[1995] ELR 33

R v LANCASHIRE COUNTY COUNCIL EX PARTE F

Queen's Bench Division

[1995] ELR 33

HEARING-DATES: 16 May 1994

16 May 1994

CATCHWORDS:
School admissions - Admissions policy - Whether policy of according, in respect of admissions to county and controlled schools, a lower priority to Roman Catholic children attending Roman Catholic primary schools than to other children where a school was over-subscribed was unlawful

HEADNOTE:
In the Lancashire Education Authority area there were 99 secondary schools, of which 22 were Roman Catholic schools. Some 20% of secondary school pupils in Lancashire attended Roman Catholic schools. Under agreements made between the governing bodies of Roman Catholic schools in Lancashire and the respondents - the Lancashire County Council (the local education authority) - limits were established on the numbers of children who were not of the Roman Catholic faith who could be admitted to the schools concerned. In some cases the agreement provided for the admission of a small percentage of such children, in other cases it provided that no non-Roman Catholic children should be admitted. The admissions policy in respect of non-Roman Catholic schools (county and voluntary controlled schools) was that places would be allocated to Roman Catholic children who were attending Roman Catholic primary schools only after applications in respect of non-Roman Catholic children. The policy was not that advised by the Department for Education in its circular 6/93, which regarded as unacceptable the application of a religious criterion in respect of admission to a non-denominational school. The respondents' policy view was that without its provision for Roman Catholic children to have lower priority for county or controlled schools in the area, it was possible that there might be the admission of a significant number of Roman Catholic children to such schools. This could result in there being no places there for a number of non-Roman Catholic children, for whom access to Roman Catholic schools was extremely limited. Having consulted the Roman Catholic diocesan authorities, who on balance considered the existing arrangements to be equitable, the respondents' education committee considered the policy further but decided to retain it, at least for the September 1994 intake of pupils. The respondents informed the Department for Education of their decision and the reasons for it on 29 October 1993, expressing the intention to keep the matter under review. On 16 November 1993 the parents of F expressed their preference for schools in accordance with the respondents' admissions procedures: (1) Highfield; (2) St Bede's; and (3) St Mary's. There were 224 first preference requests for Highfield (a non-Roman Catholic school), whereas the agreed admission number was 180. The respondents applied their admissions policy and, in consequence, F was denied a place at Highfield. The parents were informed of this decision on 1 March 1994. An application on behalf of F for judicial review was made. It was argued that the respondents' admission policy was unlawful.

Held - dismissing the application - compliance with the preference of all parents would have prejudiced the provision of efficient education and the efficient use of resources and thus the policy which had been promulgated for application when a school was over-subscribed had to be applied. The application before the court could only succeed if the policy was shown to be one which 'no sensible authority acting with due appreciation of its responsibilities would have decided to adopt' (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 per Lord Diplock at p 1064). Standing in isolation and without explanation a policy which allocated places to Roman Catholic children attending a Roman Catholic primary school only after other applications had been met sounded discriminatory and unsustainable, but when it was set in its context, as it existed in the respondents' area, it seemed impossible for the court to say that it was so unreasonable that the court should interfere. If too many Roman Catholic children from the Roman Catholic primary schools expressed a preference to go to county schools and those preferences were considered in the same way as other preferences, the local education authority would be left with a number of children who could not be given places in the areas in which they lived. The respondents had formulated their policy accordingly, after carefully considering the advice of the Department for Education.

CASES-REF-TO:
Statutory provision considered

Education Act 1944, s 8

Education Act 1980, s 6(1), (2), (3)(a),(b), Sch 2, para 7(b)

Cases referred to in judgment

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, [1968] 2 WLR 924, [1968] 1 All ER 694, HL

R v Commissioner for Local Administration ex parte Croydon London Borough Council [1989] 1 All ER 1033

R v Governors of the Bishop Challoner Roman Catholic **School ex parte Choudhary** [1992] 2 AC 182, [1992] 3 WLR 99, [1992] 3 All ER 277, sub nom R v Governors of Bishop Challoner Roman Catholic School and Others ex parte C and P [1992] 2 FLR 444, HL

R v Greenwich London Borough Council ex parte Governors of the John Ball Primary School [1989] 88 LGR 589, CA

R v London Borough of Lambeth ex parte G [1994] ELR 207

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, HL

COUNSEL:
Anthony Bradley for the applicantElizabeth Appleby QC for the respondent

PANEL: Kennedy LJ and Alliott J

JUDGMENTBY-1: KENNEDY LJ

JUDGMENT-1:
KENNEDY LJ: This is an application for judicial review of a decision of Lancashire County Council's education officer in a letter, dated 1 March 1994, refusing F, aged 10, a place in September 1994 in Highfield School, and offering him a place in St Mary's High School, Blackpool. Although the challenge is in the form of a challenge to an individual decision in relation to a particular child, it is in reality a challenge to an important part of the policy of the Lancashire County Council, which becomes effective whenever more parents wish to send children to a particular non-denominational school than it can accommodate. In other words, it is over-subscribed.

Before I identify the policy under attack, it is necessary to say something about the legislative framework within which it has to operate.

Under s 8 of the Education Act 1944 it is the duty of every local education authority (of which Lancashire County Council is one) to secure that there are available for their area sufficient schools for providing secondary education. As is clear from the affidavit of Mr Wales, sworn on behalf of the respondents, Lancashire County Council has an unusually high number of Roman Catholic and Church of England voluntary-aided schools. There are 22 Roman Catholic schools and six Church of England schools out of a total of 99 schools, and 20% of the children attend the Roman Catholic secondary schools.

Section 6(6) of the Education Act 1980 provides:

'A local education authority shall, if so requested by the governors of an aided or special agreement school maintained by the authority, make arrangements with the governors in respect of the admission of pupils to the school for preserving the character of the school; and the terms of any such arrangements shall, in default of agreement between the authority and the governors, be determined by the Secretary of State.'

That provision enables the governing bodies of Roman Catholic schools to agree with the local education authority a limit of the non-Roman Catholic children who may be admitted, and many such agreements have been made between governing bodies and Lancashire County Council. Some of the agreements provide that no children who are not Roman Catholic shall be admitted; others provide for the admission of a small percentage of the non-Catholic children. In the case of St Mary's High School the percentage is 10%.

That brings me to the earlier part of s 6 of the 1980 Act, which deals with a parent's right to express a preference as to which school a child should attend, and how the local education authority must then respond. Section 6 provides:

'(1) Every local education authority shall make arrangements for enabling the parent of a child in the area of the authority to express a preference as to the school at which he wishes education to be provided for his child in the exercise of the authority's functions and to give reasons for his preference.

(2) Subject to subsection (3) below, it shall be the duty of a local education authority and of the governors of a county or voluntary school to comply with any preference

expressed in accordance with the arrangements.

(3) The duty imposed by subsection (2) above does not apply-

(a) if compliance with the preference would prejudice the provision of efficient education or efficient use of resources;

(b) if the preferred school is an aided or special agreement school and compliance with the preference would be incompatible with any arrangements between the governors and the local education authority [made under subsection (6) below].'

In this case it is accepted that the local education authority made the arrangements required by s 6(1), and that on 16 November 1993, F's parents completed the form which expressed their preference as follows: (1) Highfield, (2) St Bede's, (3) St Mary's. At the head of the form there appear these words:

'Before completing this form parents are strongly advised to read the booklet "Secondary School Admissions 1994".'

The booklet referred to is a local education authority booklet which deals, amongst other things, with what happens when too many parents want their children to go to the same school. Paragraph 8 of the booklet, headed 'What are the admission criteria in an over-subscribed school?', reads:

'In a county or controlled school, priority is always given to parents' first preferences. Within this group the following priorities apply-

(a) brothers and sisters of children already attending the school at the time of the transfer (except for those brothers and sisters who transferred to the school at 16+), then

(b) children for whom the county council accepts there are strong medical, social or welfare reasons for admission (see Section B5) which are directly relevant to the school concerned, then

(c) the remaining places are allocated according to geographical criteria which may differ from school to school and are described in the information given with this booklet.'

Paragraph 14, headed 'If my child goes to a Roman Catholic primary school, may I express a preference for a county or voluntary controlled high school?', reads:

'Yes. However, you should be aware that where there are more applicants for a school than the places available, the policy of the county council is to allocate places to Roman Catholic children attending Roman Catholic primary schools only after other applications have been met.'

That paragraph sets out the policy which is at the heart of this case. The policy was to some extent modified or clarified in April 1994, when the education committee authorised the chief education officer:

'... to agree to preferences expressed by parents of Roman Catholic children attending Roman Catholic primary schools being considered as all other applicants

where the children have a brother or sister attending the same school or where there are exceptional special reasons of a medical, social or welfare nature for admission.'

Although Mr Bradley tried to make something of it, it seems to me that the modification or clarification is of no significance in relation to the matters with which we are concerned.

The policy so clearly set out in the local education authority booklet is not that advised by the Department for Education. In September 1993 the department published 'A Guide To Secondary School Admissions', which, under the heading 'Unacceptable admissions criteria' says, so far as material:

'... schools should not have admissions policies which:

...

take account of religious beliefs (unless they are church schools).'

The department also in July 1993 published circular 6/93 dealing with 'Admissions to Maintained Schools', and an annex to that circular deals with 'Over-subscription criteria'. Under the general heading of 'Unacceptable criteria', para 20 of the annex is headed 'Distinguishing between applicants on religious grounds in non-denominational schools', and it reads:

'It is established practice for denominational and religious schools to assign a higher priority to the applicants who belong to the faith they represent. The law also allows such schools, in certain circumstances, to refuse admissions to pupils of other denominations or faiths even if that means holding empty places.'

Paragraph 21 reads:

'But the Secretary of State does not believe that it is reasonable for non-denominational schools to distinguish between applicants on the grounds of their faith or denominational background. He starts with the position that over-subscription criteria of such schools which assign a lower priority to applicants of one faith or denomination as compared with another cannot be justified on educational grounds and are therefore unacceptable.'

It is clear that the Lancashire County Council has considered the views of the Secretary of State, in particular at a meeting of its education committee on 14 September 1993 for which a report was prepared. The whole of that report merits consideration, but I cite only a part of it. Having referred to agreements made with governors of Roman Catholic schools, the report says:

'...the admission of non-Catholic pupils to Roman Catholic High Schools in Lancashire is now limited to a small proportion of the total, even in cases where the total places available are not filled. This has the general effect that more school places are available to Roman Catholic pupils than to non-Roman Catholic pupils since access to places in Roman Catholic High Schools for non-Catholics is extremely limited. Furthermore, it is possible that if a significant number of Roman Catholic pupils were to take up places in county or controlled schools in an area, then non-Catholic pupils could find that there were no places available for them in the locality. This explains the basis for giving priority for places in county and controlled schools to non-

Catholic pupils.'

The report goes on to refer to a couple of earlier challenges to the local education authority, and to the Parent's Charter which emphasises the individual parent's right to send a child to a school of their choosing. By the time of the report the local education authority had consulted the Roman Catholic diocesan authorities who, on balance, had expressed a preference for no change of policy, because of the need to ensure the efficient use of resources in the planning of school places, and because they felt:

'it would be inequitable for Roman Catholic pupils to be given the same right of access as other pupils to the county or controlled secondary schools. However, the diocesan authorities recognised that the arguments were finely balanced and that the authority might wish to consider changing their policy.'

So the education committee had to decide whether to change their policy. In the event they decided to adhere to their policy, and in a letter dated 29 October 1993 the Department for Education was so informed. Part of that letter reads:

'If a significant number of Roman Catholic pupils were to take up places in county or controlled schools in an area, then non-Catholic pupils could find that there were no places available for them in the locality. This would lead to considerable parental discontent, inconvenience for pupils, additional expenditure for the authority in home-to-school transfer costs and pressure to provide additional accommodation without adequate capital resources to respond.'

The letter goes on to make it clear that although the admissions policy was thus resolved for September 1994, the matter was being kept under review, and the letter continues:

'This decision is seen as proper and sound based upon the authority's specific duty to secure sufficient places for pupils in secondary schools and its general responsibility to act as efficiently as possible.'

In the event there were 224 first preference requests for places at Highfield School, for which the agreed admission number was 180. The local education authority applied its policy, and thus the parents of F received the letter dated 1 March 1994 to which I referred at the beginning of this judgment. As that letter makes clear, there is under the 1980 Act a right of appeal to an independent appeal committee, which has to have regard to the local education committee's published policy (see Sch 2, para 7(b) to the Act), and so with the time being somewhat critical, because September is not far away, it was thought appropriate to commence these proceedings without waiting for the result of any appeal.

Miss Appleby, for the local education authority, takes no point about that, nor about the fact that, for reasons explained in the affidavit, the proceedings were not commenced quite as soon as they might have been.

Mr Bradley, for the applicant, submits rightly that the primary issue of law which we have to consider is:

'Is the council, in deciding on its policies for admission to a county secondary school, entitled to adopt a policy whereby, when there are more applicants for admission to

the school than the places available, applications on behalf of Roman Catholic children attending Roman Catholic primary schools are considered only after all other applications have been dealt with?'

He took us through the legislative history, but in my judgment it is not necessary to look beyond those statutory provisions to which I have already referred. He reminded us that in R v Commissioner for Local Administration ex parte Croydon London Borough Council [1989] 1 All ER 1033 there was approval expressed for a two-stage approach by a local education authority when a school is over-subscribed, the first stage being to consider whether compliance with the parents' preference would prejudice efficient education or the efficient use of resources, and if such prejudice be found, the second stage being to consider whether the extent of the prejudice is sufficient to outweigh the reasons for the preference.

Mr Bradley invited our attention to the decision of the House of Lords in R v Governors of the Bishop Challoner Roman Catholic **School ex parte Choudhary** [1992] 2 AC 182. There the governors of a voluntary-aided Roman Catholic girls' school had an admissions policy which gave priority to Roman Catholics, then other Christians, and thus when it was over-subscribed the appellants, who were a Hindu and a Muslim, were not accepted. The policy was challenged, but was upheld. At p 192, Lord Browne-Wilkinson adopted part of the judgment of Taylor LJ (as he then was) in the Court of Appeal, where Taylor LJ had said in relation to s 6 of the 1980 Act:

'If compliance with all parental preferences would result in over-crowding then the governors may apply any reasonable criteria to make the necessary reduction in numbers. Those criteria include sibling priority and geographical proximity. Likewise, in a church school, priorities such as those stated in the admissions policy here can properly be applied.'

Mr Bradley submits that by inference it was being said that religious affiliation cannot be relevant except in the case of a church school. As a general proposition that sounds attractive, but it is necessary to consider the facts of each case.

Our attention was also invited to the decision of the Court of Appeal in R v Greenwich London Borough Council ex parte Governors of the John Ball Primary School [1989] 88 LGR 589 and R v London Borough of Lambeth ex parte G [1994] ELR 207. In each case the court was concerned with the relevance of local authority boundaries, and in neither case was anything said which I regard as being of particular significance in the context of this case.

Mr Bradley submitted that as an aim of the 1980 Act was to extend the rights of parents to express preferences in relation to school admissions, the local education authority's discretion in policy-making must not be used so as to frustrate the objects of the Act (see Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997). That I would accept, but of course what is in issue here is not the right to express a preference, but how the local education authority is to act in a situation in which it is impossible to give effect to every preference which has been expressed.

Mr Bradley submits that the local education authority is unreasonable because F's parents had no knowledge of its policy until he was in his last year at primary school, and such a policy may well result in children being transferred from one primary school to another so as to improve the prospects of obtaining a place at a preferred

secondary school. That may be, but it does have to be remembered, as Mr Bradley himself pointed out, that all of these matters seem to be subject to annual review and, for example, if tactical movement of children were to become widespread, the local education authority would have to decide how to respond to it.

Mr Bradley made two final submissions which I can deal with quite quickly before I return to his more substantial submissions which I have attempted to summarise. First he submitted that if we found the provisions of the Education Act 1980 to be ambiguous as to the extent of parental preferences, we could derive some assistance from the European Convention on Human Rights. In my judgment there is no ambiguity. Secondly he invited our attention to s 10 of the Roman Catholic Relief Act 1829 which provides:

'It shall be lawful for any of his Majesty's subjects professing the Roman Catholic religion to hold, exercise, and enjoy, any civil and military offices and places of trust or profit under his Majesty, and to exercise any other franchise or civil right, except as herein-after excepted ...'

He submits that the policy in question infringes the applicant's civil rights in a way not expressly authorised by Parliament. That submission is, in my judgment, unacceptable. The applicant has no civil right to go to Highfield School. He has only a right to express a preference and if the school is over-subscribed, to have the local education authority respond in accordance with a published policy which is itself not unreasonable. It would be unreasonable if it were a policy which 'no sensible authority acting with due appreciation of its responsibilities would have decided to adopt' (per Lord Diplock in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 at p 1064).

So, at the end of the day, as it seems to me, Mr Bradley is unable to rely upon the duty set out in s 6(2) of the 1980 Act, because Highfield School is over-subscribed. Compliance with the preferences of all parents would, therefore, prejudice the provision of efficient education and the efficient use of resources. The policy which has been promulgated for application when a school is over-subscribed must, therefore, be applied and this application can only succeed if that policy is shown to be one which in Lord Diplock's words 'no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. Standing in isolation and without explanation a policy which allocates places to Roman Catholic children attending a Roman Catholic primary school only after other applications have been met sounds discriminatory and unsustainable, but when set out in the context, as it exists in this local education authority's area, it seems to me to be impossible for this court to say that it is so unreasonable that the court should interfere. Put very simply, the situation is that a large number of children have to be accommodated in a finite number of secondary schools which fall into two groups: the county high schools and the Roman Catholic schools. Because of arrangements made between the Roman Catholic diocesan authorities and the local education authority pursuant to the 1980 Act, very few non-Catholic children can be accommodated in Roman Catholic schools even if they wanted to go there.

If too many Roman Catholic children from the Roman Catholic primary schools express a preference to go to county schools and those preferences are considered in the same way as all other preferences, then the local education authority will be left with a number of children who cannot be given places, as they should be, in the areas in which they live, so the local education authority has formulated its policy

and, after carefully considering the advice of the Department for Education, has decided to adhere to it. It may be that for those who have to formulate the policy the arguments are, as the Roman Catholic and diocesan authorities observed, finely balanced, but we are not entrusted with that task.

Accordingly, in my judgment, this application fails and should be dismissed.

JUDGMENTBY-2: ALLIOTT J

JUDGMENT-2:
ALLIOTT J: I agree.

DISPOSITION:
Application dismissed. No order for costs, save for legal aid taxation of the applicant's costs. Leave to appeal refused.

SOLICITORS:
Lancashire Free Legal Action Centre for the applicantlocal authority solicitor

NEVILLE HARRIS BARRISTER