides for the payment of fee loans to new system eligible students who do not qualify for a fee grant. A new cohort student (other than a 2012 cohort student) falls within that category. Regulation 24 provides for the payment of fee loans to students who qualify for a fee grant under regulation 19. The payment of fee loans under regulations 23 and 24 will only apply in relation to courses beginning before 1 September 2012…

Part 5 of these Regulations makes provision for grants for living costs which includes grants for travel for certain categories of eligible student …

Part 6 makes provision for loans for living costs. Such loans are payable to both old system eligible students and new system eligible students …

Part 8 and Schedule 4 make provision for "college fee loans". These are loans in respect of the college fees payable by a qualifying student to a college or permanent private hall of the University of Oxford or to a college of the University of Cambridge in connection with attendance of a qualifying student on a qualifying course.

Part 9 and Schedule 5 continue to make provision for the means-testing of students taking designated full-time courses. A contribution from the student is calculated on the basis of household income. The contribution is to be applied to specified grants and loans until it is extinguished against the amount of the particular grants and loans for which the student qualifies.'

Pupil Referral Units in England

***Pupil Referral Units* (*Miscellaneous Amendments*) (*No 2*) (*England*) *Regulations 2012* (*SI 2012 No 3158*)**

The Explanatory Note says:

> '… Regulation 2 amends the Education (Pupil Referral Units) (Management Committees etc) (England) Regulations 2007 ("the MCR") [**LOE D [48551]**]. The amendments to regulation 22 of the MCR alter the functions which LAs must delegate, and are prohibited from delegating, to MCs. Schedule 3 to the MCR is amended in order to modify further the way that the School Governance (Procedures) (England) Regulations 2003 apply to units.
>
> Regulation 3 amends the Education (Pupil Referral Units) (Application of Enactments) (England) Regulations 2007. These amendments further modify the application of enactments in relation to units. The main changes are: (i) amending the way that paragraph 3 of Schedule 1 to the Education Act 2002 (powers of governing bodies) applies to units; and (ii) applying the School Staffing (England) Regulations 2009 to units with modifications.'

Faith Schools: Local

***Designation of Schools Having a Religious Character* (*Independent Schools*) (*England*) (*No. 3*) *Order 2012* (*SI 2012 No 3174*)**

38 schools are designated as having a religious character: 31 as Plymouth Brethren Christian Church, five as Christian and two as Church of England.

Inspectors of Education, Children's Services and Skills

***Inspectors of Education, Children's Services and Skills Order 2013* (*SI 2013 No 245*)**

Eight new HMI's are appointed.

Teachers' Pensions

***Teachers' Pensions* (*Amendment*) *Regulations 2013* (*SI 2013 No 275*)**

Pensions lawyers will enjoy this one.

CASES DECIDED AND REPORTED

School Governance and Section 497 Complaints

R on the application of McCormack v The Governing Body of St Edmund Campion Catholic School* (*1*) *Secretary of State for Education* (*2*) *Director of Schools Diocesan Schools Commission* (*3*) *[2012] EWHC 3928* (*Admin*), *LOE F [2012.18]; judgment given on 11 December 2012

The claimant sought to challenge by judicial review the decision of a Governing Body to suspend him as a staff governor at a time when he was

suspended from his employment as a teacher at the school. By the time the application came to court, the claimant had been dismissed from his employment and was awaiting a hearing in the Employment Tribunal.

The application for judicial review was partially successful. The court held that, although the Governing Body had been entitled to suspend him as a governor when he was suspended as a teacher, there had not been substantial compliance with the School Governance (Procedures) (England) Regulations 2003 (SI 2003/1377). Beatson J said:

'**82.** Given the history of accepted noncompliance with the Procedural Rules in the 2003 Procedure Regulations, I agree with the view of His Honour Judge Pelling in *Kilroy's* case at paragraph 19 [*R* (*Kilroy*) *v Parrs Wood High School* [2011] EWHC 3489 (Admin)], that the submission that the claim is now academic, because the period of suspension has now passed, must be approached with circumspection. In that case it is true the period of suspension had ended but not the employment, whereas in this case at present there is no employment and therefore no status as a governor. But as I have stated, what the claimant has raised is an issue of noncompliance with the Regulations by the governors of this school. On more than one occasion it has been accepted that they have not complied with these Regulations. It may be that the point will be academic *vis-a-vis* this claimant. However, subject to one point, there would be utility in this court providing guidance to the first defendant and to the relevant authorities in Birmingham City Council about what their obligations are under the regulations.

83. My caveat arises because of the involvement of the Secretary of State in all of this. The Secretary of State has concluded that there were procedural defects in the past which rendered decisions to suspend invalid. One of those was described as "an anomaly"…

84. The Secretary of State has not made a formal direction to set aside the suspension but the clear implication of what is contained in the letter, dated 8 February, is that despite what might be called the weasel phrase "procedural anomaly" there was not compliance with the Regulation … Given the background, it is, as I have said, for the Council to consider whether the way they have handled the consequences of this, either *vis-a-vis* this school's Board of governors or that of any other school in its area, where similar issues have arisen, is adequate …

86. I … turn to the case against the second defendant. There is common ground between the claimant and Miss Ward about the requirements of section 497 [of the Education Act 1996]. There has to be a complaint. There has to be a subject matter that is appropriate for investigation. The Secretary of State has to investigate. The Secretary of State must then decide, under section 497, whether there was a failure to discharge a duty, or under section 496, whether there was an unreasonable exercise of powers. Those two questions are threshold questions. If the threshold has been passed, the Secretary of State has to decide whether it is expedient to give directions.

87. The claimant's submission is that the Secretary of State's decision is irrational in *Wednesbury* terms for a number of reasons. First of all, he argued that the Secretary of State relied on the state of his Employment Tribunal proceedings and his disciplinary proceedings. He regarded those as irrelevant private law matters. Secondly, as I have stated, the claimant maintained that had the Secretary of State not delayed, he would not have been able to rely on the proximity of the other proceedings. He argued that it was irrational to rely on a factor arising after the application of the Secretary of State. The claimant also relied on what in effect was a form of procedural unfairness. This was that, although the Secretary of State communicated with the first defendant before making the decision, none of the Secretary of State's officials briefing points had been put to the claimant and he was not given an opportunity to comment on them.

88. I have concluded that this part of the claim is not made out. The *Wednesbury* standard of reasonableness has a high threshold. Fordham's Judicial Review Handbook (5th edition at page 521) states:

"Many colourful phrases have been used to explain that only in a strong case will courts intervene on grounds of unreasonableness."

He refers to "high threshold epithets". He does also refer to dangers in setting the bar too high but the phrases used in the cases set out in paragraph 57.2 of his book show how high the threshold is: "perverse" *Reid v Secretary of State for Scotland* (1999); "outrageous defiance of logical morality", in GCHQ 1985; "taking leave of its senses", in *ex parte Northamptonshire County Council*, and "something overwhelming" in *Wednesbury* itself.

89. I accept Miss Ward's submission that the claimant has not shown anything like this.…

90. …[T]he claimant reformulated his submissions on this in terms of a failure to take account of relevant factors. In effect he submitted that given the advice from the Secretary of State's officials, any departure from that advice was *Wednesbury* unreasonable or irrational. The difficulty with this is that, once the threshold of acting unreasonably or failing to discharge a duty has been met, the Secretary of State is given discretion. The discretion is given to make such directions as appear to him to be expedient … I concluded that it cannot be irrational to conclude that the suspension was not going to have effect for much longer and that the claimant's status as a governor was linked to his employment dispute and the outcome of it …

91. As to the argument that it was wrong for the Secretary of State to take account of matters that had only arisen because of his own delay, at the time of the decision the Secretary of State must take things as they then are.…'

Obiter, but just as interestingly in its way, Beatson J had this to say on costs, in a case where the claimant had represented himself:

'**106.** … I am happy to give you some time. The problem is that we are coming to the end of term and Christmas. I am willing to give you some time to make short written submissions about costs. I suggest if you put them in writing, because this building is going to be closed at half past six and, as much as we have all enjoyed each other's company, we do not want to be locked in here for the night or return tomorrow.'

School Organisation: Establishment of New Schools

British Humanist Association* (*1*) *and Jeremy Rodell* (*a member of the Richmond Inclusive Schools Campaign*) *v London Borough of Richmond upon Thames* (*1*) *and The Roman Catholic Diocese of Westminster* (*2*) *and The Secretary of State for Education* (*3*) *[2012] EWHC 3622* (*Admin*)*, LOE F [2012.19]; judgment given on 14 December 2012

The Roman Catholic Diocese of Westminster proposed the establishment of new primary and secondary Roman Catholic voluntary aided faith schools. The council approved the proposals and agreed to provide a site for the schools, resolving to lease land to the Diocese for 125 years at a peppercorn rent. But the claimants challenged these decisions, being of the view that any new state schools should operate open admission policies. The argument in the High Court concerned the relationship between s 6A of the Education Act 2006 (the requirement to seek proposals for the establishment of new Academies where a local authority thinks a new school needs to be established in their area) and s 11(1A) (where any persons propose to establish a new voluntary aided school). The number of places available for pupils who were not Roman Catholics was likely to be substantially higher at a new academy than at a voluntary aided faith school. The challenge failed. Sales, J said this:

'Ground 1: S 6A

[63] … it does not follow that whenever a local authority considers that it might be beneficial for there to be additional educational provision in the form of establishing a new school in its area, it must be taken to think that there is a "need" to establish a new school, in the sense in which that term is used in s 6A …

[65] In my judgment, it is implicit in the scheme of Pt 2 that there is a distinction between the concept of a "need" to establish a new school (under s 6A) and a more general assessment by a local authority whether it might be beneficial for a new school to be established. If a local authority thinks there is a "need" to establish a new school, the obligation under s 6A to seek proposals for the establishment of an Academy is triggered. But the Act contemplates that a local authority may act to foster or approve proposals for establishment of a new school in other circumstances, where in a wider and more general sense it thinks it may be beneficial to do so.

[66] Under s 7, a local authority may (with the consent of the Secretary of State) invite proposals for the establishment of new schools of various types, including an Academy. This power exists alongside the obligation in s 6A, and is not swallowed up by it. It would make no sense of the scheme in Pt 2 of the 2006 Act to say that every time a local authority thought it might be beneficial for a new school to be established in its area it should be taken to think there was a "need" for a new school, since that would suggest that there would be no practical scope for the operation of s 7. In order to act properly pursuant to s 7, a local authority has to think that it may be beneficial for a new school to be established, in a sense falling short of thinking that there is a "need" to establish a new school (in which case s 6A would apply).

[67] Similarly, where a proposal is made under s 10 or s 11 to establish a new school, para 8 of Sch 2 requires the local authority to consider whether the proposal should be approved (and in some cases, under para 10 of Sch 2 it is for the adjudicator to consider this question). A local authority or the adjudicator could only properly approve a proposal if they considered it to be in some way beneficial in the public interest. There is no indication that the test governing approval of proposals under ss 10 and 11 is so narrow as to turn on a question of need, rather than a more general assessment of what would be beneficial in the public interest. Again, s 6A does not swallow up these provisions.

[68] It will be a matter of fact and degree, for the assessment of the local authority, whether factors relevant under ss 13 and 14 of the 1996 Act are of such weight and of such a pressing nature that they lead to the conclusion on the part of the local authority that there is a 'need' to establish a new school in its area, for the purposes of s 6A. A local authority is entitled to take a practical approach, looking to see the extent to which there is a requirement for educational provision to ensure that children in its area have proper access to education. In the present case, for example, the Council was entitled to have in mind that the demand for Catholic school places was being met, and had been for many years, by parents sending their children to Catholic schools in neighbouring areas (just as a local authority would be entitled to have in mind, say, any pattern of parents sending their children to private schools). Section 6A is concerned with what a local authority "think", which indicates that the assessment of "need" is a matter of evaluative judgment for the authority. Further, in assessing whether there is a "need" for a new school, the local authority may be expected to look at the whole picture of educational provision in its area, and the availability or otherwise of school places at existing schools will be likely to be a very important factor which the local authority may properly take into account …

[70] On the basis of these legal points, I think there is really no doubt on the facts of the case, as reviewed above, that the Council has acted lawfully in making the assessment that it does not think that a new

school needs to be established in its area, and hence that no duty has arisen under s 6A. The Council's assessment was that there was no "need" (in a s 6A sense) for a new school to be established, but rather that it was merely desirable in its assessment of the public interest and having regard to factors relevant under ss 13 and 14 of the 1996 Act that the Diocese's proposals to establish the two new Catholic schools should be approved and the Site made available for the implementation of those proposals …

The Secretary of State's Additional Submission

[74] Parliament has not spelled out clearly in Pt 2 of the 2006 Act, as amended, how the different powers and obligations set out in it relate to each other. A local authority which thinks it desirable to invite proposals to establish new schools under s 7 may, in the light of proposals made or simply because of a change of circumstances (or a change of control of the local authority, leading to a new assessment of the situation being made by the local authority), in the course of the s 7 exercise come to think that there is a need to establish a new school in its area. What then? Does s 6A suddenly bite, so that the s 7 exercise has to be brought to an end? Similarly, if proposals are published under s 10(2) or s 11(1A), but the local authority thereafter comes to "think a new school needs to be established in their area", does s 6A suddenly apply so that the local authority has to stop consideration of the proposals on their merits and instead proceed to seek proposals for the establishment of an Academy?…

[76] On this issue I consider that the submission of Mr Hopkins [for the Secretary of State] is correct. Where a proposal for a new school is put forward under s 11(1A) it is done so as a matter of entitlement on the part of the proposer, as set out in that provision, and will likely have involved time, effort and expense on the part of the proposer in consulting on it as required by s 11(6). Section 11(8) then states: "Schedule 2 has effect in relation to the consideration, approval and implementation of proposals under this section." Para 8 of Sch 2 states that such proposals "must be considered" by the local authority, and in certain cases the local authority "must refer [a proposal] to the adjudicator" (para 10). (Similar points may be made about a proposal put forward in response to a notice issued under s 7: such a notice invites the making of proposals, which will involve time, effort and cost on the part of the proposer, and s 7(7) provides that Sch 2 has effect in relation to such proposals).

[77] The statutory language is clear, and in relevant places is mandatory. There is no suggestion that the rights of proposers or the obligations on a local authority under these provisions are to be regarded as subject to the distinct provision in s 6A.

[78] Further, since these provisions requiring a local authority (or, as the case may be, the adjudicator) to consider proposals operate in relation to proposals put forward by persons by virtue of rights set out in or

arising under the Act itself and where they are likely to have invested time, money and effort to put them forward, it would require strong and clear language to indicate that Parliament's intention was that their rights to have their proposals considered on their merits was to be removed. No such language has been used. The natural inference, therefore, is that Parliament did not intend s 6A to operate to disapply the obligation of a local authority (or, as the case may be, the adjudicator) to consider such proposals on their merits.

[79] That is not to say that the possibility that proposals might be invited for the establishment of an Academy would be irrelevant to the consideration to be given to proposals made under s 11(1A) or other provisions of Pt 2. When considering whether to approve such proposals under Sch 2 to the 2006 Act a local authority might consider that it was, overall, more beneficial for educational requirements to be met by inviting proposals for establishment of an Academy, or the Secretary of State might issue guidance under para 8(6) suggesting that consideration be given to such a possibility …

[84] Since I have had to consider the general effect of Pt 2 of the 2006 Act, I should perhaps mention one final point. It is possible that a case could arise in which a local authority thinks there is a need for a new school in its area and therefore, in compliance with its duty under s 6A, seeks proposals for the establishment of an Academy; and, while that is going on, a third party puts forward proposals for a new school under s 10(2) or s 11(1A). In such a case, I think that the local authority would be required to consider the latter proposals in accordance with the procedure laid down in Sch 2 to the 2006 Act, but in doing so would be entitled to have regard to the possibility that educational needs in its area might be about to be met by the establishment of an Academy. That might be a basis on which it would be entitled to conclude that the proposals ought not to be approved.'

Human Rights – Education – Discrimination

Horváth v Hungary* (*App. No. 11146/11*), *[2013] ECHR 11146/11; judgment given on 29 January 2013

The applicants, H and K, are of Roma origin and were being educated in remedial school until, at a summer camp. Independent experts assessed them and concluded that both should be in mainstream classes. The experts also noted that the diagnostic methods applied should be reviewed, and that Roma children could have performed better in the tests if they had not been designed for children belonging to the ethnic majority. H and K claimed damages in the domestic courts against the expert panel which had misdiagnosed them, the school, and the county council. The case went through the domestic courts. At first instance the court found in favour of the defendants and the expert panel did not challenge that decision. The Court of Appeal reversed the decision and then the Supreme Court found that judgment partly unfounded. But the Supreme Court did not decide on whether the

human rights of H and K had been violated which question came before the European Court of Human Rights. They argued that their education in a remedial school represented ethnic discrimination in the enjoyment of their right to education, in breach of art 2 of Protocol No 1 read in conjunction with art 14 of the Convention. The ECtHR found that:

'**101.** The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations …

102. The Court has further established that, as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority. They therefore require special protection …

103. Furthermore, the Court reiterates that the word "respect" in art 2 of Protocol No 1 means more than "acknowledge" or "take into account"…

104. In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order, inter alia, to assist the applicants with any difficulties they encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems, such as active and structured involvement on the part of the relevant social services (see *Oršuš*, cited above, para 177)…

105. Furthermore, the Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. Such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent (see, amongst other authorities, *DH*, cited above, para 184).

A general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable on the basis of an ethnic criterion, may be considered discriminatory notwithstanding that it is not specifically aimed at that group, unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate (see *Oršuš*, cited above, para 150). Furthermore, discrimination potentially contrary to the Convention may result from a de facto situation (see *Zarb Adami v Malta* [2006] ECHR 17209/02, para 76).

106. Where it has been shown that legislation produces such indirect discriminatory effect, the Court would add that, as with cases concerning employment or the provision of services (see, mutatis mutandis, *Nachova v Bulgaria* [2005] ECHR 43577/98 and 43579/98, para 157), it

is not necessary, in cases in the educational sphere, to prove any discriminatory intent on the part of the relevant authorities (see *DH*, cited above, para 194).

107. When it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence (see D.H., cited above, para 188).

108. Where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden of proof shifts to the respondent State. The latter must show that the difference in treatment is not discriminatory (see, mutatis mutandis, *Nachova*, loc. cit.). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (see, mutatis mutandis, *Nachova*, cited above, para 147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.'

Applying those principles to the present case, the Court found that there had been a violation of Art 14 of the Convention taken in conjunction with Art 2 of Protocol No 1 in respect of each of the applicants.

Universities: Assessment Criteria

Eric Burger v Office of the Independent Adjudicator for Higher Education* (*Defendant*) *and London School of Economics and Political Science* (*Interested Party*), *[2013] EWHC 172* (*Admin*); *judgment given on 6 February 2013

The claimant failed an examination twice and was therefore ineligible, under the rules of the LSE, to complete his MRes award or proceed to PhD registration. He took up the matter with the university and with the OIA. He then made this limited application for judicial review on two grounds: firstly that the Deputy Adjudicator had erred when she stated at paragraph 22 of her decision that she did not consider that the relevant paragraph of the instructions for examiners went so far as to dictate that the assessment criteria or marking schemes be disclosed to students in advance of examination; and secondly on the question of whether the LSE was in breach of its own rules by not publishing their assessment criteria for the relevant examination in a form that was available to the claimant as a student in advance of his taking that examination. The application was dismissed. The LSE was required under its rules to publish assessment criteria. The Deputy Adjudicator had fallen into error in holding that assessment criteria of the type considered should not be prepared and published to students. But there could not be even the faintest suggestion that marking schemes should be published to students before an examination and the error had not been material.

Mostyn J said this:

> '**20.** Had the Deputy Adjudicator been aware that other Departments published assessment criteria of the kind exemplified above then she would no doubt have phrased paragraph 22 of her ruling differently and drawn a clear distinction between assessment criteria and marking schemes. She would, I am sure, have agreed with my conclusion that paragraph 6.1(*b*) did indeed require the publication of such criteria in this case but would also have concluded that that had such publication taken place it would have made absolutely no difference to the claimant's performance in the exam, and the complaint should therefore be dismissed under rule 3.5. Further, I consider it likely that she would have concluded that the claimant, not having raised the failure to publish assessment criteria within the internal appeals process, had not exhausted his remedies with the LSE under rule 4.1. I have no doubt that had this confusion not arisen the result would have been exactly the same – the complaint would have been dismissed.
>
> **21.** It is accepted that the OIA is amenable to judicial review, although the court will generally be very slow to interfere with its decisions (*R* (*Siborurema*) *v OIA* [2008] ELR 209). However, where an inferior tribunal has made an error of fact, relief by way of judicial review will only be granted if the error is material – see *E v SSHD* [2004] QB 1044 at para 66 per Carnwath LJ (as he then was).
>
> **22.** In my judgment the error here was not material. It arose from regrettable confusion as to what assessment criteria actually comprised and its unhappy conflation with a marking scheme, publication of which most definitely cannot be made to students.'

Application dismissed.

Universities: Libel

University of Salford v Duke [2013] EWHC 196 (QB); judgment given on 6 February 2013

The University of Salford brought a libel action against Dr Duke over a number of blogs he had published. He applied to have the action struck out but the application was rejected. On a renewed application to appeal, he was granted leave to enable two matters to be resolved: firstly, whether a university could sue for libel at all and, secondly, on the assumption that it had capacity, whether or not the claim, or any part of it, should be struck out in accordance with the principles outlined by the Court of Appeal in *Jameel* (*Yousef*) *v Dow Jones Inc* [2005] EWCA Civ 75.

Eady J said this:

> '**[2]** I was surprised by the submission that no university has the capacity to sue for libel: see eg *University of Glasgow v Economist Ltd* [1997] EMLR 495 and *Hong Kong Polytechnic University v Next*

Magazine Publishing Ltd [1997] 7 HKPLR 286. I had always understood that a university would be able to sue to protect its reputation (provided the words complained of genuinely referred to the university itself, as opposed to identifiable individuals with responsibilities for its administration) and that they were such as to damage its reputation. …

[3] The argument which Dr Duke wishes to resurrect is that the decision of the House of Lords in *Derbyshire County Council v Times Newspapers* [1993] AC 534, [1993] 1 All ER 1011, 91 LGR 179 has the effect of preventing universities from suing for libel on the basis that they are to be regarded as public or governmental bodies providing higher education on behalf of central government which has delegated the task to them. This is simply not correct. …

[5] In this jurisdiction, if it were decided that as a matter of public policy universities should not have the right to sue for libel, that could only be implemented by the legislature or, perhaps, by the Supreme Court. …

[6] The important question on the present appeal, therefore, is whether the claim should be struck out as an abuse of process or, as I would formulate it more specifically, whether the words complained of do actually refer to the University or defame it.

[7] One can envisage circumstances in which allegations of a general nature about a university could cause genuine damage to its reputation. Such allegations, if they reflect adversely upon its employment practices or admissions policy, might well discourage prospective employees or students from making applications. One can readily understand that such an institution would have a reputation as an employer and as a teaching or research body. What must be of central importance in every case is the extent to which the words do indeed reflect upon the university itself.

[8] From time to time, it has been emphasised how important it is for the court to be wary, in cases where a corporate entity is suing for libel, to ensure that it is not being "put up" or used as a protective shield when the real gravamen of the defamatory words is to reflect upon the reputation of an individual or individuals: see eg *Gatley on Libel and Slander* (11th edn) at para 28.4, n 16; *Carter-Ruck on Libel and Privacy* (6th edn) at para 8.7, n 1; and *Duncan & Neill on Defamation* (3rd edn) at para 10.05, n 1. Considerations of this kind have a particular resonance in the present case.

[9] The words complained of appeared on a website …

[10] … There is no doubt that the University was referred to in various contexts and criticisms were made as to the way it was being administered. A persistent theme, however, was the focus upon two individuals in particular, namely Dr Adrian Graves and Professor Martin Hall. Professor Hall is the Vice-Chancellor of the University and Dr Graves holds the post of Deputy Vice-Chancellor … I have come to the

conclusion that any adverse comments about the University are, in context, really incidental to the attacks made upon the conduct attributed to the two individuals.

[11] Mr Rushbrooke has submitted that, simply because libellous allegations reflect upon individual members of the academic staff, that does not mean that the University itself cannot also be defamed by the same words. He is quite right about that, of course, as a matter of general principle. What is important, however, is how the court construes the specific words which form the subject of complaint. I regard it as wholly unreal, and indeed an abuse of the court's process, for these proceedings to continue on the basis that the only Claimant is the University when the conduct to be examined in any plea of justification or fair comment would be that of Dr Graves and Professor Hall. …

[23] It is in the light of this pleading that I have come to my conclusion that, in substance and reality, this is an action about allegations against individuals rather than against the University itself … I am not convinced that there is a "real and substantial tort", so far as the University is concerned, or that the proceedings should be allowed to continue purely for the purpose of the University's obtaining an injunction to stifle criticism of Dr Graves and Professor Hall (for that is what it is about).

[24] It is sometimes said that the appropriate test to apply, on such applications, is whether "the game is worth the candle": see eg most recently the decision of the Court of Appeal in *Cammish v Hughes* [2012] EWCA Civ 1655 at 52 et seq. For the reasons I have given, I am satisfied that in this instance the litigation is not worth pursuing if its sole objective is to protect the reputation of the University (any damage to which is purely incidental) or to obtain an injunction to prevent bloggers criticising Professor Hall and Dr Graves (since they are not parties).

[25] Sometimes, where an employee is libelled in relation to the carrying out of his/her duties, it may be legitimate for the employer to support and fund a claim in the name of the relevant individual. If Dr Graves and/or Professor Hall wished to bring an individual libel claim (and were able to surmount any difficulties imposed by the Limitation Act 1980, as amended), it is conceivable that such an action might be supported by University funds. That would be a decision, however, for the appropriate authority to make in the circumstances prevailing when that bridge has to be crossed.

[26] I will allow the appeal on the basis of *Jameel* abuse, because I cannot see that a real or substantive tort has been perpetrated against the University; nor do I foresee any tangible advantage being achieved by way of its reputation being effectively vindicated (even assuming that it has been damaged). In so far as there has been any incidental damage to the corporate reputation, it is not going to be in any real sense

vindicated for so long as any defamatory allegations against Professor Hall and Dr Graves with regard to their stewardship are left in the air.'

Assessment and Examination Boards

R* (*on the application London Borough of Lewisham*) *v* (*1*) *Assessment and Qualifications Alliance* (*'AQA'*), (*2*) *Pearson Education Limited* (*'Edexcel'*), (*3*) *Office of Qualifications and Examinations Regulation* (*'Ofqual'*); *judgment given on 13 February 2013

Readers will recall the controversy over the awarding of English GCSE grades in the summer of 2012, which generated much publicity in the press. In this case, the decisions of two examination boards (or qualification awarding organisations) and of the regulator, Ofqual, were challenged by more than one hundred and fifty claimants, but the claim for judicial review failed. The crux of the issue was that different grade boundaries were set for candidates who were assessed in June 2012 from those set for candidates who were assessed in January 2012. Summer 2012 was the first time that GCSEs were awarded for these particular English courses which were new on the curriculum from September 2010. Examination was modular and marks and grades boundaries were published after modules had been assessed. Many teachers assumed that the grade boundary between grade C and grade D would be the same or almost the same from one assessment to another.

Elias, LJ, sitting with Mrs Justice Sharp, said this:

> '**149.** The claimants brought this case because they considered that students had been treated unfairly. There are two principal grievances: first, the actual performance of these students had not been fairly reflected in their grade because the results had been unjustly moulded to reflect predicted performance. The statistics had dominated the assessment process in a wholly unacceptable way. I have rejected that submission, essentially on the ground that it was legitimate for Ofqual to pursue a policy of comparable outcomes, ensuring a consistent standard year on year, and assessing marks against predicted outcomes was a rational way of achieving that objective. Moreover, the Awarding Committee in each of these AOs believed that the June grades fairly reflected the quality of the candidates.
>
> **150.** The second grievance is a wholly understandable one, and relates to the inconsistent treatment meted out to the students taking assessments in January and June respectively. There is no doubt with hindsight that the former were treated more generously than the latter. Some teachers, again understandably, took the January grade boundaries as a strong guide to future assessment. They did not anticipate the boundary shifting as much as it did in certain units. The reason for the change was in part that some teachers had marked papers more leniently in June specifically in order to bring them just above the C grade; but that was far from the whole story. More significantly, there was fuller information available in June than in January and it became clear with hindsight that the January cohort had been treated too leniently.

151. Ofqual was in a difficult position. It considered and rejected the possibility of re-assessing the January grade assessments. Nobody seriously suggests that it should have retrospectively reduced a candidate's grade in that way when the result had been made public. Yet if it were to have applied the grade boundaries in June, it would have led to a significant dilution of standards, with an unrealistically high proportion of students obtaining a C grade. That would have created an injustice as between those qualifying in June 2012 when compared with students in earlier and subsequent years. Indeed, the problem is compounded when it is appreciated that some candidates for particular units in June 2012 were qualifying in June 2013. If they were to be assessed according to the January 2012 boundary marks, that would be unfair to candidates taking the same unit in January and June 2013. It would manifest precisely the same unfairness that the claimants now allege, but shifted to different victims.

152. The problem lies in the modular nature of the examination, coupled with the fact that grade boundaries were assessed and made public at each stage of the process. Mr Sheldon was highly critical of this structure. He rightly points out that a number of experts had predicted precisely the kind of difficulties which have, in fact, arisen. He says that the problem is of Ofqual's own making (or at least, Ofqual's predecessor). That may be so, but the judicial review challenge is not to the modular nature of the assessment process, or to the practice of assessments being made at different points in the two year qualification period. It is a challenge to the way in which Ofqual and the AOs sought to deal with the problems once they had materialised.

153. Initially it was assumed that since the same procedures were being adopted in January as in June, there should be no change in standards. In fact, this was not so and the January cohort were assessed more leniently. Once that became clear, Ofqual was engaged in an exercise of damage limitation. Whichever way it chose to resolve the problem, there was going to be an element of unfairness. If it imposed the same standard in June as it had in January, this would be unjust to subsequent cohorts of students taking the units in subsequent years. If it did not, that would favour the January cohort over the June cohort in 2012. Unless standards were to be lowered into the future and the currency of GCSE English debased, at some stage a decision would have had to be taken to depart from the less rigorous January grade boundaries and at that point, whenever it was, there would be winners and losers.

154. The claimants submit that even if the January cohort was treated unduly favourably, it was wrong to draw a distinction between groups of candidates qualifying in the same year. This was more important than equality as between years.

155. However, there is no obvious or right answer to the question where the balance of unfairness should lie. Ofqual's solution was in my judgment plainly open to them. Their priority was to protect the

comparable outcomes objective, although it meant that January candidates were treated more generously. However, the adverse consequences were relatively contained by acting at that point since far fewer students took the relevant units in January than in June.

156. For these reasons, which briefly recapitulate those spelt out in some detail in this judgment, I do not think it can be said that Ofqual or the AOs erred in law.

157. I therefore dismiss these applications. As I have said, however, this is a rolled up hearing, and although nothing turns on the point, I would grant permission for the applicants to bring these proceedings. This was a matter of widespread and genuine concern; there was on the face of it an unfairness which needed to be explained. There is no question, in my view, that the matter was properly brought to court. Indeed, following the outcry when the results were published in August, Ofqual itself carried out an investigation into the concerns which were being expressed and produced two reports, an interim report and a final one produced after consulting widely with interested parties. Ofqual was not persuaded that it should require the grade boundaries to be changed, but it appreciated that there were features of the process which had operated unfairly and it proposed numerous changes for the future which are designed to ensure that the problems which arose in this case will not be repeated. It also took the unusual step of allowing students to take resits in November instead of having to wait until the following January. We are not directly concerned with those reports which simply reflect Ofqual's own views. However, having now reviewed the evidence in detail, I am satisfied that it was indeed the structure of the qualification itself which is the source of such unfairness as has been demonstrated in this case, and not any unlawful action by either Ofqual or the AOs.

158. For these reasons, I therefore grant permission to bring judicial review proceedings but dismiss the applications.'

ITEMS OF INTEREST

Ombudsman Decision: No Education

After a complaint to the Local Government Ombudsman, Croydon LBC has paid £6500 to a family whose children were left without education for six months after they moved into Croydon's area (November 2012).

Information Commissioner News

The Information Commissioner's Office has been monitoring the Department for Education for three months after the Department failed to respond to 85% of its Freedom of Information Act requests within 20 days (1 January to 31 March 2013).

Another jolly press release from the ICO (in December 2012) listed some types of information which public authorities have had to release recently under the FOI Act. The list included:

- The number of school fires started deliberately in Sussex
- The amount of asbestos found in Devon schools and
- The school that had the highest exclusion rate in England

Government to Abolish SEN Statements

A Government Press Release announcing the Children and Families Bill 2013 put a predictable gloss on the part dealing with SEN:

'The Government is transforming the system for children and young people with special educational needs (SEN), including those who are disabled, so that services consistently support the best outcomes for them. The Bill will extend the SEN system from birth to 25, giving children, young people and their parents greater control and choice in decisions and ensuring needs are properly met. It takes forward the reform programme set out in Support and aspiration: A new approach to special educational needs and disability: Progress and next steps by:

- replacing statements and learning difficulty assessments with a new birth- to-25 Education, Health and Care Plan, extending rights and protections to young people in further education and training and offering families personal budgets so that they have more control over the support they need;
- improving cooperation between all the services that support children and their families and particularly requiring local authorities and health authorities to work together;
- requiring local authorities to involve children, young people and parents in reviewing and developing provision for those with special educational needs and to publish a "local offer" of support.'

Copyright Licensing in England

According to a DfE Press Release, the DfE and the Copyright Licensing Agency have agreed a three-year arrangement from 1 April 2013, in relation to the print-based 'CLA Schools Licence' and the 'Schools Printed Music Licence' published by the CLA.

Easier Planning Permission for Free Schools

In June 2013, the DfE and the DCLG intend to make it easier for new Free Schools to open quickly, by removing many of the planning permission constraints. It is not clear yet whether the new freedom will apply to all schools, to all academies or only to those academies which are also free schools. (Source: DCLG and DfE Press Release)

New Ofsted Inspection Framework for Independent Schools

The framework for inspecting education in 'non-association independent schools' in England gives the statutory basis for inspection and summarises the main features of school inspections carried out under s 162A of the Education Act 2002, as inserted by Sch 8 of the Education Act 2005. It sets out how the general principles and processes of inspection are applied to non-association independent schools in England. This framework should be read alongside 'the evaluation schedule for inspecting non-association independent schools' and the guidance called 'conducting inspections of non-association independent schools'.

This framework covers the inspection of provision for pupils aged three to five years in the Early Years Foundation Stage, taking account of the statutory framework for the Early Years Foundation Stage. It does not cover the inspection of registered provision for the care of children from birth to age three, which is inspected under s 49(2) of the Childcare Act 2006.

This framework should be read alongside 'the framework for inspecting boarding and residential provision in schools', 'conducting inspections of boarding and residential provision in schools' and 'the evaluation schedule for inspecting boarding and residential provision in schools'.

The evaluation schedule requires inspectors to make the following key judgements about the school:

- overall effectiveness
- pupils' achievement
- pupils' behaviour and personal development
- quality of teaching
- quality of curriculum
- pupils' welfare, health and safety and
- leadership and management.

This new framework was published on 16 January 2013.

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