

we wish to create than excellent education for every young person, it seemed to me a right and valuable thing to do. However, my officials and lawyers have persuaded Alan Johnson and myself that the declaratory value would be outweighed by the legal uncertainty that such an apparently simple change would involve, and that it might perversely have the effect of jeopardising or qualifying the well-established rights to education which are now very well embedded in case law. They are also concerned at the potential effect such an amendment might have in extending rights to minority forms of schooling which do not conform to the legal framework required to safeguard the national curriculum, fair access and community cohesion. Let me set out the arguments - and case law - in the way that it has been presented to me.

As I have already mentioned, the right to education is guaranteed by Article 2 of the First Protocol to the ECHR and, for children, by Article 28 of the UN Convention on the Rights of the Child. The right to education provided by the ECHR is already part of national law by virtue of the Human Rights Act 1998, which sets out in detail the procedure for making a claim that a right has been infringed and also sets out the remedies available for a breach. To legislate along the same lines in education legislation would undermine the regime set out in the Human Rights Act 1998, as it would not be clear which should prevail. Moreover, a free-standing right with provision neither for the procedure for claiming a breach nor for remedies would not be as effective as the Human Rights Act 1998 right.

I have also previously mentioned the "fourfold foundation" and how such foundation fulfils the right to education:

The first element is the duty of parents under section 7 of the Education Act 1996 to cause their children to receive efficient and suitable full time education either by regular attendance at school or otherwise;

The second element is the Secretary of State's duty under Section 10 of the Education Act 1996 to promote the education of the people of England and Wales;

The third is that LEAs are required by section 13 of that Act to secure that efficient education is available to meet the needs of the population of the area; and

The fourth is the maintained schools themselves: each such school is under the direction of its governing body who must conduct the school with a view to promoting high standards of educational achievement at their school.

I am advised that this is more effective in securing the right than would be a free-standing right to education in English law. Not only is it flexible enough to allow for various different arrangements for education (for example, education provided by LEAs, by the independent sector, by Academies or at home), but it also places clear and positive duties on the various parties (parents, local education authorities, Secretary of State and governing bodies) which are much more easily enforceable. The effectiveness of the fourfold foundation was set out by Lord Bingham in the Ali case (*Ali v Lord Grey School* [2006] UKHL 14) when he said:

This fourfold foundation has endured over a long period because it has, I think, certain inherent strengths. First, it recognises that the party with the keenest personal interest in securing the best available education for a child ordinarily is, or ought to be, the parent of the child. Depending on age, maturity and family background, the child may or not share that interest. But the parent has a statutory duty. Secondly, the regime recognises that for any child attending school it is that school through which the education provided by the state is in practice delivered. The relationship between school and pupil is close and personal: hence the restrictions on its interruption or termination. It is a relationship resembling, but for the

want of consideration, a contractual relationship. But, thirdly, the regime recognises the need for a safety net or longstop to ensure that the education is not neglected of those who for any reason (whether 'illness, exclusion from school or otherwise? are not being educated at school in the ordinary way. It is plainly intended that every child of compulsory school age should receive appropriate education in one way if not another, and that responsibility rests in the last resort with the LEA.

In a sense, therefore, the fourfold foundation goes beyond what a free-standing right to education would provide, as it takes into account the different and complementary roles of parents, local authorities, the Secretary of State and governing bodies in the education of children.

As well as being less effective than the current provisions (and potentially weakening them), legislating for a right to education for children in England and Wales could also have other undesirable implications. The Courts, if tested, will assume that Parliament did not legislate in vain and that a new, positive right to education is meant to be a change in the law. They may, therefore, seek to import something more into the law than is currently provided. This has a number of ramifications.

First, the ECHR "right to education" (Article 2 Protocol 1 ECHR), as given effect in national law by virtue of the Human Rights Act 1998, is currently phrased negatively ("no one shall be denied the right to education"). The fact that the right is phrased negatively has influenced the way in which the Courts have construed the right. It has been held that the negative formulation does not require that Member States establish at their expense, or subsidise, education of a particular type or at any particular level, but rather implies for those under the jurisdiction of a Member State the right to "avail themselves of the means of instruction existing at a given time,,1. Its primary objective has, therefore, been held to be to guarantee a right of equal access to the existing educational facilities.

A positive right, along the lines of that envisaged by the amendment which you tabled at Committee Stage, would I am advised be likely to be construed differently by the Courts. It might be interpreted as imposing an obligation on local authorities to ensure that children could receive education of a particular type or standard which the authorities were unable to provide (or which they considered undesirable to provide). Taking, for example, the Belgian Linguistics case itself, the Court held that the right to education, as phrased negatively, did not give rise to a right to be taught in the language of the child's (or their parent's) choice, nor was there a right of access to a particular school of choice. Logically, therefore, a positive right might be held to require the State to make provision for teaching in, or schools for, languages other than English.

Furthermore, a provision along the lines suggested in your amendment would not make clear whether the right was being conferred on the parent or the child. Conceivably, conflicts could arise where the parent wanted to educate the child at home, or at an independent school and the child had a legally enforceable right to be educated at a maintained school.

In the light of these issues, I have also considered whether we could legislate in the Bill to provide that no person/child of school age can be denied the right to education. However, since this is already provided by the Human Rights Act 1998 ("no person shall be denied the right. ..") to do so would, in effect, be replicating a provision of primary legislation in another provision of primary legislation, which would normally require a repeal of the earlier legislation.

You will appreciate the undesirability of seeking to amend the Human Rights Act and the rights which it gives effect to: indeed, it could not be amended without the agreement of the

European member states. If both rights remained in place, not only would there be questions as to which right should prevail (the wider Human Rights Act right or the narrower education law right), but there would be a disparity between the regimes for claims and remedies, as mentioned above.

You rightly pointed out in Committee that Scotland have legislated for a statutory right in favour of every child to have a school education. As far as we know, this right has not actually been invoked yet: no one has relied on section 1 of the Standards in Scotland's Schools Act 2000 ("the Act"), so it has not yet been tested by the Courts. In other words, it has not been relied upon by parents or children wishing to advance their rights. As regards the risks of changing the meaning of the existing right to education highlighted above, the Scottish Executive took the view that the declaratory benefits were worth the risk of legal challenge - this is not a view that, on serious reflection we share.

If you would find it helpful personally to discuss this issue further, I would be very happy for you to meet my Bill manager [REDACTED] together with the Department's legal advisers.

Please do contact [REDACTED] ^{DCSF OFFICIAL} directly on [REDACTED] if you would find this helpful.

ANDREW ADONIS

1 As per the European Court of Human Rights in the Belgian Linguistics Case."

Secondly, we are dismayed to see once again that the Government's Children's Plan has attained quasi legal status to the point where alleged statutory guidance refers more to the Children's Plan than to the primary Act.

A case in point would be the 2008 consultation on statutory guidance to section 10 of the Children Act. What follows are extracts from Education Otherwise consultation response in June 2008. Many of the same points had been made in the Home Education Guidelines consultation in July 2007 and were made again in the Consultation on Revised Statutory Guidance on Children at Risk of Not Receiving Suitable Education.

We have absolutely no evidence that these responses are ever shared outside the DCSF Consultation Unit.

We often ask ourselves why we bother.

<http://www.education-otherwise.org/Legal/Consultations/2008.htm>

<http://www.education-otherwise.org/Legal/Consultations/consultationstatutoryguidancecooperatejune08.pdf>

"The document on which we are invited to comment does not serve the function of "statutory guidance on section 10 of the Children Act 2004". Instead it serves the function of a commentary and expansion of the Government's 2007 Children's Plan Building Brighter Futures.

Could we not perhaps rename it "Building Brighter Futures: Guidance for Children's Trusts." Have we been supplied with the wrong document?"

"Are the authors of the draft statutory guidance aware of Working Together to Safeguard Children 2006 dealing with sections 10-13 of the Children Act 2004 and could they please tell us whether the draft statutory guidance on section 10 is intended to supercede WTtSC, particularly over the remit of Local Safeguarding Children Boards?"

<http://www.everychildmatters.gov.uk/resources-and-practice/IG00060/> “

SECTION 10 (8) OF THE CHILDREN ACT 2004

http://www.opsi.gov.uk/Acts/acts2004/ukpga_20040031_en_3#pt2-pb1-11g10

Section 10 of the Children Act 2004 stated that each children's service authority in England must make arrangements to promote co-operation between the authority and relevant partners with a view to improving the well-being of children relating to “physical and mental health and emotional well-being”; “protection from harm and neglect”; “education, training and recreation”; “the contribution made by them to society”; and “social and economic well-being.” Section 11 of the Children Act 2004 covered “arrangements to safeguard and promote welfare” and section 12 dealt with “information databases.”

We are extremely concerned by the implications of section 10 (8) of the Children Act 2004:

“A children's services authority in England and each of their relevant partners must in exercising their functions under this section have regard to any guidance given to them for the purpose by the Secretary of State. “

DRAFT STATUTORY GUIDANCE ENCOMPASSES WIDE-RANGING POLICIES NOT YET ENSHRINED IN LEGISLATION OR EMBEDDED IN MODELS OF GOOD PRACTICE

The draft statutory guidance on which we are invited to comment addresses policy issues in the Children's Plan which have not yet been enshrined in legislation, for example around the Education and Skills Bill in raising the participation age. The 0-7 pilots have also not been launched and are therefore out of place in statutory guidance.

In addition, the sudden announcement of the Centre for Excellence and Outcomes in Children and Young People's Services is inappropriate in statutory guidance. We are concerned to find that CfEO will be directly accountable to the Secretary of State, since this appears to bypass many other levels of accountability and management. We are told that CfEO is “ a resource offer” and “someone who has been invited to help.” It is not clear whether it will be possible to decline the offer of help. We are particularly concerned about how this consortium will shape national policy.

“The Department looks forward to establishing a close working relationship with the CfEO. The operational relationship between the CfEO and the Department will be defined in the terms of the grant which will be discussed at the dialogue stage.”

<http://www.everychildmatters.gov.uk/files/CfEO%20QA%20Briefing19May08.rtf>

Through its work, the CfEO will put forward to Ministers and the Department any recommendations for national level action. Decisions will then be made on how to handle this. In addition, evidence of what works will help inform the nature of new policy, and the data development agenda will inform thinking about new research / evaluation activities.”

DRAFT STATUTORY GUIDANCE CONTAINS MISLEADING OR AMBIGUOUS STATEMENTS ABOUT CHILDREN WHO ARE OUT OF SCHOOL.

The draft statutory guidance also contains a number of ambiguous or misleading statements about children who are not attending school. We go on to highlight these in the following areas:

outcomes

deficit model