Neutral Citation Number: [2020] EWHC 3376 (Admin)

Case No: CO/3092/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2020

Before :
CLIVE SHELDON QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between :

R (CHARLES MEREDITH HASTING COLCHESTER (on behalf of LET KIDS BE KIDS COALITION) (1) — **Claimant**

ANA FRANCESCA LYNCH (2)

CLARE AGNES THOMAS (3)

ROSINA AFAR (4)

- and -

SECRETARY OF STATE FOR EDUCATION — **Defendant**

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Paul Diamond, Bruno Quintavalle (instructed by **J M Wilson Solicitors**) for the **Claimants**
Tom Cross (instructed by **Government Legal Department**) for the **Secretary of State for Education**

Hearing dates: 3 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 8 December 2020.

Clive Sheldon QC (sitting as a Deputy Judge):

1. This is a renewed application for permission to apply for judicial review brought by (1) Charles Colchester; (2) Ann Lynch; (3) Clare Thomas; and (4) Rosina Afsar against the Secretary of State for Education. Permission was refused on the papers by Lane J.

2. The Claimants challenge secondary legislation: paragraphs 4, 12 and 13 of the Schedule to the *Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019* ("the 2019 Regulations"), made under section 34 of the Children and Social Work Act 2017 ("the 2017 Act"). The Claimants also challenge certain paragraphs (4, 6, 16, 27, 37, 45, 46, 47, 48, 50, 59, 68, 75 and Annex B) of the *Relationships Education, Relationships and Sex Education and Health Education 2019 Guidance* ("the Guidance"). The Claimants also contend that the Secretary of State has failed to comply with his public sector equality duty under section 149 of the Equality Act 2010 ("the PSED").

3. The thrust of the Claimants' case is that:

   "the Regulations are unlawful in that (a) they remove or restrict existing statutory and Convention-guaranteed rights of parents to excuse their children from sex education provided at school where such teaching is contrary to the parents' religious or philosophical convictions; and (b) they are ultra vires the 2017 Act; and contrary to A21P rights (paragraph 2 of the Statement of Facts and Grounds);

   "the Guidance is unlawful in that it encourages or leads to teaching within school of moral/ideological views contrary to the parents' religious or philosophical convictions. In so doing the Defendant is in breach of the requirement under [A2P1] to encourage plurality in education; alternatively, the Guidance encourages teaching amounting to State-sanctioned "indoctrination".

4. The 2019 Regulations were made on May 9th, 2019, and they say in terms that they come into force on September 1st, 2020. There was, therefore, no need for a commencement order to be made before they became law. The Guidance was published on June 25th, 2019. The claim was issued on September 1st, 2020.

5. At the permission stage, I have to decide whether or not the claim was brought in time and, if not, whether time should be extended. If it should be extended, I then have to consider whether or not the grounds of challenge are arguable.

   <u>When did the grounds to make the claim first arise?</u>

6. CPR 54.5(1) provides that "the claim must be filed (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose".

7. The first question that I need to consider, therefore, is when did "the grounds to make the claim first ar[i]se". The principles that assist me in deciding this question were

recently discussed by the Court of Appeal in *Regina (Badmus) v Secretary of State for the Home Department* [2020] EWCA Civ 657.

8. That case concerned the rates of payment for voluntary activities undertaken by individuals detained in immigration removal centres. The rates had been fixed at £1 per hour in accordance with detention service orders made in 2008 and 2013 by the Secretary of State, acting pursuant to his power under rule 17 of the Detention Centre Rules 2001. Following a review, the Secretary of State decided in May 2018 to leave the rates unchanged. A challenge was brought to the 2013 order and the 2018 review decision.

9. The Court of Appeal in *Badmus* stated that in determining when the grounds first arose, for the purposes of CPR 54.5(1), it was necessary to identify what was sought to be judicially reviewed. The Court noted that the parties were agreed that the correct approach to this question was that expressed by the Divisional Court in *R. (on the application of DSD) v Parole Board for England and Wales* [2019] QB 285, at [167]:

> "there is a distinction between cases where the challenge is to a decision taken pursuant to secondary legislation, where the ground to bring the claim first arises when the individual or entity with standing to do so is affected by it, and where the challenge is to secondary legislation in the abstract."

The Court in *Badmus* observed that it was convenient to refer to those two categories as "the person specific category" and "the abstract category".

10. In *Badmus*, the Court held that the claims before it fell within the former category: that is: "the person specific category". In that case (as well as in other analogous cases analysed by the Court) it was only when the claimant first became affected by the measure or policy that he or she had sufficient status or standing to bring the judicial review claim. Precisely when a person first becomes affected will depend upon the facts and circumstances of each case. On the facts, the Court held that the detainees were not affected by the £1 flat rate rule until they were detained in an Immigration Removal Centre in which that rule applied. It was only then that they had the standing and the grounds to bring their claim; and that was when time started to run.

11. During the course of their examination of the various authorities, the Court in *Badmus* referred to the decision of Moses LJ in *R (Cukurova Finance International Ltd) v HM Treasury* [2009] Eu LR 317. In that case, the claimant had sought to challenge in 2007 the *vires* of the Financial Collateral Arrangements (No.2) Regulations 2003: these regulations had been made on December 10th, 2003 and came into force on December 11th and 26th 2003. In the course of his judgment, Moses LJ held at [30] that the "grounds for making that challenge arose when, as is alleged, the Regulations were unlawfully made or came into force".

12. The Court in *Badmus* stated at [80] that it was not necessary to express a view about the correctness or otherwise of *Cukurova*: the facts of that case were unusual and arose in a purely commercial setting, with no public body involved. The Court noted that "More obvious, and better, examples of cases which do not fall within the person specific category, are challenges in principle by activist and non-governmental

organisations to legislation or policy which affects them in that the challenge falls within their objects".

13. The approach adopted in *Badmus* was followed by the Court of Appeal in *R (on the application of Julie Delve, Karen Glynn) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199, a challenge to various pieces of pensions legislation increasing the State Pension Age to 67. It had been argued that if the claimants had brought judicial review proceedings shortly after enactment of their legislation, their claim would have been dismissed as premature. It was argued that standing to challenge the legislation arose only at the point when the claimants reached their 60th birthdays and did not receive a state pension. The Court of Appeal rejected these arguments, holding at [127] that the claimants had standing to bring judicial review proceedings challenging the Pensions Acts which affected them as soon as those Acts were passed. The Court stated that "it was inevitable once those Acts were passed that the [claimants'] entitlement to a state pension would be deferred".

14. In *Hughes v The Board of the Pension Protection Fund* [2020] EWHC 1598 (Admin), Lewis J referred to *Badmus*, when holding that "In the context of a claim relating to legislative provisions, the grounds for bringing a claim for judicial review first arise in relation to a particular claimant when that claimant is affected by the legislative provisions under challenge (not the date on which the legislative provisions were enacted or came into force)."

15. In the instant case, Mr. Cross, acting for the Secretary of State, urged on me that the challenge here fell within the "abstract category" of case as described by the Court of Appeal in *Badmus*, and that the grounds first arose (within the meaning of CPR 54(5)) when the 2019 Regulations were made, and the Guidance was published. Mr. Diamond, acting for the Claimants, contended that the categories referred to in *Badmus* were not especially helpful, but argued that time did not begin to run until the 2019 Regulations and Guidance had come into force. That is, on September 1st, 2020. Accordingly, the claims were brought in time.

16. In my judgment, the taxonomy described by the Court of Appeal in *Badmus* can be helpful, as it requires the Court to identify the nature of the challenge being made, and then to consider the date from which the claimant would have had standing to challenge the decision in question.

17. The challenge brought by the First Claimant, Mr. Colchester, is an "abstract challenge" using the taxonomy approved by the Court of Appeal in *Badmus*. Mr. Colchester is said to be acting in this case "on behalf of LET KIDS BE KIDS Coalition)". This is an inter-faith coalition which, according to his witness statement, "seeks to protect and safeguard children by securing the parental right to direct the moral welfare of their own children." Mr. Colchester could only have standing to challenge the 2019 Regulations and Guidance in the "abstract", as he is and will not be personally affected by their application; similarly, the groups that his coalition represents. Whilst it is correct that the Coalition was not set up until May 2000, that does not mean that the grounds of claim only arose at that point. It is necessary to consider the date when that Coalition would have had standing if it had been set up at an earlier point. In my judgment, that would be the date when the 2019 Regulations were made and the Guidance was published. At that point in time, an “abstract

challenge" could have been brought, as there was no further step that needed to be taken by the Secretary of State to bring the 2019 Regulations into force.

18. With respect to the Second to Fourth Claimants (who are parents of school-age children), the challenge is a "person specific challenge" within the *Badmus* taxonomy. In my judgment, they had standing to challenge the 2019 Regulations and Guidance as soon as the 2019 Regulations were made, and the Guidance was published. From those points in time, applying the language of the Court of Appeal in *Delve*, it was "inevitable" that the 2019 Regulations and Guidance would be applied to them, or would impact on them, as parents of school-age children. There was no further step that needed to be taken by the Secretary of State to bring the 2019 Regulations into force.

19. This applies also to the challenge made by the Second to Fourth Claimants as "victims" under the Human Rights Act 1998. Their situation is analogous to that of the claimants in *R. (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin). In that case, a challenge was brought by parents of secondary school pupils to a decision made by the Secretary of State on February 12th, 2015, to issue new GCSE Subject Content ("The Subject Content") for Religious Studies ("RS") with effect from the 2016 academic year. It was contended that the Secretary of State was proposing to give unlawful priority to the teaching of religious views as compared to non-religious views, including those of humanism, in contravention of their Convention rights (the combined effect of Article 9 and Article 2 of Protocol 1). The Secretary of State argued that, among other things, the claim was premature.

20. Warby J held in *Fox* at [50] that it was "not premature or speculative to bring this challenge at this stage, because the Defendant's prescriptions for RS subject content are highly likely to flow through to the final detail of what gets taught at GCSE. It is, indeed, beneficial to good administration for the issues to be confronted now, when the critical choices have not yet been made". Further, at [60], Warby J rejected the submission that "the present uncertainty as to what the agreed syllabus content will turn out to be means that these Claimants cannot now claim the status of actual or potential "victims" of unlawful conduct, within the meaning of section 7 of the Human Rights Act. According to Warby J., the test is whether the claimants can establish that they "run the risk of being directly affected by the measure of which complaint is made", referring to *R (Taylor) v Lancashire County Council* [2005] EWCA Civ 284 at [39]. Warby J held that in *Fox* there was sufficient evidence to show that the Claimants were "at risk of being directly affected by the measure under challenge" once the Secretary of State had issued the Subject Content in February 2015.

21. In the instant case, the Second to Fourth Claimants have argued that the test under the Human Rights Act is "whether the national law creates a situation where the effective exercise of their rights could be affected: whether the law places them "under the shadow" of a potential breach, referring to the Strasbourg case of *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293. It is clear to me that the Second to Fourth Claimants were "under the shadow" of a potential breach from the dates when the 2019 Regulations were made, and the Guidance was published. That was the date from when (using the test applied by Warby J. in *Fox*) they ran "the risk of being directly affected by the measure of which complaint is made". Indeed, this is supported by the evidence of the Second Claimant in particular, who described how

the new provisions had already affected her in the 2019-20 academic year, not long after the Guidance had been published and the 2019 Regulations had been made.

22. Accordingly, I consider that for each of the Claimants the grounds to make the claim first arose on May 9th, 2019, with respect to the 2019 Regulations, and June 25th, 2019 with respect to the Guidance. A claim brought on September 1st, 2020 could not be said to have been brought "promptly" and was well outside of the 3-month limit set out in CPR 54.5(1). It is necessary, therefore, for me to consider whether time to bring the claim should be extended.

Are there good reasons to extend time?

23. Section 31(6) of the Senior Courts Act 1981 provides that:

> Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant-
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> (a) leave for the making of the application; or
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> (b) any relief sought on the application,
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> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

24. There has plainly been "undue delay" in bringing these proceedings. The expression "undue delay" in that provision is to be read as meaning a failure to act promptly or within three months: see *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell* [1990] 2 AC 738.

25. It has been said that questions arising under section 31(6) of the Senior Courts Act 1981 are more appropriately to be dealt with on the hearing of a substantive application for judicial review, and that it is better to grant permission where there is considered to be a good reason to extend time: see Lord Goff in *Ex p Caswell*. However, it seems to me that in this case it is obvious that there would be detriment to good administration if this claim was permitted to proceed after such a delay, and so it is appropriate to consider the questions under section 31(6) of the Senior Courts Act 1981 at this hearing. As was explained in the Summary Grounds of Resistance, "Schools have been planning for the teaching of the subjects, which requires careful consideration of their content, during the previous academic year. The Regulations and Guidance were made and published so long ago precisely to enable them to do that. The teaching is now underway."

26. I need to consider whether there are good reasons to extend time to bring the claim, and then weigh this against the obvious detriment to good administration if permission is to be granted.

27. Mr. Diamond has raised a number of matters that he said supported the extension of time. First, he has sought to point out the reasons why the claim was not brought

before September 1st, 2020. These relate primarily to why the Coalition was only established in May 2020. I am doubtful that the fact that there were no other bodies seeking to challenge the Defendant is a good reason to extend time. Furthermore, these reasons do not explain why the other Claimants did not, or could not, have brought the claim earlier.

28. There is no suggestion in the evidence submitted by the Claimants that they only became aware of the 2019 Regulations and/or the Guidance close to the date when this claim was issued. Indeed, the evidence is to the contrary.

29. Mr. Colchester has stated that "There appeared to be much criticism and concern of the policies of the Government, but little resistance in practice to the plans of the Government to introduce Relationships Education, Relationships and Sex Education and Health Education - RSE". He says that "I was waiting for someone to commence litigation . . . To my surprise, it became apparent that there was no one prepared to challenge" the new policies, and so he established the coalition described above in May 2020.

30. The Second Claimant says that she was "dismayed when we were informed that we could not withdraw our child from Relationships Education (despite the fact that it is not mandatory yet)" in the school year 2019-20. The Third Claimant says that she "became very concerned after the publication of the Guidance . . . in May 2019".

31. Second, Mr. Diamond contends that the matters raised in the application are of public importance, relating to non-trivial issues involving the delicate balancing of parental rights and responsibilities against those of the State. I agree with this in principle; however, it begs the question as to why the claim was not brought sooner. Echoing Warby J in *Fox*, it would have been "beneficial to good administration for the issues to be confronted . . . when the critical choices [had] not yet been made".

32. Third, Mr. Diamond contends that the refusal to extend time would be unjust to the Claimants as the issue of delay was not raised by the Defendant in his response to the Pre-Action Response. In particular, it is suggested that the claim could have been reformulated as a claim under the Human Rights Act 1998. However, the Claimants' Pre-Action Letter was only sent on July 9th, 2020, well over a year after the Guidance was published, and so any reformulated claim would have faced the same arguments on limitation as I have considered at this hearing.

33. Fourth, Mr. Diamond argued that fundamental rights should be addressed without delay; that, if permission is refused, it is certain that a new claim will be made very quickly "as soon as an excusal request is refused". I am not so sure of this. The submission presupposes that an excusal request will, in fact, be refused, and that cannot be known for certain. Furthermore, even if there is a refusal, it seems to me that the circumstances surrounding the refusal will actually assist the Court in analysing the legislative and jurisprudential framework, and therefore examining the rights involved in the light of actual facts, rather than in the “abstract” as the Court would have to do if I granted permission to this claim.

34. In my judgment, I do not consider that these are good reasons to extend time. Furthermore, despite Mr. Diamond's thoughtful advocacy (both written and oral), I do not consider that the underlying arguments have any serious, or realistic, prospect of

success, and so the strength of the claim is not, in my judgment, a good reason to extend time. Without setting out my reasoning in any detail, whilst I consider that Grounds 1 to 4 are arguable, they only just pass the threshold for arguability. They are not sufficiently arguable, however, to justify outweighing the clear detriment to good administration of extending time.

35. I consider that Ground 5 is not arguable, and so I would have refused permission on this ground if I had allowed time to be extended.

36. Ground 5 is a challenge to the Defendant's exercise of the public sector equality duty at section 149 of the Equality Act 2010. It is contended that the Equality Impact Assessment ("the EIA") carried out by the Secretary of State failed to address, or adequately address, the impact of the teaching of "LGBT content" in mandatory RE, RSE and HE on people of religious backgrounds. Further, it is alleged that the duty at section 149 is a continuing duty (see *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 at [95]), and the EIA should have been reviewed when it became clear that following publication of the Guidance and the making of the 2019 Regulations there were protests around the country in those schools that had introduced "LGBT content" contrary to the religious and philosophical convictions of parents. It should, Mr. Diamond contends, have become apparent to the Defendant that the Guidance was not fostering good relations between people with the protected characteristic of religious belief and those without.

37. In my judgment, there is no arguable basis for challenging the initial EIA. That document faced up squarely to the fact that "Some of the content of the new subjects, especially of RSE, may challenge the religious beliefs of some groups. The subjects cover topics where some faith communities' views on what is right can differ from what is permitted under the law." The EIA said that the policy had the potential to advance equality of opportunity and may also lead to greater integration and better relationships, although there was a risk that some schools may feel that the guidance goes too far on some topics. This was, in my judgment, a careful balancing of the competing rights and interests and demonstrated that "due regard" had been had to the relevant public sector equality considerations.

38. As for the contention that the Secretary of State has failed to comply with the duty at section 149 of the Equality Act 2010, because he has not reviewed the policy in light of the reaction that it received from some groups or individuals, I consider that this is not arguable.

39. Section 149 only applies to "the exercise of functions". There were no further "functions" for the Secretary of State to "exercise" with respect to the 2019 Regulations or Guidance. The Secretary of State had already exercised his functions with respect to the 2019 Regulations and Guidance when he made the former and published the latter. The Secretary of State committed to review the Guidance after three years from September 2020: at that point, he would be exercising his functions with respect to this matter again.

40. Moreover, the fact that the duty has been said to be a "continuing one" (*R (Brown)*) does not mean that "due regard" to equality issues must be had on each, or any, occasion when the policy at issue (here, the 2019 Regulations and/or the Guidance) has impact and/or encounters criticism, especially when that impact and/or criticism

was already contemplated by the initial assessment under section 149. To hold otherwise would impose an impossible burden on public authorities. This could not have been contemplated by Parliament when it enacted section 149 of the Equality Act 2010.

Conclusion

41. For the foregoing reasons, therefore, I refuse permission to bring this application for judicial review. The claim is out of time, and there is no good reason to extend time.