The Queen on the Application of R v Leeds Magistrates Court and Others

CO/6282/2004

High Court of Justice Queen's Bench Division The Administrative Court

28 June 2005

[2005] EWHC 1479 (Admin)

2005 WL 1650625

Before: Mr Justice Davis

Tuesday, 28th June 2005

Representation

Mr Alex Offer (instructed by Davis, Gore, Lomax) appeared on behalf of the Claimant.

Mr Andrew Wilson (instructed by Leeds City County Council) appeared on behalf of the Defendant.

Judgment

Mr Justice Davis:

1 I repeat my direction that there is to be no publicity of this case which might in any way cause to be identified the child or the school concerned.

2 This is an appeal by way of case stated from a decision of the justices given on 10th September 2004, whereby the appellant, Mrs R, was convicted of an offence under section 444 of the Education Act 1996 .

3 Section 444 provides in the relevant respect as follows:

> "(1) If a child of compulsory school age who is a registered pupil at a school fails to attend regularly at the school, his parent is guilty of an offence.
>
> "(2) Subsections (3) to (6) below apply in proceedings for an offence under this section in respect of a child who is not a boarder at the school at which he is a registered pupil.
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> "(3) The child shall not be taken to have failed to attend regularly at the school by reason of his absence from the school—
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> "(a) with leave,
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> "(b) at any time when he was prevented from attending by reason of sickness or any unavoidable cause, or
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> "(c) on any day exclusively set apart for religious observance by the religious body to which his parent belongs."

4 The remaining parts of the section deal with the position where the child shall not be taken to have failed to attend regularly at the school if the parent proves various matters.

5 Having convicted the appellant by reference to that section, the justices granted an absolute discharge but ordered the appellant to pay costs of £25.

6 It may be noted in passing that section 444 is to be contrasted, and quite distinctly contrasted, with the provisions of the new section 444(1A) , which prescribes penalties in circumstances where a parent knows that his child is failing to attend regularly at the school and fails without reasonable justification to cause him to do so. The penalties by reference to section 444(1A) are potentially significantly greater than those under section 444 itself and it may also be noted that a considerable focus of section 444(1A) is by reference to whether or not the parent has reasonable justification for what that parent has done: a consideration which does not feature in section 444 itself.

7 Putting it very shortly for the present purposes, the complaint related to the non-attendance of the youngest daughter of Mrs R, who may be identified by the initial K, at a certain grammar school. K in fact, as the information said, was absent from that school for a period of 117 days between 16th June 2003 and 24th October 2003. K, it might be added, was born on 12th December 1988. The attendance of K at various schools, both primary and secondary, including this particular school, has been marked over the years by very frequent absences, K's complaints essentially consisting of bullying at the various schools and classes which she attended. Mr Offer, counsel appearing on behalf of Mrs R on this appeal, accepted that K may be said to have, using his phrase, an “eggshell personality” in this regard. It is also expressly accepted that the school concerned took every proper step to confront the problem and to address the difficulties that had arisen with regard to K.

8 A case was in due course stated by the Magistrates upon the request of Mrs R's legal advisers. The case stated is quite detailed. It summarises at considerable length the evidence that had been heard at the trial before the justices. The prosecution had called the evidence of Mrs Fry, an Educational Welfare Officer. Mrs Fry gave evidence about the attendance of K at the school, saying it had been very irregular with very few full school weeks completed and some periods of block non-attendance. Mrs Fry also stated, and it has been accepted, that the school in question had put in place every measure it could to avoid K being bullied. Mrs Fry refers to the personal circumstances of K and her parents and noted that, very sadly, Mrs R had been diagnosed with breast cancer. Mrs Fry is recorded as saying that K was a very anxious girl who had difficulties with her peers and that this would have been the same in any school. She also explained why it had not been possible to arrange a transfer of K to any other school.

9 As for Mrs R, she gave evidence of the bullying that K had experienced, beginning at her primary school and then on moving on to the grammar school. It was noted that Mrs R said that the problems of the bullying were so bad in the middle of year 8 that K was “stressed” and, according to Mrs R, the school did not seem to be helping. Mrs R said K was “totally stressed” and she herself felt that enough was enough, she had an obligation to her daughter. Mrs R is recorded as saying in her evidence that K was threatening suicide and that, when she had told Mrs Fry, Mrs Fry had said K needed counselling. Mrs R's attitude was that she did not want her daughter to be another suicide statistic. She said that that she was stressed out and she had had enough, which is why she withdrew K from the school during 2003. She referred to a suicide attempt on the part of K and also said that K had come out in a physical rash because she was “basically stressed”. She said that K had been put on antidepressants by her general practitioner but that, in the view of Mrs R, this was not the solution. She said all this was a period of time when all that was on K's mind was suicide and she decided in June that she was pulling K out of school.

10 K herself gave evidence. She said, amongst other things that she did not attend school for fear of being bullied and that she felt stressed and suffered spots. She is recorded as saying that she did not really want to live because it was so bad. She said that her mother had wanted her to go to school and that she wanted to go also, but she just did not want to get bullied. She referred to her wish to go to other schools and that she said that if she had gone to another school she could have made new friends. It may be noted that K gave no evidence about any attempt at suicide or having directly suicidal thoughts. I was told today that this was because it was thought better not to raise such questions with her, given her age.

11 K's older sister also gave evidence that she was aware that K had been bullied at school by being called names. She said she had tried to protect her but was not always around. She said that K had tried to commit suicide by putting a tie around her neck and had been standing near a

cupboard door but that she, the sister, had taken the tie off her. That was in about March 2002. It may be noted that on various occasions after that date K went back to school.

12 The justices then in the case stated went on to record at great length the submissions made on behalf of Mrs R before them, both as to the facts and as to the law. One submission that was noted was that the bullying rendered it "intolerable" for K to attend and that was the reason for her non-attendance and that the impact upon the child was "extreme". The overall submission was that that amounted to "unavoidable cause". Thereafter, the case stated dealt at great length with the various legal points raised, including copious references to the European Convention on Human Rights .

13 The justices then set out to record their findings of fact and reasons for the decision which, as I gather, reflected those which were announced in court on the day the result was announced. Having recited some of those facts, this is said in paragraphs 20, 21 and 22 of the case stated:

> "20. We felt that all witnesses gave good, clear, concise evidence.
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> "21. We do not feel that [K] was away from school through an unavoidable cause. Looking at the situation and all the evidence we cannot conclude that K faced anything over and above the name calling that is commonplace in the majority of schools. We do acknowledge that this did have an effect on K.
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> "22. Regarding the argument under Article 8 of the Human Rights Act 'Right to respect for private and family life' we do not accept the defendant's argument. We feel that in these particular types of education cases the interference is necessary and justified and is a proportionate and legitimate aim to ensure school attendance."

The justices went on to record that they were satisfied the prosecution had proved beyond reasonable doubt the elements necessary for them to convict for this offence and found the case proved.

14 In imposing an absolute discharge, the justices noted that that was appropriate in cases where the parent's evidence has been believed. That carries with it the implication that the justices here had indeed believed Mrs R's evidence. The justices then went on to pose as questions for the court:

> "1. As a matter of law should the individual circumstances of both child and parent be considered by the Justices when determining the question of whether there was unavoidable cause? If so, did the undisputed evidence for the defence amount to an unavoidable cause?
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> "2. As a matter of law should the Justices have considered Article 8 in the following terms:
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> "First, was it applicable?
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> "Second, if it was applicable, was the undoubted interference with the defendant's family life justified within one of the express exceptions provided by Article 8(2) and was it necessary and proportionate?
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> "In determining whether the interference was both necessary and proportionate, should the Justices have considered just the public policy issue or should they have gone on to consider the individual circumstances of the case?
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> "3. As a matter of law could the Justices reject the defendant's defence raised pursuant to s.7 Human Rights Act 1998 simply by reference to general policy considerations namely that '… in these particular types of education cases the interference is necessary and justified and is a proportionate and legitimate aim to ensure school attendance'?"

It may be noted that the first question refers to the "undisputed" evidence for the defence.

15 I have to say that the questions as posed seem altogether too broad for the purposes of this particular case and I will have to make some comments on those questions in due course. It certainly is not appropriate that this court should pontificate in an academic and theoretical way on issues of law which do not directly relate to the facts of the particular case before it.

16 The submissions of Mr Offer, very cogently put on behalf of the appellant, may be summarised, and I stress the word summarised, in this way. First he noted that, in the case stated, the justices had expressly indicated that all witnesses had given good, clear, concise evidence. The justices had further indicated in terms that they believed the evidence of Mrs R and they had also referred to the evidence for the defence being undisputed. Moving on from that, he submits that the crucial findings as set out in the case stated, being those contained in paragraph 21, are simply erroneous in concluding that there had been no absence through an unavoidable cause, given, submits Mr Offer, that the justices had (as he submits they had) accepted the evidence of Mrs R, K and K's sister. That, he submitted, simply was not a sustainable conclusion on that evidence. Further, he says that the reasoning is erroneous because, whilst the justices say that they acknowledged that the bullying did have an effect on K, they did not in terms state what that effect was: and he submits that that effect can only have been, on the evidence of K, Mrs R and K's sister, that there had been a significant risk of suicide had K been returned to the school in question.

17 In saying that, Mr Offer submits that that is the crucial question here; namely, was there a significant risk of suicide if K were to be returned to school? And he submits that if there were a significant risk of suicide, then an “unavoidable cause” was identified for the purposes of section 444 . That is to say it is not simply a question of that being Mrs R's genuine subjective belief although he says that was indeed her genuine subjective belief but that was also the position viewed objectively. In that regard Mr Offer submits that the following facts should be taken to have been found by the justices, given that they had, as he submits, accepted the evidence of the witnesses. Those facts in particular included:

(1) that K had been bullied at school.

(2) that she had threatened/attempted suicide as a result of the bullying.

(3) that the school had put in place every measure it could to avoid K being bullied.

(4) that the appellant had made many efforts to try to encourage K to attend school.

(5) K did not attend school for fear of being bullied.

(6) K was taken out of school in June 2003 because she was again becoming suicidal and was under severe mental stain as a result of the bullying.

Accordingly, submits Mr Offer, an unavoidable cause was shown, though of course the burden in this respect is on the prosecution. Mr Offer also sees arguments by reference to the consideration of the provisions of Article 8 of the European Convention on Human Rights as pointing to what he says was the only proper conclusion the justices could have reached, having accepted the evidence of the witnesses: which was to acquit.

18 Mr Offer makes clear that he does not seek to say that section 444 in itself fails to comply with any provision of the European Convention on Human Rights ; but he says that Article 8 must be taken into account; in the question of the application of the section to any particular case. In that regard Mr Offer referred also to the decision of the *European Court of Human Rights in the case of Nielsen v Denmark [1988] 11 EHRR 175* , where at paragraph 61 of the judgment the court, amongst other things, said this, after making certain relevant observations:

> “Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental

> responsibilities, is recognised and protected by the Convention, in particular by Article 8. Indeed the exercise of parental rights constitutes a fundamental element of family life."

19 Mr Offer also referred me to certain observations of Elias J at paragraphs 55 and 57 of his judgment in the case of *Alison Barnfather & London Borough of Islington & others [2003] EWHC 418* (Admin). Those points of Elias J it may be noted are obiter and also differ from the observations of Maurice Kay J, the other judge constituting that particular divisional court. Mr Offer further submitted that the court, if appropriate, by reference to Section 3 of the Human Rights Acts 1998, should read down the provisions of section 444(3) so as to ensure compliance with the provisions of Article 8 .

20 A further criticism made by Mr Offer is by reference to paragraph 22 of the case stated. In that paragraph, the justices pretty plainly have accepted that Article 8 was engaged in that case. Mr Offer submits that, that being so, the justices were at fault in disposing of the argument on Article 8 by reference to the generality of that type of education case; and they should have considered the question of the application of Article 8 by reference to the individual circumstances of this particular case.

21 On behalf of the education authority, Mr Wilson submits that the justices were fully justified in finding that K was not away from school through "unavoidable cause". Mr Wilson accepted that paragraph 21 of the case stated was not as well phrased or as detailed as it might appropriately have been; but he submits that it is to be read, and plainly to be read, as rejecting, on the facts, any finding of significant risk of suicide. It is important in this context to note that Mr Wilson expressly conceded for the purposes of this case that if there were evidence of a significant risk of suicide, that could be a defence for the purposes of section 444(3) of the 1996 Act: albeit he did add to that concession that if that were indeed something that arose on the evidence, that would then be much more likely and appropriate to fall within the ambit of the word "sickness" (which he submitted, and in my view rightly, extended not just to physical illnesses but also to mental illnesses) rather than within the ambit of the phrase "unavoidable cause".

22 Mr Wilson went on to submit that the finding of the justices in this case was strongly supported by the lack of any medical evidence, either from a general practitioner or psychiatrist or psychologist. He submitted that if an issue as to whether or not there was a significant risk of suicide on return to school was to be raised, then one would expect some such evidence; and here there was none which might impact upon the justices' reasoning. As to paragraph 22 of the case stated, Mr Wilson conceded that the justices should have indicated that they were referring to the individual case and not to the generality of this sort of case. But he submits that, set in context, it is quite clear that the justices had indeed focused on the individual case, and indeed it could have made no difference to their reasoning if it were otherwise. In the result Mr Wilson submits that the conclusion which the justices reached, namely that K was not away from school through "unavoidable cause", was fully open to them on the evidence having regard to their findings.

23 There can, I think, be little doubt that in some cases the application of section 444 of the 1996 Act can result in what might, to some people, seem to be hard results. But the policy behind the section is, I think, reasonably clear: that is to say to seek to ensure the attendance at school of children and to underline the responsibilities of the parents in that regard. Certainly, what one might perhaps describe as harsh results by virtue of a strict application of the section can be found in cases such as *Crump v Gilmore [1969] 68 LGR 56* , *Bath and North East Somerset Council v Warman [1999] ELR 81* , cases which Mr Offer was swift to note preceded any question of the application of the Human Rights Act 1998 . It was also, I might add, common ground between Mr Offer and Mr Wilson that in assessing "unavoidable cause" that phrase has to be taken in relation to the child and not to the parent; see *Jenkins v Howels [1949] 2 KB 218* .

24 I have no hesitation in rejecting Mr Offer's principal submissions. I do not think that one can properly conclude from references to the witnesses giving "good clear concise evidence" and to the mother being believed, that the justices had found that there was indeed a significant risk of suicide if K were returned to school. Indeed, as it seems to me, one only has to look at paragraph 21 to see that the justices were not making any such finding. It has to be said that the submissions before the justices, at least in their written form, had not placed anything like the emphasis on the notion of significant risk of suicide as Mr Offer has. But the issue of the suicidal

thoughts and intent of K certainly had been raised and, as I see it, that was not accepted by the justices. Accordingly, I reject that particular strand of Mr Offer's argument.

25 I also reject his argument by reference to paragraph 22. It is indeed, I agree (and, as I have said, Mr Wilson accepted) not right in assessing the question under Article 8 simply to focus on the generality of this type of case: although certainly it is legitimate to have some regard to the generality of this type of case. I agree that focus is also needed on the individual case. But I accept Mr Wilson's submission that, set in context, the justices plainly had been focusing on this individual case and, as I see it, no different result could have been reached simply by the justices, as it were, going through the formulaic motions of again, saying they had considered the circumstances of that particular case. It is plain that they had.

26 The principal question then, as I see it, is whether Mr Wilson is right in saying that one can deduce from paragraph 21 of the statement of case a clear rejection of the notion that there was a significant risk of suicide. As I have said, the justices, plainly by inference, had not accepted that there *was* a significant risk of suicide; but it does not necessarily follow that they had clearly accepted that there was *no* significant risk of suicide. This, I agree, does have to be set in the context of the justices' nowhere saying that they had in terms rejected any part of the evidence adduced by the defence; and on the contrary, as Mr Offer stressed, they describe it as good and say that Mrs R's evidence was being believed. It is, I think, somewhat unfortunate that the justices did not expand on their findings in paragraph 21. In particular I think Mr Offer understandably complained about the brevity of the finding “we do acknowledge that this did have an effect on K”. As Mr Offer, in my opinion, rightly pointed out, the main emphasis required here was to focus on what the effect on K had been, not simply and solely as to what had happened at the school: although obviously what had happened at the school was of relevance in deciding just what the impact on K might well have been.

27 It does seem to me, trying to be realistic about this, that when the justices were saying that they acknowledged that what had happened at school did have an effect on K, they were rejecting the notion that there would be a significant risk of suicide to K if she were returned to school. I cannot think the justices would have phrased themselves in this way were it otherwise. That was a conclusion which the justices were entitled to reach, even if they did not in terms reject any of the evidence adduced before them. After all, the subjective beliefs of the mother were not conclusive in this regard and, after all, K had frequently attended school even after the suicide attempt, if suicide attempt it was, in March 2002. That being a finding which was properly open to the justices, they were then entitled to conclude that they did not consider that K was away from school through an unavoidable cause.

28 Once that is accepted as being a finding on the facts properly open to the justices (as in my view it was) it seems to me that all the elaborate structure sought to be raised by reference to the Human Rights Act and the European Convention on Human Rights falls away. Quite simply, by reference to section 444(3) , once the issue of significant risk of suicide was rejected, the justices were entitled to draw the conclusion that they did. Indeed, having regard to the wording of the section which, of its very nature, has a particular degree of strictness about it, it would in my view have been surprising had they reached any other conclusion on the evidence placed before them.

29 That being so, I have come to the conclusion that this appeal must be dismissed.

30 I revert to the questions posed. As I have indicated, these are, as I see it, far too widely framed. As to the first question, it seems to me that the reality is that in cases of this kind, the justices should consider all the circumstances of the case. It is true that in *Jenkins v Howels* unavoidable cause must be assessed by reference to the child. But I would not go so far as to say that the individual circumstances of the parent would always be irrelevant; because it may be, I know not, that there are some cases where the circumstances of the parent may impact upon the circumstances of the child. More than that, I do not think I can meaningfully comment on question 1. As to questions 2 and 3, again I do not think they appropriately require specific answers from me; it has not been disputed here that Article 8 was engaged and it has not been disputed that justices ordinarily should have regard not only to the generality of cases of this kind and to the underlining policy considerations, but also to the individual circumstances of each case. Again, more than that I do not think it would be appropriate for me to comment say.

31 In the result this appeal fails.

32 I only add this: I was told that K is now aged 16 and is no longer required to attend any school. I was told that she may have received some form of education at home during her absences from school, although it is not clear whether that education at home was on any formal basis. At all events, I was glad to hear that she is now on some vocational course and one very much hopes that all of these issues relating to her schooldays are now behind her.