HOUSE OF LORDS

REGINA

v.

BIRMINGHAM CITY COUNCIL
(APPELLANTS)

EX PARTE
THE EQUAL OPPORTUNITIES COMMISSION
(RESPONDENTS)

LORD KEITH OF KINKEL

My Lords,

I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons he gives would dismiss the appeal.

LORD ROSKILL

My Lords,

I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend, Lord Goff of Chieveley. For the reasons he gives, with which I am in entire agreement, I would dismiss this appeal.

LORD BRANDON OF OAKBROOK

My Lords,

For the reasons to be given by my noble and learned friend, Lord Goff of Chieveley, I would dismiss the appeal.

LORD GRIFFITHS

My Lords,

I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Goff of Chieveley. I entirely agree with it and, for the reasons given, I too would dismiss this appeal.

LORD GOFF OF CHIEVELEY

My Lords,

This case is concerned with proceedings for judicial review brought by the Equal Opportunities Commission against the Birmingham City Council. The subject matter of these proceedings is the provision by the council for selective education in single sex secondary schools. At all material times there have been available considerably more places for boys at the age of 11 than there have been for girls. As appears from the evidence, there are eight selective schools in the city, all of which are single-sex schools. These are as follows:

Boys' schools	Places
King Edward's Grammar School for Boys, Aston	90 at age 11
King Edward VI Camp Hill School for Boys	90 " " 11
King Edward VI Five Ways School	90 " " 11
Handsworth Grammar School	120 " " 11
Bishop Vesey's Grammar School	150 " " 12
Girls' schools	**Places**
King Edward VI Camp Hill School for Girls	90 at age 11
King Edward's Grammar School for Girls, Handsworth	120 " " 11
Sutton Coldfield County Grammar School for Girls	150 " " 12

Of these schools, all except Sutton Coldfield County Grammar School for Girls are voluntary-aided secondary schools. It will be seen from the table that there are equal numbers of places available for boys and girls at the age of 12; but at the age of 11, whereas there are 390 places available for boys, there are only 210 places available for girls. The total number of places offered

for secondary transfer at the age of 11 by selective schools represents only about 5 per cent. of the total available secondary places for that age. How this came about is set out in an affidavit sworn in the present proceedings by Mr. John Crawford, the Director of Education of the Birmingham City Council. He has demonstrated how the history of proposals for secondary school reorganisation in Birmingham has been a history of changing policies according to the philosophy of the political party in power. I need not rehearse this story. The effect has however been that, since 1974, when the number of places offered by selective schools represented about 27 per cent. of the total number of places available, there has been a substantial reduction in the number of places available in Birmingham. This is the product of a policy to reorganise all selective education in the city on a non-selective basis. But, as a result of successful resistance by voluntary aided schools and changes in political control (both of the City Council and of central government) the voluntary aided schools I have identified survived as selective schools, with the disparity I have referred to above.

The effect of this disparity is demonstrated in a table which was placed in evidence, showing the number of places offered by these eight schools to boys and girls respectively over the years 1984-87. The table shows that girls with a test mark near the borderline have a substantially smaller chance of obtaining education at selective schools in Birmingham than do boys with comparable marks. This effect has been known to the council for some years; and, since December 1985, the council has known that the Equal Opportunities Commission considered that the arrangements made by the council constitute unlawful sex discrimination contrary to section 23 of the Sex Discrimination Act 1975. Following representations by the commission, a report was prepared by the chief education officer and the city solicitor for the education (policy and finance) sub-committee, in which the whole matter was reviewed in detail. In that report, the options open to the council for remedying the situation were listed as follows:

> (a) to open a new selective school or schools for girls, providing another 180 places per year group [to this option there was later added the alternative of enlarging girls' selective schools by 180 places per year]; (b) to close one (90 place) boys' school and to reopen it as a girls' school; (c) to close two boys' schools; (d) to reorganise two boys' schools as mixed schools; (e) to reorganise all of the selective schools as mixed schools; (f) to cease to maintain any selective schools at all."

The officers recommended that the sex discrimination in admissions to selective schools should be recognised and that steps should be taken to remove the discrimination at the earliest opportunity; in particular, it was recommended that discussions regarding the steps to be taken should be entered into with the King Edward Foundation and the governors of Handsworth Grammar School. However, the sub-committee resolved, on 17 March 1987, that consideration of the matter should be referred to a later meeting to enable the various options to be further investigated. At a subsequent meeting on 30 June 1987, the sub-committee considered the various courses of action open to them, and decided to deny

the allegation of sex discrimination but nevertheless to consult the governing bodies of the schools in question on possible solutions to eliminate sex discrimination. There is no evidence on the question whether such consultations have taken place.

The various options proposed to the sub-committee by the responsible officers were obviously intended to be a list of options theoretically open to the council: it was not being suggested that any one of them constituted a practical or desirable course of action in the circumstances. Furthermore, the council's powers (under section 12 of the Education Act 1980) are subject to severel legal restraints. I need not go into detail; it is enough to record that there are important limitations in connection with voluntary schools, and that implementation of proposals by the council is subject always to the overriding attitude of the Secretary of State. In addition, the falling demand for school places in the area creates of itself a major practical constraint. There is no doubt that the council faces great difficulties in the way of solving the problem of disparity between the sexes in selective secondary schools. However, it has to be said that, whatever the difficulties may be, there is no evidence that the council has sought actively to overcome them.

In these circumstances, the commission commenced proceedings for judicial review. They sought (1) a declaration that the arrangements currently made by the council for the provision of selective secondary education were unlawful pursuant to section 23 of the Act of 1975 read with section 8 of the Education Act 1944 (as amended), and (2) an order of mandamus requiring the council to consider without delay the means by which such unlawful sex discrimination was to be removed. On 14 October 1987, McCullough J. upheld the commission's complaint of sex discrimination. He granted the declaration asked, but declined to make an order of mandamus. The council appealed to the Court of Appeal. On 13 May 1988, the Court of Appeal by a majority (Dillon and Neill L.JJ., Woolf L.J. dissenting) dismissed the appeal. The council now appeals to your Lordships' House by leave of the Court of Appeal.

In order to consider the issues in the appeal, it is necessary to set out the terms of the most relevant statutory provisions of the Act of 1975. Section 1 defines sex discrimination against women. Subsection (1) provides:

> "A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if - (a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or (b) he applies to her a requirement or condition which applies or would apply equally to a man but - (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (iii) which is to her detriment because she cannot comply with it."

Sections 22 to 27 are concerned with discrimination in the field of education. Section 22 deals with discrimination by bodies in

charge of particular education authorities (including discrimination in relation to educational establishments maintained by a local education authority); section 23 deals with other discrimination by local education authorities; section 24 with certain designated establishments; and section 25 with a general duty in the public sector of education. Sections 26 to 28 provide for exceptions in certain cases. In particular, section 26 provides for an exemption in the case of single-sex establishments, with the effect that none of the relevant schools in the present case is guilty of unlawful discrimination by reason of offering places to children of one sex only. Because of that exception, section 22 is not relevant in the present case. The two sections which are of direct relevance are sections 23 and 25, it being alleged by the commission that the council is guilty of unlawful discrimination under section 23. Section 23(1) (as amended by Section 33(1) of the Education Act 1980 and Schedule 3, paragraph 11 to the Education Act 1981) provides as follows:

> "It is unlawful for a local education authority, in carrying out such of its functions under the Education Acts 1944 to 1981 as do not fall under section 22, to do any act which constitutes sex discrimination."

I should add that, by section 82, an act includes a deliberate omission.

So far as material, section 25 provides:

> "(1) Without prejudice to its obligation to comply with any other provision of this Act, a body to which this subsection applies shall be under a general duty to secure that facilities for education provided by it, and any ancillary benefits or services, are provided without sex discrimination. (2) The following provisions of the Education Act 1944, namely - (a) section 68 (power of Secretary of State to require duties under that Act to be exercised reasonably), and (b)section 99 (powers of Secretary of State where local education authorities etc. are in default), shall apply to the performance by a body to which subsection (1) applies of the duties imposed by sections 22 and 23 and shall also apply to the performance of the general duty imposed by subsection (1), as they apply to the performance by a local education authority of a duty imposed by that Act. . . . (4) The sanctions in subsections (2) and (3) shall be the only sanctions for breach of the general duty in subsection (1), but without prejudice to the enforcement of sections 22 and 23 under section 66 or otherwise (where the breach is also a contravention of either of those sections). . . . (6) Subsection (1) applies to - (a) local education authorities in England and Wales; . . . "

The first argument advanced by the council before your Lordships' House was that there had not been, in the present case, less favourable treatment of the girls on grounds of sex. Here two points were taken. It was submitted (1) that it could not be established that there was less favourable treatment of the girls by reason of their having been denied the same opportunities as the boys for selective education unless it was shown that selective education was better than non-selective education, and that no

evidence to that effect was called before McCullough J.; and (2) that, if that burden had been discharged, it still had to be shown that there was less favourable treatment on grounds of sex, and that involved establishing an intention or motive on the part of the council to discriminate against the girls. In my opinion, neither of these submissions is well-founded.

As to the first it is not, in my opinion, necessary for the commission to show that selective education is "better" than non-selective education. It is enough that, by denying the girls the same opportunity as the boys, the council is depriving them of a choice which (as the facts show) is valued by them, or at least by their parents, and which (even though others may take a different view) is a choice obviously valued, on reasonable grounds, by many others. This conclusion has been reached by all the judges involved in the present case; and it is consistent with previous authority (see, in particular, Gill v. El Vino Co. Ltd. [1983] Q.B. 425 and Reg. v. Secretary of State for Education and Science, Ex parte Keating (1985) 84 L.G.R. 469). I have no doubt that it is right. As to the second point, it is, in my opinion, contrary to the terms of the statute. There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned (see section 66(3) of the Act of 1975), is not a necessary condition to liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex. Indeed, as Mr. Lester pointed out in the course of his argument, if the council's submission were correct it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present, case whatever may have been the intention or motive of the council, nevetheless it is because of their sex that the girls in question receive less favourable treatment than the boys, and so are the subject of discrimination under the Act of 1975. This is well established in a long line of authority: see, in particular, Jenkins v. Kingsgate (Clothing Productions) Ltd. [1981] 1 W.L.R. 1485, 1494 per Browne-Wilkinson J., and Ex parte Keating per Taylor J., at p. 475; see also Ministry of Defence v. Jeremiah [1980] Q.B. 87, 98, per Lord Denning M.R. I can see no reason to depart from this established view.

I turn then to the most substantial issue in the case. This turns upon the true construction of section 23 of the Act of 1975, and its relationship with section 25.

Mr. Beloff, for the council, fastened upon certain words in section 23, which provides that it is unlawful for a local education authority, in carrying out such of its functions under the Education Acts 1944 to 1981 as do not fall under section 22, to do any act which constitutes sex discrimination (I have emphasised the words in question). The relevant functions of local education authorities are to be found in section 8 of the Act of 1944 (as amended by section 3 of the Education (Miscellaneous Provisions) Act 1948 and section 21 of the Act of 1981), which, so far as relevant, provides as follows:

"(1) It shall be the duty of every local education authority to secure that there will be available for their area sufficient schools - . . . (b) for providing secondary education, that is to say, full-time education suitable to the requirements of senior pupils, other than such full-time education as may be provided for senior pupils in pursuance of a scheme made under the provisions of this Act relating to further education and full-time education suitable to the requirements of junior pupils who have attained the age of ten years and six months and whom it is expedient to educate together with senior pupils; and the schools available for an area shall not be deemed to be sufficient unless they are sufficient in number, character, and equipment to afford for all pupils opportunities for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities, and aptitudes, and of the different periods for which they may be expected to remain at school, including practical instruction and training appropriate to their respective needs . . . . "

The functions identified in section 8 relate to the provision of a sufficient number of schools having certain specific characteristics. That function can be performed by the provision of selective schools or non-selective schools or both; but it is no part of the function of the authority to supply selective schools as such. It followed, submitted Mr. Beloff, that failure to provide selective schools was neither an act nor a deliberate omission within section 23 of the Act of 1975.

In the alternative, Mr. Beloff sought to support the conclusion of Woolf L.J., in his dissenting judgment in the Court of Appeal. Woolf L.J. was much concerned with the practical difficulties facing a local education authority when ensuring that facilities for education are provided without sex discrimination. In this connection he was concerned not only with the problem facing the Birmingham City Council in the present case, but also with less important situations, such as, for example, those relating to size of classes, quality of school buildings, pupil to teacher ratio and, indeed, almost every aspect of the educational system. He saw the solution to such problems in a proper identification of the roles of sections 23 and 25 respectively of the Act of 1975. He observed that, whereas a breach of duty under section 23 led to an action lying in tort against the offending establishment, a breach of duty under section 25 (assuming that it was not also a breach of sections 22 or 23) led to the result that the breach would only be remedied by the Secretary of State exercising his powers under sections 68 or 99 of the Act of 1944, whereby he has power to give appropriate directions to remedy the situation - a much more flexible remedy. He concluded [1988] 3 W.L.R. 837, 849 that, having regard to the wording of section 23, a breach under that section only occurred where the local education authority did an act which constituted sex discrimination, i.e. not only resulted in sex discrimination but itself involved sex discrimination, or where

"the act complained of amounts to a decision by a local education authority to implement a policy which is

discriminatory or where there is a deliberate failure to take a decision because of a policy of sex discrimination."

Only in those circumstances would an act or deliberate omission be unlawful under section 23. In his opinion, the present was not such a case.

In order to consider these submissions it is necessary to consider the relationship between sections 22, 23 and 25. As I read them, sections 22 and 23 are concerned with unlawful discrimination - in section 22, by bodies (including local education authorities) in charge of particular educational establishments in relation to those establishments; and, in section 23, by local education authorities in other circumstances. I can see no reason why those two sections should not, in the field of education, embrace all cases of unlawful discrimination as such by local education authorities. Section 25, however, is, as I read it, concerned with something different. It is concerned with a positive duty placed upon bodies in the public sector, including local education authorities, to secure that "facilities for education provided by it, and any ancillary benefits or services, are provided without sex discrimination." This section is therefore intended, not to outlaw acts of discrimination as such, but to place upon such bodies a positive role in relation to the elimination of sex discrimination. The idea appears to have been to see that such bodies are, so to speak, put on their toes to ensure that sex discrimination does not occur in areas within their responsibility. It must not be forgotten that, in the field of education, there must be some reluctance on the part of parents to become entangled in disputes with their children's schools, or with the authorities reponsible for them, on this subject. Quite apart from fear of prejudicing their children's prospects, the simple fact is that children pass rapidly on to other things, and a complaint of this kind may soon become irrelevant in relation to them. Bearing the purposes of section 25 in mind, I feel unable to accept either of Mr. Beloff's submissions. First of all, I do not think that it can be right to restrict section 23 as he suggests, so as to exclude discrimination in a case such as the present. On this point, I accept Mr. Lester's submission, that it is not necessary for the commission to show that the council is in breach of its duties under section 8 of the Act of 1944. All that is necessary for the commission to show is that the council, in carrying out its functions under the section, did an act (or deliberately omitted to do an act) where such act or omission constituted sex discrimination. Were that not so, there would be a serious gap in the legislation. This conclusion is consistent with the decision of Taylor J. in Ex parte Keating, 84 L.G.R. 469, which appears to me to be correctly decided. Nor, with all respect, is it right, in my opinion, to restrict section 23 as Woolf L.J. would do, with reference to the word "constitutes" in the phrase "to do any act which constitutes sex discrimination." I myself do not attach such significance to that word. As I read them, the effect of sections 22 and 23 is to render unlawful all cases of particular acts or (deliberate) omissions by local education authorities which are discriminatory in the sense laid down in section 1 (and section 2) of the Act of 1975. Where there is at the same time a failure by an authority to fulfil its general duty under section 25, a person discriminated against by an act or deliberate omission made unlawful by sections 22 or 23 can still bring proceedings against the local education authority.

For these reasons, I find myself in agreement with the conclusion of McCullough J. and with the majority of the Court of Appeal. I agree with the general conclusion expressed by Dillon L.J. in the following passage [1988] 3 W.L.R. 837, 856:

> "In truth the council's position really is that they are knowingly continuing their acts of maintaining the various boys' and girls' selective schools, which inevitably results in discrimination against girls in the light of the great disparity in the numbers of places available, because the only alternatives open to the council, even with the consent of the Secretary of State, are unattractive or difficult to apply."

The time has come for the Birmingham City Council to accept that it is in breach of section 23 of the Act of 1975, and that something has got to be done about it. Its proper course must surely be to respond to the proposal of the commission that it should begin the necessary process of consultation, with a view to finding the most practical solution available which accords with the obligations imposed upon by Parliament.

I would dismiss the appeal.

Regina v. Birmingham City Council (Appellants), ex parte the Equal Opportunities Commission (Respondents)

My Lords, I beg to move that the Report of the Appellate Committee be now considered.

The Question is:-

That the Report of the Appellate Committee be now considered.

As many as are of that opinion will say "Content". The contrary "Not-content".

The Contents have it.

(Their Lordships will indicate what Order they would propose to make.)

My Lords, I beg to move that the Report of the Appellate Committee be agreed to.

The Question is:-

That the Report of the Appellate Committee be agreed to.

As many as are of that opinion will say "Content". The contrary "Not-content".

The Contents have it.

- PLEASE TURN OVER -

The Question is:-

That the Order appealed from be reversed.

As many as are of that opinion will say "Content". The contrary **Not-content**".

The Not-contents have it.

The Question is:-

That the Order of the Court of Appeal of the 13th of May 1988 be affirmed and the appeal dismissed with costs.

As many as are of that opinion will say **"Content"**. The contrary "Not-Content".

The Contents have it.

Regina
v.
Birmingham City Council (Appellants), ex parte the Equal Opportunities Commission (Respondents)

JUDGMENT

Die Jovis 23° Februarii 1989

Upon Report from the Appellate Committee to whom was referred the Cause Regina against Birmingham City Council, ex parte the Equal Opportunities Commission, That the Committee had heard Counsel on Wednesday the 11th and Thursday the 12th days of January last upon the Petition and Appeal of Birmingham City Council of The Council House, Birmingham B1 1BB praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of Friday the 13th day of May 1988, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of the Equal Opportunities Commission lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal (Civil Division) of the 13th day of May 1988 complained of in the said Appeal be, and the same is hereby, **Affirmed** and that the said Petition and Appeal be, and the same is hereby, dismissed this House: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondents the Costs incurred by them in respect of the said Appeal, the amount thereof to be certified by the Clerk of the Parliaments if not agreed between the parties.

Cler: Parliamentor: