Neutral Citation Number: [2022] EWHC 49 (Admin)

Case No: CO/686/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2022

Before :

THE HON. MR JUSTICE BOURNE

- -

Between :

THE QUEEN
On the application of

"L" **Claimant**

- and -

HAMPSHIRE COUNTY COUNCIL **Defendant**

- -

Jason Coppel QC and Tom Cross (instructed by **Sinclair's Law**) for the **Claimant**
Andrew Sharland QC and Ben Mitchell (instructed by **Hampshire Legal Services**) for the **Defendant**

Hearing date: Thursday 16 December 2021

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Approved Judgment

The Hon. Mr Justice Bourne:

Introduction

1. This is an application by the Claimant for permission to seek judicial review. Within it there is an application for permission to rely on expert evidence. On 13 August 2021 Sir Ross Cranston directed that the applications be determined at an oral hearing.

2. The challenge is directed at parts of the Defendant's non-statutory guidance, *Hampshire: a safe place to learn, a safe place to grow: LGBT+ guidance for Hampshire schools and colleges* ("the Guidance").

3. The Claimant originally advanced 5 grounds of challenge. In light of the recent judgment of the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 ("A v SSHD"), grounds 1 and 3 are not being pursued. The surviving grounds assert that the Guidance is unlawful in a number of respects. The common theme is a failure to respect the rights of those whose beliefs are at variance with the Guidance.

4. The Defendant contends that the surviving grounds are not arguable and that some of the grounds advanced in counsel's skeleton argument have not been pleaded. The Defendant also contends that permission should be refused on the ground of delay.

5. After oral argument it was agreed that the application for permission to rely on expert evidence could be dealt with as a matter of case management if permission to seek judicial review was granted.

The Guidance

6. The Guidance was published in June 2018, 3 ½ years ago. It runs to 90 pages. Almost all of its contents are not subject to challenge. Under the heading "Purpose of this document", it lists the following aims, none of which are challenged:

> "• provide practical information in regard to supporting the emotional health and wellbeing of all members of the school community, including LGBT+ pupils and staff
>
> • ensure that teachers and governors receive high-quality advice, support and professional development in all matters relating to LGBT+
>
> • build on the good practice that already exists in Hampshire schools, particularly in developing a rights respecting ethos and the promotion of

British values (the values we ascribe to as a liberal democracy) through spiritual, moral, social and cultural (SMSC) education

• support schools in developing a culture and environment that celebrates diversity and values each and every member of the school community

• support schools in developing a curriculum that will give all pupils a voice, challenge stereotypes and create and sustain effective policies, such as anti-bullying

• enable schools to develop an inclusive and diverse ethos in respect to the Equality Act 2010."

7. The opening section refers to other sources of guidance including *Inspiring equality in education* published by the Department for Education (DfE) and Government Equalities Office in 2016, and other departmental guidance, none of which is challenged. The Guidance also refers to the United Nations Convention on the Rights of the Child, to the requirement that children's rights be respected without discrimination under UNCRC Article 2 and to reports of LGBT young people, and especially trans young people, facing bullying at school. It reproduces from *Schools transgender guidance*, issued by Cornwall Council in 2015, a summary of relevant legal obligations under the Human Rights Act 1998 ("HRA"), the Gender Recognition Act 2004 and the Equality Act 2010.

8. There are then a number of further sections. I have not extracted those which are not challenged. Those which are challenged are extracted within the discussion of each ground of challenge below.

Ground 2

9. The material parts of sections 406 and 407 of the Education Act 1996 ("EA 1996") provide:

"406.— Political indoctrination.

(1) The local authority, governing body and head teacher shall forbid—

…

(b) the promotion of partisan political views in the teaching of any subject in the school.

…

407.— Duty to secure balanced treatment of political issues.

(1) The local authority, governing body and head teacher shall take such steps as are reasonably practicable to secure that where political issues are brought to the attention of pupils while they are—

(a) in attendance at a maintained school, or

(b) taking part in extra-curricular activities which are provided or organised for registered pupils at the school by or on behalf of the school,

they are offered a balanced presentation of opposing views.

…"

10. By ground 2 the Claimant contends that the Guidance:

1. authorises or approves unlawful conduct by schools, namely teaching in breach of those obligations ("the first strand"); and

2. is itself in breach of those obligations as a local authority ("the second strand"); and/or

3. authorises or approves unlawful conduct by schools, namely teaching without ensuring the right of parents to ensure "education and teaching in conformity with their own religious and philosophical convictions" as required by Article 2 of the First Protocol to the European Convention on Human Rights ("ECHR") ("A2P1"), read with section 6 of the HRA ("the third strand").

11. In support of ground 2 Jason Coppel QC, representing the Claimant, points to the section of the Guidance entitled "*The school ethos and curriculum*". In particular this states:

"It is worth exploring how LGBT+ issues can be incorporated in a cross-curricular approach to learning, perhaps as part of the spiritual, moral, social and cultural thread that runs throughout school life. In the taught curriculum this would include all subjects. The DfE and Government Equalities Office publication, *Inspiring equality in education* (2016), has some excellent examples of cross-curricular learning as a starting point for schools (pages 1.16 and 1.17), but we are also pleased to offer some examples in personal development learning from Hampshire schools on the following pages."

12. There are then reproduced a number of slides headed "*Crestwood Community School sample lessons*". Of these:

1. One is headed "sex versus gender" and states, among other things, "sex has two main categories: male and female", "gender has two main

categories: masculine and feminine" and "gender distinctions are created by social norms".

2. Another states: "Some people are born with internal and/or external organs which do not 'fit' clearly into the male or female category. The term for this is 'intersex'."

3. Another states "these are just a few examples of genders which some people identify as" and lists 12 examples including bigender, transgender, cisgender and non-binary.

4. Another states that "some transgender people will 'transition' from male to female or female to male" e.g. by surgery, taking hormones and/or living their life as their intended gender, that these are personal choices and that the UK has laws which protect transgender rights.

5. The next slide asks "How should we treat people who are intersex/transgender/agender, etc?" and give the answer: "Like human beings! Because we are all human and deserve equal respect regardless of age, gender, sex, religion, race …".

13. Mr Coppel submits that these slides, considered as a whole, contain "partisan political views" and do not contain "a balanced presentation of opposing views" on "political issues", so that the Defendant infringes sections 406 and 407 by failing to take the necessary steps itself and by approving or authorising unlawful teaching by schools.

14. The basis for that submission is that:

1. The Claimant and many other people, for religious or other reasons, believe that sex and gender are fixed at birth as male or female and cannot be changed.

2. This is a "political" issue because it concerns matters of government or public policy.

3. The content of these "Crestwood lessons" is partisan because it presents only one side of this issue.

4. The Guidance approves the teaching of the Crestwood lessons by schools.

15. The legal principles applying to a challenge to policy have recently been stated by the Supreme Court in *A v Secretary of State for the Home Department* [2021] UKSC 37 [2021] 1 WLR 3931 ("A v SSHD"), in a judgment handed down after this claim was issued. Approving *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, the Court in the judgment of Lord Sales and Lord Burnett CJ:

1. at [38] stated the test to be: "does the policy in question authorise or approve unlawful conduct by those to whom it is directed?" and said that "the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others";

2. at [41], added: "If the policy directs them to act in an unlawful way which contradicts the law it is unlawful"; and

3. at [44], approved the approach of Underhill LJ in *R (Bayer plc) v NHS Darlington Clinical Commissioning Group* [2020] EWCA Civ 449; [2020] PTSR 1153, ruling that a policy was lawful because it was "realistically capable of implementation by NHS trusts in a way which did not lead to, permit or encourage unlawful acts" and rejecting the contention that it was unlawful because it "left open the possibility" of unlawful implementation.

16. As to the meaning of sections 406-7 and the meaning of the word "political", Mr Coppel points out that support for gay marriage was considered by the Supreme Court to be a "political opinion" (albeit by reference to different legislation) in *Lee v Ashers Baking Co Ltd* [2018] UKSC 49 [2020] AC 413. There Baroness Hale approved earlier dicta to the effect that political opinion relates "to the conduct of the government of the state or matters of public policy". Similarly in *Dimmock v Secretary of State for Children* [2007] EWHC 2288 (Admin), it was agreed that Al Gore's documentary film "An Inconvenient Truth" promoted "political" views because it urged steps to be taken to counter global warming which would "influence a vast array of political policies" (see [3] per Burton J).

17. Mr Coppel argues that issues about whether or when persons should be recognised as having a sex or gender identity beyond male or female, and if so what the consequences should be for them and others, are "political" because they are the subject of political debate, relate to the policy of government or to matters touching the government of the state, and/or relate to matters of public policy.

18. Mr Coppel refers to the Equality Act 2010, under which the characteristic of sex is defined by reference to being a man or being a woman. Protected characteristics include gender reassignment, which is defined by reference to several requirements set by the Gender Recognition Act 2004, but not gender identity. That law and the underlying policy are, he says, a matter of intense public debate in which changes are sought by some and resisted by others.

19. Mr Coppel argues in the alternative that, regardless of whether these matters are "political", teaching in accordance with the Guidance would put school authorities in breach of section 6 of the HRA by requiring them to act incompatibly with the rights of parents under Article 2 of Protocol 1 to the ECHR ("A2P1"), to ensure "education and teaching in conformity with their own

religious and philosophical convictions". The relevant contents of the Guidance are contrary to the religious and philosophical convictions of the Claimant and others who share her religious beliefs, in particular that biological sex is part of divine design and cannot be changed.

20. To avoid a breach of A2P1, the state must ensure that teaching which engages A2P1 is "objective, critical and pluralistic" so as to avoid indoctrination: *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711 at [53]. The Claimant repeats her complaint that the Guidance is one-sided.

21. Mr Sharland QC, for the Defendant, responds that, applying *A*, if the Guidance could be implemented either lawfully or unlawfully, the Claimant cannot succeed. He makes the point that the Claimant's own evidence refers to working with the Guidance in schools, apparently demonstrating that it can be used by a teacher who holds different views. It is also necessary to bear in mind that school authorities, who are independent of the Defendant, may be expected to take their own advice and make their own decisions. An aggrieved person may challenge such a decision if it is unlawful.

22. Mr Sharland also objects to the first and third strands of ground 2 because they were not pleaded in the SFG and there has been no application to amend.

23. I would not refuse permission on the basis of the pleading point. However, ground 2 is not arguable for several reasons.

24. First, it is not arguable that the content of the Crestwood lessons is unlawful. The statement about intersex and about people identifying as different genders and undergoing transition are statements of fact, and also reflect UK law as presently contained in the Gender Recognition Act 2004. The only controversial material I have been shown is the reference to "main" categories of sex, because some people believe that there are two fixed categories of sex and there is no such thing as a main or not main category. However, the law does not require every reference by a teacher to a subject on which there are multiple opinions to include a reference to all of the different opinions. As Mr Sharland pointed out, that would (for example) force all teachers when referring to evolution or geology to remind pupils of the beliefs of creationists.

25. Instead, sections 406 and 407 must be interpreted as prohibiting political indoctrination. Even if the Crestwood lessons could be viewed as political, it is not arguable that they contain any risk of indoctrination. That is not least because they are just a set of slides. They leave it open to teachers to pursue any wider discussion which is appropriate for the pupils who are being taught. It is not arguable that the use of the word "main" crosses the line into indoctrination.

26. But it is also necessary to read the slides as a whole. Their collective aim is to make good the proposition at paragraph 12(5) above, that students who are "intersex/ transgender/agender, etc" should be treated like human beings. Unsurprisingly the Claimant does not dissent from that proposition. There is no "indoctrination" involved in explaining the meaning of "intersex/transgender/agender, etc" or in teaching that respect is owed to all individuals regardless of gender issues.

27. I also do not consider it arguable that these issues are "political". It is true that there is an intense social debate about various gender issues. But what Lady Hale was referring to in *Lee* was the existence of an active debate in the Northern Ireland Assembly about proposals to change the law on gay marriage. She was not saying that issues about sexual orientation were inherently political. Her ruling was consistent with the ruling of Slade J in *McGovern v AG* [1982] Ch 321 at 340 that a trust has a "political purpose" where its aim is to support a political party or to procure changes in law or policy, and also with *Dimmock* where the message of the film was that Government policies needed to be changed.

28. In the present case, the contents of the Guidance have nothing to do with any active political debate e.g. about possible changes in the law. Instead it contains practical advice about how to make children safe in schools. The fact that there are pressure groups who lobby for legal change, e.g. on the question of whether sex should be regarded as mutable or immutable, is not sufficient to turn a social or educational question into a political one.

29. Even if, contrary to my view, the impugned content of the Guidance could be seen as both political and partisan, it is not arguable that the Guidance, read as a whole, authorises or approves unlawful teaching contrary to section 406 or that it is a failure to secure a balanced presentation contrary to section 407. First, it is only guidance. Second, even if it is read as instruction rather than guidance, it does not require teachers to use the Crestwood lessons. Nor, more importantly, does it forbid them from referring to any opinion or other material not contained in the slides. Applying the test from *A* and *Gillick*, the Guidance is realistically capable of lawful implementation and is not made unlawful by leaving open the mere possibility of unlawful implementation.

30. The lack of the necessary authorising or approving is also fatal to the Claimant's reliance on A2P1. Even if that were not so, I would not consider it arguable that the European Convention on Human Rights is infringed by pedagogical material which teaches that students who are "intersex/transgender/agender, etc" should be treated like human beings. The fact that some people with particular beliefs disagree with the use of the word "main" does not alter that conclusion.

Ground 4

31. Under this ground the Claimant complains that the Guidance authorises or approves school authorities to breach their duty under section 6 of the HRA 1998 read together with ECHR Article 9 and/or A2P1 and /or Article 8. Once again, the principles in *A* and *Gillick* apply.

32. A section of the Guidance is headed "*Supporting individual pupils in a safe space*". This also contains sections entitled "*Dealing with homophobic and transphobic bullying"* and *"Supporting pupils who are coming out or questioning their sexuality and/or gender*", which include the following:

> 1. "If a young person has chosen to share this personal issue with a member of staff it is important to provide affirmation and support and to ensure that they feel in control … Positive affirmation is crucial".
>
> 2. "Specifically, for pupils questioning their gender identity … Some pupils may go on to transition, for instance from male to female or female to male. Social transition can include changing names, personal pronouns … It is important to take the lead from pupil at all times … Where social transition is happening, it is vital that all staff are briefed and trained so that support for the pupil is consistent, for instance, use of pronouns …".
>
> 3. The Guidance commends Cornwall Council's Schools transgender guidance as "excellent advice". From that document it references a passage which states: "Changing their name and gender identity is a pivotal point for many Trans people. If a Trans pupil or student wishes to have their personal data recognised on school systems, this needs supporting and will feed on to letters home, report cycles, bus pass information etc. Furthermore the change of name and associated gender identity should be respected and accommodated in the school".

33. Another section is entitled "*Introduction to Y Services' Charter of Rights*". This explains that in 2016, young people from across Hampshire attended a conference and workshops. Feedback from attendees was used to compile a Charter of Rights which is a 3-page document in poster style. The Guidance explains that this "evolved from young people's direct voice in the workshops. The charter is their work entirely; their views, their opinions, their expressed needs." The Guidance invites schools and colleges to adopt the charter to demonstrate a commitment "to ensuring that LGBT+ pupils in our schools and colleges across Hampshire and the Isle of Wight are included, valued, supported and will be treated with equality of opportunity and fairly when they access your services". In particular:

> 1. the Charter states that "all students should have their preferred name and pronouns recorded on the school/college register and used by school staff".

2. It identifies a "right" of LGBT+ young people to "be addressed … using our preferred name and pronouns".

3. Under the heading "*Achieving a standard that exceeds the minimum expectation*", it advocates that in the case of a Gillick-competent child, teachers should "use the young person's preferred name (not birth name) in all circumstances, even when parents do not consent".

4. Under the heading "*Why should you sign up to the Hampshire and Isle of Wight Schools and Colleges LGBT+ Charter of Rights?*", it states:

"By doing so you are showing your commitment to ensuring that LGBT+ pupils in our schools and colleges across Hampshire and the Isle of Wight are included, valued, supported and will be treated with equality of opportunity and fairly when they access your services.

Achieving the LGBT+ Charter of Rights will help demonstrate your commitment to LGBT+ pupils in the local area by supporting them to identify their rights alongside respect and responsibilities.

The LGBT+ Charter of Rights will help you as an organisation and community to look at your policies and practice, including your legal obligations in the context of the Equalities Act 2010 and LGBT+ equality.

By displaying the LGBT+ Charter of Rights you will send a positive message to LGBT+ people in your schools, colleges and communities in Hampshire and the Isle of Wight, that they are included, valued, supported and will be treated with respect, equality of opportunity and fairly when they access your services.

You will also make it clear to other organisations, pupils, members of staff and members of the community that rights, respect and responsibility, as well as overarching equality and diversity, is at the heart of the service delivery at your school or college.

Displaying the charter will reassure people that your school and/or workplace is a safe and supportive place for LGBT+ people."

5. Under the heading "*Future steps: how to use the Y Services' Hampshire and Isle of Wight Schools and Colleges LGBT+ Charter of Rights*", the Guidance states:

"The Y Services' Hampshire and Isle of Wight Schools and Colleges LGBT+ Charter of Rights is essentially a three-page, poster-style document. The charter is a stand-alone document which states what LGBT+ young people have said that they want to see in school as their right. The charter standards of minimum and exceeding expectations are two documents that work in tandem and sit alongside an audit tool, which should, initially, be

used as a self-assessment and action planning process. Y Services has developed a charter to work with as a live document that is based on local need and has been designed by local LGBT+ young people. Therefore, the charter is an up-to-date, relevant tool for local schools and colleges in Hampshire and the Isle of Wight to use to ensure that they are addressing the needs of their LGBT+ pupils, not a working document that has been designed by officers but by those who have identified the needs for themselves."

34. Mr Coppel argues that this advice or encouragement to staff to use the preferred names and pronouns of trans students authorises or approves breaches of:

1. the "compelled speech" rights of staff and other pupils under Article 9, which provides:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

2. the right of parents under A2P1 to ensure education and teaching in conformity with their own religious and philosophical convictions; and

3. the right to private and family life under Article 8, which provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

35. As to Article 9, an example of "compelled speech" is found in *Lee*, where the Supreme Court ruled that bakers who had been asked to supply a cake iced with words supporting gay marriage had a right not to be compelled to engage in expression with which they deeply disagreed on religious or philosophical

grounds, even where the compulsion would be intended to prevent unlawful discrimination against customers who supported gay marriage.

36. In my judgment this strand of the claim is not arguable because:

1. There is no compulsion. In *Lee*, the compulsion which the Court rejected consisted of declaring that the bakers' refusal to make the cake was unlawful discrimination giving rise to liability for compensation. Here, the alleged compulsion consists merely of advice to schools. If a school adopted it and if, say, a teacher was unwilling to follow it, the school would have to consider how to proceed, having regard to the teacher's Article 9 rights and to all the circumstances. The Guidance itself does not create adverse consequences for any individual.

2. For the same reason, and as under ground 2 above, the Guidance is realistically capable of lawful implementation.

3. But if there is any compelled speech on these facts, the Claimant as a parent may disagree with its content but she is not a "victim" of any compulsion, contrary to the requirement of section 7(1) of the HRA 1998.

37. Under A2P1, Mr Coppel points out that the Guidance approves its approach even for children whose parents do not consent to it because of their religious or philosophical beliefs, which could cause unhappiness and difficulty for those parents. Citing Article 8, he contends that the Guidance does not strike a balance between the rights of the children and the rights of their parents, even though in some cases the proper balance could come down in favour of the parents' wishes.

38. Mr Sharland responds that the Guidance merely encourages a particular approach but does not "direct" it. The wording quoted at paragraph 33(5) above expresses the views of the young people who wrote the charter but does not impose any requirement on anyone. The reference to overriding parents' wishes is expressly described as exceeding a minimum expectation, and not as an inflexible rule.

39. As I have said in relation to other grounds above, I consider that the Guidance is realistically capable of lawful implementation and the contrary is not arguable. It advises teachers, rather than directing them. It recommends "displaying" the charter, in order to demonstrate commitment and send a positive and reassuring message. Although it also recommends adopting the charter as a commitment, it does not recommend enforcing it in any way. Once again it seems to me that if a conflict arose between the wishes of a student and a parent, the school would have to consider the parent's A2P1 and Article 8 rights. But the Guidance does not authorise a breach of those rights.

40. It is also doubtful that the Claimant could qualify as a victim under this part of ground 4, as no such conflict has arisen in the case of her children.

Ground 5

41. Mr Coppel contends that the Guidance advises schools to act in a way which may have adverse impacts on those with the characteristic of "religion or belief" which is protected under the Equality Act 2010. Section 149 of the 2010 Act required the Defendant to consider the effect of the Guidance on the need to eliminate discrimination against, harassment of, or victimisation against persons with protected beliefs, on the need to advance equality of opportunity between persons who hold protected beliefs and those who do not, and on the need to foster good relations between those groups of persons.

42. The Defendant concedes that it has not undertaken an Equalities Impact Assessment in relation to the Guidance. But in a reply dated 8 July 2020 to a letter about the Guidance from some other concerned persons, it claimed that section 149 was addressed through "central governance structures" and that the Guidance involved "building on the work of a Schools Task and Finish Group with assistance from external contributors". In its Summary Grounds it refers to "nearly two years of work by a task and finishing group, which worked with various governmental and non-governmental bodies".

43. Whether or not there was a failure to consider section 149 in 2018, Mr Sharland points out that a challenge on procedural grounds to the introduction of the Guidance would be far out of time, a submission which is obviously correct.

44. The 2020 correspondence continued with a solicitors' letter sent pursuant to the pre-action protocol on 18 November 2020. The letter set out the proposed claim in detail, though it did not articulate the section 149 ground. The Defendant responded on 3 December 2020, setting out its defence on the merits to the anticipated claim. It also stated that the Guidance will be reviewed in due course, consistently with the statement in Annex 9 of the Guidance which described it as "dynamic and continually evolving" and invited comments on it.

45. There was a further exchange of detailed letters on 22 December 2020 and 7 January 2021 in which the Defendant maintained its position.

46. The Claimant would probably struggle to show that there has been a new decision, i.e. a decision not to withdraw the Guidance, which engaged section 149. But even if there has, in my judgment it is not arguable that the Defendant failed to consider the matters identified in the section. They were the very matters which were being debated in the correspondence.

47. It is also worth keeping in mind that section 149 creates a process obligation, a breach of which does not prove any substantive defect in the underlying decision. Even if there was a new decision, and a failure to have regard to section 149, at most the Claimant could demand a further review, which the Defendant has said will be happening anyway.

Time limit

48. As I have said, to the extent that ground 5 is directed at the issue of the Guidance in June 2018 it is out of time and permission will be refused for that reason.

49. Otherwise, my refusal of permission is not based on any lack of promptness. The Guidance is of continuing application. If there were an arguable case that it is unlawful, there would be a strong public interest in determining the issue.

Conclusion

50. Permission to claim judicial review is refused.

51. If permission were to be granted following any appeal, the question of admissibility of parts of the evidence adduced on the Claimant's behalf would remain to be determined.