Michaela School Prayer Ban JR: Religious Discrimination Arguments

Katherine Barnes

Image source: Michaela community school

Agenda

Linden J: R (TTT) v Michaela Community Schools Trust [2024] EWHC 843

- Background
- Disposal of Art 9 ground
- Disposal of EA 2010 indirect discrimination ground
- PSED
- Exclusions
- Wider implications

Image source: Google Maps

Background

- JR of recently introduced school policy to ban all prayer rituals
- C practising Muslim
- Attended Michaela Community School in Brent since Year 7
- Secular state school; *"strictest school in Britain"*; exceptionally good results
- Prior to March 2023, some Muslim pupils in the sixth form prayed on site (small scale)
- Spring 2023 (when C in Year 9), interest developed among some Muslim pupils (not in sixth form) re praying during lunchbreak. Content to catch up prayers unavoidably missed (e.g. during lessons) via *"Qada"* after school, but considered it important to pray during *"free"* time
- Start of March 2023, small number of pupils started praying during lunchbreak in playground
- By end of March 2023, c.30 pupils praying in playground during lunchbreak

Background

- Evidence less devout pupils pressured into praying, fasting during Ramadan
- Defiant/rude behaviour when told to put away prayer mats (not permitted item of school equipment). C given 2 day FTE for *"extreme rudeness towards a teacher"*, following for 4 days in isolation unit (subsequently reduced to 2 days)
- Online petition with over 4,000 including comments with vile abuse directed at school staff
- 25 March 2023: school received bomb threat (no bombs found when searched by police)
- 27 March 2023: prayer rituals banned on an interim basis (permanent ban from 23 May 2023)
- End of term trips cancelled, term ended two days early, brick thrown through window of teacher's home and attempted break-in at another
- Start of summer term: no further behavioural issues at school and threats/harassment died down

The School

- School attributes its outstanding results to its ethos. Two components:
- 1) Disciplinary ethos
  - Staff and students are not equals; authority of staff is absolute
    - *"Rule of four"*
    - Silent corridors
    - No items permitted on school property apart from those expressly authorised (if mobile found during school day, confiscated for rest of half term)
    - Active participation in class positively required (e.g. all pupils must put hand up to answer any question)
    - Zero tolerance for rule breaking (detention for even minor infringements)
- 2) Team ethos
  - Sacrifice of the individual's preferences for the collective good
  - Minimising the distinctions between children and promoting social and cultural integration
- Located in former office building. Very short of space.
- Lunchbreak has two elements: compulsory *"family lunch"* followed by educational clubs or supervised socialisation

Article 9

- Article 9 ground dismissed on basis:
  - No interference with C's Article 9 rights
  - In any event, any interference was justified

Image source: Vecteezy

Article 9

Why no interference?

- Williamson [2005] UKHL 15: *"What constitutes interference depends on all the circumstances of the case, including the extent to which in the circumstances an individual can reasonably expect to be at liberty to manifest his belief in practice"* (Lord Nicholls at [38])
- Begum [2006] UKHL 15: *"The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience"* (Lord Bingham at [23])

Article 9

- Re voluntary acceptance
  - When C enrolled at school known to be secular and strict, she impliedly accepted restrictions on ability to manifest her religion (at [176]). Does not matter that not aware of precise nature of restrictions when enrolled (at [151])

- Re other means to observe religion without undue hardship or inconvenience
  - Evidence of impact on C if were to move to another school where prayers permitted did not reach threshold: *"She has not adduced any specific evidence about other schools in the area to show, for example that in fact there is no school within travelling distance which would permit her to do so, or there is no such suitable school, or that it would impossible for her to secure a place at such a school."* (At [177])
  - Rejected arguments based on disruption to GCSE programme and likely worse results: *"I do not suggest that there would be no adverse consequences for the Claimant if she were to choose to move, but it is reasonable to assume that in all of the Article 9 schools cases […] the parents and the pupil had a preference for the school about which they were complaining, and the pupil had no wish to move."*
  - [Prohibition meant lunchtime prayers would be unavoidably missed so could use Qada to compensate]

Article 9

Why was interference justified?

- Risk of peer pressure or intimidation of less observant Muslim pupils
- Undermining of school's objective/ethos of inclusivity/social cohesion (especially given likely substantial take up)

  "These arrangements [certain Muslim students going inside to pray during the lunchbreak] would be particular to Muslim pupils and they would serve to emphasise their religious difference, in their minds and in the minds of the rest of the School community. I do not suggest that this would inevitably to a good or a bad thing, as it not my function to take a view about this. The point is merely that it is clearly rational for the School to take the view that the permitting and facilitating ritual prayer in school would have these effects, and that the PRP is therefore a way of protecting and promoting the ethos of the School" (at [198])

  Rejected C's argument that the school's ethos of eliminating difference actually prevented pluralism and that alternative was for pupils to be taught to respect each others' differences: secular approach another means of achieving this objective

- Complexity of practical arrangements required given lack of suitable space and staff supervision
- Availability of Qada and C's choice to attend school

Equality Act 2010

Section 85:

"(2) The responsible body of such a school must not discriminate against a pupil-

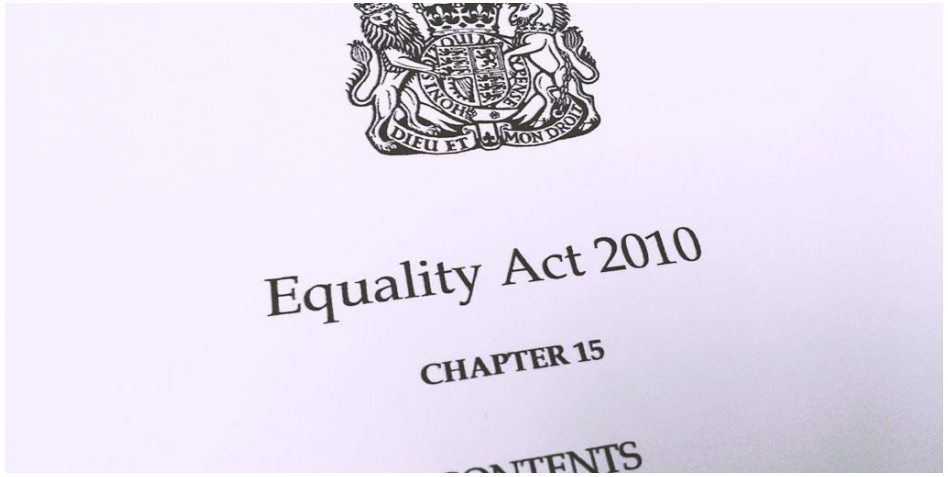
[…]

(f) by subjecting the pupils to any other detriment"

- C argued the prohibition amounted to indirect discrimination on the basis of religion (Muslim pupils disproportionately affected)
- Judge found C subjected to a *"detriment"* for purposes of s.85(2) (different test than for *"interference"* with Art 9 rights under the ECHR)
- BUT prohibition justified for same reasons as any Art 14 justification

Michaela School Prayer Ban JR: PSED and Exclusion Arguments

Anna Bicarregui



Public Sector Equality Duty

- Section 149 of the Equality Act 2010:
- (1)A public authority must, in the exercise of its functions, have due regard to the need to—
- (a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
- (b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Public Sector Equality Duty

- Key principles in R(Bridges) v Chief Constable of South Wales Police [2020] EWCA Civ 1058
- "(1) The PSED must be fulfilled before and at the time when a particular policy is being considered.
- (2) The duty must be exercised in substance, with rigour, and with an open mind. It is not a question of ticking boxes.
- (3) The duty is non-delegable.
- (4) The duty is a continuing one.
- (5) If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consultation with appropriate groups is required. (6) Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then it is for the decision-maker to decide how much weight should be given to the various factors informing the decision."

Public Sector Equality Duty

- No requirement to monitor
- What ‘due regard’ entails is fact specific – depending on the context and the evidence, the PSED may require monitoring
- “The possibility of a need to monitor the impact of a measure or system is a function of the fact that the PSED is a continuing duty (Bridges Principle (4)) and the need to be properly informed before taking decisions” (para 240).
- Conclusion on monitoring para 266 – does not arise on the facts of this case – pleaded case does not raise issue of a failure of monitoring since the policy was agreed by the governors in May

Public Sector Equality Duty

- Defendant emphasised passages from judgments making the following points (para 244):
  1. Section 149 is a procedural requirement, rather than requiring a particular outcome: Baker at [31], albeit that does not diminish its importance for the reasons explained in, for example, Bridges at [176].
  2. The duty of the decision maker is to have due regard to the need to achieve the relevant statutory objectives, rather than actually to achieve those objectives: Baker [31].
  3. "Due regard" means taking the need into account and giving it such weight as is "appropriate in all the circumstances": Baker [31]. In the light of the word "due" it is not possible to be more precise or prescriptive than this given that "the weight and extent of the duty are highly fact sensitive and dependent on individual judgment": Hotak at [74].
  4. Whether there has been due regard is a matter of substance, not form – has the decision maker in substance had regard to the needs set out in section 149(1)(a)- rather than there being a requirement that they demonstrate, in the language in which the decision is expressed, that they are or were conscious of discharging the relevant duty: Baker [34]-[37].
  5. It is for the decision maker to determine how much weight to give to the relevant need. Provided that there has been "a proper and conscientious focus on the statutory criteria…..the court cannot interfere simply because it would have given greater weight to the equality implications of the decision": Hotak at [75], approving Elias LJ in R (Hurley and Moore) v Secretary of State for Business Innovation and Skills [2012] EWHC 201 (Admin), [2012] HRLR 13 at [77]-[78].
  6. Provided there has been regard to the matters required by section 149, challenges on the basis that there was insufficient regard, or there was insufficient inquiry, may only be made on irrationality grounds, albeit taking into account to the aims of section 149 and its statutory context. There is no duty to make further inquiries "if the public body properly considers that it can exercise its duty with the material it has.": Hurley at [90].

Public Sector Equality Duty

- Focus is on the governors' decision
- Judge accepted as relevant:
  - the Governing Body is likely to have had a degree of familiarity with the School by virtue of its role. Absent evidence to the contrary, it can also be taken to have carefully considered the information with which it was provided
- Judge accepted the Headteacher's evidence that *"It was entirely obvious to everyone at the School and on the Governing Board that the [PRP] would have more of an impact on Muslim children and children from certain ethnic backgrounds than on other children, although it could also have adverse impacts on children of other religions.*
- Not a case in which there were potential hidden impacts of the relevant measure, or the nature of the impacts was unknown
- Para 260 – judge goes through section 149(1)(a) – (c) and finds that the Governing Body had due regard to the factors
- There was a duty of reasonable inquiry but that did not prevent the governors from relying on the inquiries that had been made by the Headteacher
- Whilst there was no express reference to section 149 the relevant statutory needs were considered
- Note – would also have refused relief under section 31(2A) of the Senior Courts Act 1981

Public Sector Equality Duty

- Note that in respect of s149(1)(c) read together with section 149(5) – **the need to foster good relations between people who share a protected characteristic and others** – the Head teacher's view that - the PRP would do just this by promoting a secular, inclusive, environment and by not facilitating division into groups which were defined by reference to religion. The Governing Body was asked to consider her view that the PRP would promote the ethos of the School which was "to build friendships across the faiths and not to allow segregation". It was also made aware of her concern about the intimidatory atmosphere, albeit between observant and less observant Muslim pupils, which had developed and which she considered was likely to develop if ritual prayer was permitted.
- The Judge considered that implicit in all of these considerations was a recognition of the need to tackle prejudice and promote understanding between people of different religions including Muslims and other religious groups.

Public Sector Equality Duty

- Number of recent cases on PSED in education –

- When making exclusion decisions
  - R (TZA) v A secondary school [2023] EWHC 1722 (Admin)

- When considering needs in an Education Health and Care Plan
  - R (AI) v LB Wandsworth [2023] EWHC 2088 (Admin)

- In disability discrimination claims in schools
  - GP v Lime Trust [2023] UKUT 77

- In each case the claim that there had been a failure of have ‘due regard’ to the requirements of the PSED failed

Exclusions

- *"Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement"* applicable
- The statement that the "views of the pupil should always be taken into account" is not limited to cases of permanent exclusion
- The judge held that the school's own exclusion policy was intended to provide that the Headteacher would give the pupil or their parent or carer an opportunity to respond to an allegation against them by evidence, comment or argument unless it was not appropriate to do so
- Not given an opportunity in respect of either FTE – 23 March/28 April
- 23 March FTE – context – 'not appropriate' to hear from the C
- 28 April FTE – breach of the duty to act fairly – potential conflict of evidence between pupils

Wider implications: “a victory for all schools?”

- In light of restrictive approach to finding an *“interference”*, difficult to see how in practice there will ever be an Art 9 *“interference”* by an educational institution – in almost all cases nothing to prevent C moving elsewhere where restriction does not apply (especially given state faith schools). Art 9 therefore toothless in this context
- Instead will need to rely on EA 2010. Whether the restriction is a proportionate means of achieving a legitimate aim will depend on the facts. School here has very particular and clear ethos, as well as evidence of intimidation of less observant Muslim pupils – should not therefore assume from this case that prayer ban by other educational institutions will be justified
- Courts will respect discretion of educational institutions as to method for achieving pluralism: secular approach v multiculturalism. In theory therefore considerable freedom for institutions to develop policy that suits their needs and values
- When choosing which educational institution to attend, prospective pupils for whom religious beliefs are important should weigh any express/implied restrictions on the manifestation of their religion against other positive features of the institution

Some useful pointers

- It's all about the evidence…
- Rejected claimant's submission that a high quality of decision making was needed to make out a justification defence (proportionality being a matter for the court) BUT
- "*all other things being equal the better the quality of the decision making process, and the greater the relative level of expertise of the decision maker, the greater the weight which their judgment is likely to be given by the court, and visa versa*" (para 168)
- Due regard in the PSED is all about substance and not name checking the Equality Act itself

The End

Image source: Michaela community school