## GUIDANCE ON THE PARAMETERS OF ARTICLE 14 THLIMMENOS DISCRIMINATION

Katherine Barnes

For some time now it has been clear that the prohibition on discrimination under Article 14 of the European Convention of Human Rights ('the Convention') does not only prevent an unjustified difference in treatment between people in analogous situations. Article 14 also encompasses the *Thlimmenos* principle, which prohibits similar treatment, without objective justification, of people in relevant different situations. In short, *Thlimmenos* is the Convention's answer to indirect discrimination.

A recent High Court case, the decision of Swift J in *R (Drexler) v Leicestershire County Council* [2019] EWHC 1934 (Admin) has given important guidance on the parameters of the *Thlimmenos* principle. In particular, it addresses the question of what "similar" treatment entails and how this is to be judged.

The Claimant in *Drexler*, a severely disabled 17 year old girl, challenged the Defendant local authority's revised home-to-school transport policy for pupils with special educational needs ("SEN"). The local authority had introduced two revised home-to-school transport policies. In so far as relevant, under the first policy ("the Mainstream Policy") for sixth-form pupils in mainstream schools in full-time education, who started a sixth-form course when aged 16-18 years old, and who live more than 3 miles away from the school or college they attend, the local authority will not provide transport, but it will provide an annual grant of £150 if either: (a) the pupil is from a qualifying low-income family, or (b) the travel time from home to school is more than 75 minutes by public transport. The grant is by way of a contribution to the cost of home to school transport; it will not meet the annual cost of travel.

Under the second policy ("the SEN Policy"), for pupils aged 16-18 years old with SEN who live more than 3 miles away from the school or college they attend,

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the local authority offers "travel assistance". Whilst in very exceptional cases the local authority will provide the transport itself (essentially where local authority provided transport is the only viable option for the pupil travelling to school), in the vast majority of cases a Personal Transport Budget ("PTB") (i.e. a money payment) will be provided. The SEN Policy explains that in many cases the PTB would cover the cost of the transport but it recognises that in some cases parents will need to "top up" the PTB themselves.

The Claimant argued that the SEN Policy's treatment of pupils aged 16-18 years old was contrary to the *Thlimmenos* principle. It was said that travel assistance for children aged 16 to 18 under the SEN Policy was insufficiently different from the annual grants paid to pupils without SEN under the Mainstream Policy.

Swift J recognised the validity of this argument as a matter of law, but rejected it on the facts. He summarised the key principles as follows at [55]:

> *'A requirement only for similarity means that some degree of disparity of treatment must be tolerated, and will not of itself rule out the existence of an indirect discrimination claim. Yet, a degree of rigour must be applied if the integrity of the claim is to be maintained. If the difference of treatment between the comparator groups is significant and material, the wrong that an indirect discrimination principle exists to address will not be present; rather, the complaint will be a complaint about a lack of positive discrimination.'*

Applying this framework to the facts of the case the Judge found at [56]:

> *'When the policies are considered overall, there is no sufficient similarity in the treatment afforded to the comparator groups so as to permit sensible consideration of a claim of indirect discrimination. Under the Mainstream Policy free home to school transport is not provided at all for 16 to 18 years old. Under the SEN Policy transport is provided, albeit in exceptional cases (and it is apparent from the decision made in the Claimant's case that the class of exceptional cases will be small). The availability of money payments is also materially different. Grants under the Mainstream Policy are available in very restricted circumstances; where they are available what is paid is a low, fixed amount. Under the SEN Policy, PTBs are available to all who live more than 3 miles from school (those who live closer may also apply). Even assuming the amount paid will be in accordance with the Council's Ready Reckoner document, it will be more than the grant under the Mainstream Policy.'*

It follows that *Thlimmenos* discrimination is not limited to scenarios where there is a single rule which applies identically to the relevant comparator groups. Instead, it may be possible to establish indirect discrimination under the Convention in circumstances where the comparator groups are treated in a similar manner, but not necessarily in the same manner. In order words, it can be said that although the public authority may have established some difference of treatment, there has been a failure to treat the relevant groups sufficiently differently. However, the claim will be rejected if the difference in treatment reaches the "significant and material" mark. As the ultimate rejection of the claim in *Drexler* demonstrates, whether this threshold is met is highly fact sensitive and will have to be considered on a case by case basis.

The Court of Appeal has recently granted the Claimant permission to appeal in Drexler.

**Jenni Richards QC** acts for the Claimant in the appeal.

## REMEDIES IN FIRST-TIER TRIBUNAL DISCRIMINATION CLAIMS

### Tom Amraoui and Rachel Sullivan

What remedies are available where a claimant succeeds in a disability discrimination claim against a school in the First-tier Tribunal (FTT)? It is clear from paragraph 5 of Schedule 17 to the Equality Act 2010 that the FTT has no power to award financial compensation. Beyond this, however, what may it do? Schedule 17 casts the scope of the FTT's powers in incredibly wide terms: *'The tribunal may make such order as it thinks fit'*. The legislation also provides that this power *'may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person of any matter to which the claim relates'*, but this does not do much to narrow the scope.

The view that the FTT has a very wide, but not

unfettered, discretion over remedies is supported by the recent decision of the Upper Tribunal in *Ashdown House School v JKL & MNP* HS/1322/2019. The decision has potentially far-reaching implications for schools considering excluding pupils with disabilities.

In *Ashdown*, a ten year old boy with ADHD, sensory processing difficulties and emotional and social difficulties. He attended the school with an EHCP, but was excluded in February 2019 following aggressive behaviour towards other students. An appeal was unsuccessful and his parents subsequently appealed to the FTT.

The FTT concluded that by excluding him, the school had treated Bobby unfavourably because of something arising in consequence of his disability and, that treatment was not a proportionate means of achieving a legitimate aim, the school had therefore subjected Bobby to unlawful discrimination in breach of s. 15 of the Equality Act 2010. The school was ordered to reinstate Bobby and to apologise to him in writing. The school appealed to the Upper Tribunal.

On appeal, the Upper Tribunal rejected the argument that reinstatement was an impermissible remedy (and that this and the other orders made against the school, such as the requirement to provide tuition, were not enforceable) on the grounds that, as an independent school, the parent-school relationship was contractual and the FTT had no jurisdiction to order specific performance.

The Upper Tribunal held in clear terms that the FTT *did* have power to make binding orders in a disability discrimination claim against a school, and that in appropriate cases this would include an order for reinstatement of a pupil who had been unlawfully excluded from (even an independent school), with enforcement available in the High Court (not the FTT or the Upper Tribunal) or by the Equality and Human Rights Commission (via an injunction). This should not, however, be taken as authority for the proposition that reinstatement is appropriate in all cases where it is sought. One important factor, discussed in *Ashurst*, is whether or not the relationship of trust and confidence had <u>not</u> broken down as between the school and the parents.

*Ashdown* also addresses the vexed issue of apologies as a form of relief. It provides detailed and helpful guidance (see paragraph 256) on the circumstances in which an apology may be most appropriate. In particulars, tribunals should bear in mind that an apology may have a purpose beyond simply preventing future discrimination. The Upper Tribunal notes in particular that there can be value in an apology (it may provide solace for the emotional or psychological harm caused by unlawful conduct) but, particularly where there has been a dispute or a contested hearing, the FTT should always consider whether it is appropriate to make an order and bear in mind that it may create resentment on one side and an illusion on the other, do nothing for future relations and may make them even worse.

Running throughout the whole of the Upper Tribunal's decision in *Ashdown* is a concern that the FTT's power over remedies should not be toothless. Any such concern is plainly allayed by the effect of *Ashurst* itself, which gives the FTT plenty of bite! The decision is likely to be welcomed by parents and will require careful consideration by schools facing disability discrimination claims.

## CASE NOTE: R (ON THE APPLICATION OF BARKING & DAGENHAM COLLEGE) V OFFICE FOR STUDENTS [2019] EWHC 2667

Barking and Dagenham College ("the College") which is a long established provider of vocational, technical and professional education and training in a deprived area in East London, has brought a judicial review challenge to the decision of the Office for Students not to register it as a higher education provider. The Office for Students ("OfS") was established by the Higher Education and Research Act 2017 and with effect from 1 January 2018 has maintained a register of English higher education providers. In order to be registered, an institution must satisfy certain requirements set by the OfS. Registration is not compulsory but providers that are not registered are ineligible for certain benefits which include automatic designation of higher education courses for the purpose of enabling students to obtain student loan funding. The College applied for registration as a higher education provider and was refused registration because in the view of the OfS it had not met condition

B3 of the OfS's requirements which provides that a provider must *"deliver successful outcomes for all of its students which are recognised and valued by employers and/or enable further study."* The OfS identified student continuation rates and progression rates to graduate employment as a particular area of concern. As said, there are judicial review proceedings on foot in relation to the substantive challenge. The College's criticisms of the OfS's decision include that the OfS has focussed narrowly on continuation rates by application of an algorithm which does not reflect the regulatory framework and that the OfS has failed to give weight to contextual factors; its approach does not permit continuation rates to be seen in the context of the College's student body, the availability of employment in the local area and the types of employment to which students progress.

The College sought, by way of interim relief, an injunction preventing the publication by the OfS of its decision not to register the College pending the outcome of the judicial review hearing. Chamberlain J dismissed the College's application. The Judge found that section 12 of the Human Rights Act 1998 applied because the relief sought would affect the rights of existing and potential students of the College (members of the public) to receive information which the OfS wished to communicate, and hence, might affect their rights to freedom of expression. Having so found, the Judge concluded, pursuant to s. 12(3), that he had to be satisfied that it was likely that the College would establish at trial that publication would not be allowed. The Judge carried out a comprehensive survey of authorities concerning interim relief to restrain publication by a public authority of a report adverse to a claimant including the recent decision of Nicklin J in *Taveta Investments Ltd v Financial Reporting Council* [2018] EWHC 1662 (Admin). The College argued that the reputational damage caused by publication would be widespread and irreparable, particularly in light of the College's crucial role in the local council's regeneration programme including the projects and initiatives with business with which the College is involved. The College was particularly concerned that the decision would be regarded as an indictment of its whole educational offering in circumstances where the registration decision only affects regulated higher education courses. The College argued that the judicial review proceedings could be expedited so that publication would be delayed only for a short period, and that the need for information relied upon by the OfS only concerned a very small group of students who were already aware that the College was not registered. The Judge held that the College's case for publication did not meet the threshold of compelling grounds or compelling reasons or exceptional circumstances that was required to justify restraining the OfS from publication. The OfS's decision has subsequently been published and the substantive claim against the OfS continues. There is at least one other similar challenge to the OfS's refusal to register an education provider on foot.

**Fenella Morris QC** and **Nicola Greaney** are instructed by the College.

## CENTRAL GOVERNMENT FUNDING FOR SEN

### Adam Boukraa

In *Simone v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin), the issue of central government funding for special educational needs came before the court.

The claim was brought against the Chancellor of the Exchequer and the Secretary of State for Education. It involved a challenge to the budget announced in October 2018, as well as to what was described as an ongoing failure to allocate sufficient resources for the provision of special educational needs, most recently in December 2018.

The claimants advanced four grounds: i) that each of the defendants had breached his public sector equality duty under section 149 Equality Act 2010; ii) that the Secretary of State had breached the duty imposed by section 7 of the Children and Young Persons Act 2008 to promote the well-being of children in England; iii) that the defendants' decisions were irrational; and iv) that the defendants had breached Article 14 ECHR read with Article 2 of the First Protocol or Article 8.

Lewis J approached the grounds by considering them against the defendants' particular decisions and functions, following a detailed analysis of the decision-making process. He was not prepared to approach the decisions or functions in a broader way, or to treat

them as part of an ongoing failure to allocate sufficient resources.

All four grounds of challenge failed. On the first ground, Lewis J found that all of the relevant functions and decisions were taken in accordance with the duty to have due regard to the matters specified in section 149 of the 2010 Act, including the need to advance equality of opportunity for children and young persons with special educational needs and disabilities.

On the claimants' second ground, Lewis J concluded that section 7 of the 2008 Act imposes a "general" duty with a broad aim. It does not give rise to obligations to individuals, enforceable through the courts, to take specific steps. In the context of the claim, section 7 did not impose an enforceable obligation on the Secretary of State to make specific funding allocations, or to make specific bids for particular levels of funding from the Treasury. On the facts, there was no basis for concluding that he had breached this general duty.

As well as dismissing the claimants' rationality challenge, Lewis J rejected their argument that there had been a breach of the Article 14 ECHR non-discrimination obligation. This ground fell at the first hurdle of showing differential treatment (which includes treating persons who are in relatively different situations in the same or a similar way). Having regard to the legal and factual framework, the judge concluded that children and young persons with special educational needs were not treated in the same or a similar way to others who do not have such needs. He also rejected a submission there had been a failure to make reasonable accommodation for persons with disabilities, as had been found to be the case in two decisions of the ECtHR.

The problems confronting local authorities in funding their statutory obligations around special educational needs are well-known. So too are the difficulties faced by parents in trying to ensure their children's needs are met. Nonetheless, this case illustrates how challenging it is to bring a successful claim for judicial review against central government decisions on budget-setting and funding allocation.

Lewis J seemed keen to emphasise this point. The final part of his judgment contains something of a warning to those considering similar claims in the future. The two-day hearing had been rolled-up (i.e. the substantive hearing was to take place immediately after – or, as here, alongside – the application for permission to proceed). The judge recorded that he was just satisfied that each of the four grounds was arguable and merited full investigation. However, he stressed that this conclusion should not be seen as an indication that similar challenges to budgetary decisions of central government would be granted permission in other cases, noting that *"the likelihood is that many grounds of challenge to decisions involving the allocation of expenditure will not give rise to arguable grounds of challenge" (§113).*

**Jenni Richards QC** and **Katherine Barnes** acted for the claimants

## Jennifer Thelen – Editor

jennifer.thelen@39essex.com

Jennifer is recognised in the Education law section of Chambers and Partners (Band 4) and The Legal 500 (Tier 5). She regularly appears in the First tier Tribunal and Upper Tribunal on behalf of local authorities in education cases as well as, for both local and central government, on education matters in the High Court. She has been instructed to advise and appear across a range of education matters including special educational needs, disability discrimination, governance, admissions and exclusions appeals, as well as challenges by way of judicial review to the implementation of statements of special educational needs and Ofsted reports. Jennifer has a broad legal background, having practised corporate and regulatory law before being called to the Bar. Jennifer is a member of the Attorney General's B Panel of Junior Counsel to the Crown. To view full CV click here.

## Tom Amraoui – Contributor

tom.amraoui@39essex.com

Tom is ranked as a leading junior in Education law by Chambers and Partners and The Legal 500. He regularly represents local authorities in special educational needs cases, has advised and represented schools in discrimination cases and has experience in the Upper Tribunal on education matters. Tom speaks regularly at education law conferences and seminars, and has delivered training to many authorities on effective case preparation in SEN appeals. Tom also has extensive experience of school admissions and exclusion appeals, having acted as both a representative and clerk at many such appeals. To view full CV click here.

## Adam Boukraa – Contributor

adam.boukraa@39essex.com

Adam has broad public law practice and a range of experience in education law. This includes appearing regularly before the First-Tier Tribunal in special educational needs appeals and disability discrimination claims, advising on and drafting an appeal to the Upper Tribunal, advising on potential applications for judicial review, and acting for a university seeking to strike out a damages claim. To view full CV click here.

## Katherine Barnes – Contributor

katherine.barnes@39essex.com

Katherine is a public law and human rights specialist, with particular expertise in education law. She has worked on several claims for the judicial review in this area including a recent challenge to the closure of a rural primary school and a decision by a local authority to reduce its special educational needs funding. In addition to her judicial review work, Katherine regularly appears before the First-Tier Tribunal and Upper Tribunal in special educational needs cases and disability discrimination claims. She also has significant experience of admissions and exclusions appeals. In respect of higher education matters, Katherine's recent work includes advice on student finances and various complaints to the Office of the Independent Adjudicator. Katherine recently acted for Ofsted in relation to the case study on child sexual abuse at residential Catholic schools as part of the Independent Inquiry into Child Sexual Abuse. To view full CV click here.

## Rachel Sullivan – Contributor

rachel.sullivan@39essex.com

Rachel is developing her education law practice, having joined chambers in 2017 following the completion of pupillage. She has recently appeared for a local authority in a CCMC for an Equality Act claim. To view full CV click here.

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan
Senior Practice Managers: Sheraton Doyle and Peter Campbell

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

**LONDON**
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

**MANCHESTER**
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

**SINGAPORE**
28 Maxwell Road #04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6320 9272

**KUALA LUMPUR**
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085