

SUMMARY

THE KING on the application of
(1) KIMBERLY ISHERWOOD
(2) AXD
(3) GRACE PATTON
(4) MARK THOMAS
(5) KATE BROOM
-v-
THE WELSH MINISTERS

[2022] EWHC 3331 (Admin): Mrs Justice Steyn DBE

[References in square brackets are to paragraphs in the judgment of the Court.]

1. The Court has handed down judgment in this judicial review claim today, following the hearing of the claim on 15 and 16 November 2022.
2. The claim has been dismissed. The Court has made directions for the determination without a hearing of any arguments as to any other orders to be made consequent on the judgment.

The claim

3. The Curriculum and Assessment (Wales) Act 2021 (‘the 2021 Act’) established a new framework for curricula to be designed, adopted and implemented by maintained schools in Wales. ‘Relationships and Sexuality Education’ (‘RSE’) is described in the 2021 Act as a ‘mandatory element’ of the new curricula.
4. The claimants are five parents of children of school age living in Wales who object on religious and/or philosophical grounds to their children being taught RSE ([65]-[72]). By this claim for judicial review, they challenged the lawfulness of *The Curriculum for Wales – Relationships and Sexuality Education Code* (‘the Code’;) and *The Relationships and Sexuality Education (RSE): Statutory Guidance* (‘the Guidance’) ([74]-[80]).
5. The claimants did not allege that the 2021 Act, or any provision of that Act, was outside the Senedd’s legislative competence as defined in s.108A of the Government of Wales Act 2006 ([37]-[38]). The focus of the challenge was on the Code and the Guidance.

Issues for determination

6. The claimants were granted permission to apply for judicial review on four grounds. The list of agreed issues for determination is set out at [3]. The main issues were:

- (a) Whether the common law provides a parental right of excusal (that is, in essence, a right of a parent of a child registered at a state school to withdraw their child from certain classes, without permission,). The description of the claimed right is at [82].
- (b) Whether, having regard to the principle of legality (described by the court at [127]-[129])), the 2021 Act had the effect of removing the parental right of excusal (if any) provided by common law, or of removing the statutory parental right of excusal provided by s.405 of the Education Act 1996 (which has been amended for Wales by the 2021 Act, [31]).
- (c) Whether the Code or the Guidance purport to authorise or positively approve teaching that would breach the second sentence of article 2 of protocol 1 of the European Convention on Human Rights ('A2P1'), the whole of which article provides:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

Decision

- 7. The court analysed the case law relied upon and found that no fundamental parental right of excusal exists at common law ([103]-[126]), and the court should not now develop such a right in a field that has been comprehensively regulated by the legislature for many years ([91]-[92], [103]).
- 8. The held that the effect of the principle of legality is that common law constitutional rights can be abrogated not only expressly but also by necessary implication. On either basis, for the court to interpret legislation as overriding fundamental rights, it must be crystal clear that the legislature intended do so ([129]).
- 9. The court held that it necessarily follows from the express provisions of the 2021 Act that the statutory right of excusal in s.405 of the 1996 Act no longer applies to Wales, and if a common law right of excusal existed it has been removed by the 2021 Act ([129]-[134]).
- 10. The court analysed the authorities on A2P1 at [169]-[197] and identified the key principles applicable in this case at [198]. In particular, the court noted that:
 - (a) The second sentence of A2P1 is aimed at safeguarding the possibility of pluralism in education.
 - (b) The setting and planning of a curriculum is, in principle, a matter for the state. But the state must take care to ensure that information or knowledge of a directly or indirectly religious or philosophical kind is conveyed in an objective, critical and pluralistic manner ('the pluralism requirement'). And the state may not pursue an aim of indoctrination.
 - (c) In determining the content of education and the manner of its provision the state has a duty to respect parents' convictions, be they religious or

philosophical. But the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions.

- (d) If the pluralism requirement is met, and the prohibition on indoctrination is not breached, A2P1 does not permit parents to object to the compulsory nature of such teaching.
- (e) Teaching should be neutral from a religious perspective, but it is not required to be value neutral. In particular, sex and ethics education which aims to encourage tolerance between human beings irrespective of their sexual orientation and identity, and to enable children to deal critically with influences from society, so that they develop into responsible and emancipated citizens capable of participating in the democratic processes of a pluralistic society, is consonant in its objectives with the principles of pluralism and objectivity embodied in A2P1.

11. The court found that the introduction of mandatory RSE in Wales had been the product of a process of careful consideration ([199]), and the Welsh Government's aims were consistent with the requirements of the Convention ([200]-[201]).
12. There was a disjunct between the actual contents of the Code and the Guidance, and the claimants' allegations ([202]). On analysis of those texts, the court concluded that the contention that they fall foul of the rule against indoctrination was misconceived ([213]); and both documents complied with the pluralism requirement.
13. The court observed that pluralism is an ethic of respect that values human diversity, and the promotion of a spirit of tolerance ([208]). Openness to a plurality of ideas, and the ability to engage sensitively, critically and respectfully in debates within society (such as on the topic of gender identity), which RSE seeks to encourage and develop, fully accords with the aim of pluralism in a liberal and democratic state ([205]). The court rejected the claimants' contention that the Code or the Guidance will result in teaching that breaches A2P1 (or article 9).

NOTE: This summary is provided to help in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.judiciary.uk and <http://caselaw.nationalarchives.gov.uk/>

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