



29 June 2011

PRESS SUMMARY

R (on the application of G) (Respondent) v The Governors of X School (Appellant) **[2011] UKSC 30**

On appeal from the Court of Appeal (Civil Division): [2010] EWCA Civ 1

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Brown, Lord Kerr, Lord Dyson

BACKGROUND TO THE APPEAL

The issue in this case is whether the claimant's rights under article 6(1) of the European Convention on Human Rights ("ECHR") were engaged in a disciplinary hearing that was conducted by X School ("the School"). The claimant contends that the School's refusal to allow him legal representation violated his article 6 rights.

The Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act") and its predecessor legislation requires, *inter alia*, a school to report the circumstances of dismissals involving findings of sexual misconduct to the Independent Safeguarding Authority ("ISA") which maintains a "children's barred list". Those included on the children's barred list are prohibited from undertaking certain work with children, including teaching. Part 1 of Schedule 3 of the 2006 Act applies to ISA's determinations of whether to include an individual on the children's barred list. It provides that ISA must include an individual on the children's barred list if a) ISA is satisfied that the person has engaged in relevant conduct and b) it is appropriate to include the person on the list (para 3(3)). Relevant conduct includes conduct of a sexual nature involving a child (para 4(1)). It also provides that ISA must give an individual facing being placed on the children's barred list the opportunity to make representations (para 2) and it empowers ISA to require various persons, such as the police, to provide it with information (para 19). In coming to its determination, ISA must make an independent evaluation of the facts. It is not bound by the findings of any prior disciplinary hearing. This is also set out in guidance provided to case workers. If ISA determines to place an individual on the children's barred list, that individual has a right of appeal to the Upper Tribunal (section 4(1) & (4)).

The claimant was a sessional music assistant at the School. On 4 October 2007 he was suspended from his post on the basis of allegations that he had formed an inappropriate relationship with M, a 15 year old boy doing work experience at the School. Disciplinary proceedings were launched by the School. The claimant was advised by his solicitor not to participate in them until the police had completed their investigations. In early February 2008 the Crown Prosecution Service indicated that they did not intend to take any further action. By this time the School had also completed its investigation. The investigation report concluded that there was strong evidence that the allegations were proven. A disciplinary hearing was scheduled to take place on 21 February 2008. In advance of the hearing, the claimant was told that he was entitled to be represented by a trade union representative or work colleague. The claimant was not a member of a trade union and sought to be represented by his solicitors. The School refused. The claimant attended the disciplinary hearing accompanied by his father. He refused to answer questions on the basis that he believed the proceedings to be unfair. The disciplinary panel found that the claimant had formed an inappropriate relationship with M. They held that this constituted gross misconduct which warranted his summary dismissal. In May 2008, the School reported this to the Secretary of State in accordance with the legislation preceding the 2006 Act. The question of whether or not the claimant should be added to the children's barred list remains pending before ISA. The claimant issued judicial review proceedings on 19 May 2008 seeking a declaration that by reason of the denial of his right to legal representation before the School's disciplinary hearing, it was in breach of his rights under article 6 ECHR. He succeeded before Mr

Stephen Morris QC sitting as a Deputy High Court Judge at first instance ([2009] EWHC 504 (Admin)) whose decision was upheld by the Court of Appeal (Laws, Wilson and Goldring LJ) ([2010] EWCA Civ 1).

JUDGMENT

The Supreme Court, by a majority, allows the appeal. Article 6(1) does not apply to the disciplinary proceedings in issue. The lead judgment is given by Lord Dyson, with whom Lord Walker agrees. Lords Hope and Brown give separate, but concurring, opinions. Lord Kerr gives a dissenting judgment.

REASONS FOR THE JUDGMENT

Article 6 ECHR applies where there is a “determination of ... civil rights and obligations”. The meaning of “determination” was considered by the European Court of Human Rights (“ECtHR”) in *Ringeisen v Austria* (No 1) (1971) 1 EHRR 455. In that case the ECtHR held that it meant “proceedings the result of which is decisive for private rights and obligations”. In *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, the ECtHR contrasted proceedings which are “directly decisive” of the right in question, to which article 6 applies, with those which have a “tenuous” or “remote” consequence. The ECtHR has repeated this ‘mantra’ in a series of further cases: [36]-[59].

The ‘mantra’ has been applied to circumstances in which initial proceedings do not themselves determine a civil right but are closely linked to subsequent proceedings which do. The ECtHR takes a pragmatic, context-sensitive approach to the question of when such a link is established. The case law demonstrates that the factors it takes into account include: whether the first proceedings are in fact dispositive of the later proceedings; how close the link is between the two proceedings; whether the object of the two proceedings is the same; and whether there are policy reasons for holding that article 6(1) should not apply in the first proceedings. In light of this, the test of “substantial influence” formulated by Laws LJ in the Court of Appeal below is a useful formulation and is endorsed: [64]-[69].

In application to the present facts, it is not disputed that the civil right in question is the claimant’s right to practise his profession as a teaching assistant and to work with children more generally. This civil right would be directly determined by a decision of ISA to include him on the children’s barred list. Accordingly, article 6(1) ECHR applies to proceedings before ISA. However, it was not the function of the School’s disciplinary proceedings to determine the civil right in issue. Rather, they were only concerned with the claimant’s employment at the School. Therefore, in and of themselves, the School’s disciplinary proceedings do not engage article 6(1) ECHR. As regards the establishment of a link such that article 6(1) ECHR applies to the disciplinary proceedings, they do not directly determine or exert a substantial influence over the ISA proceedings. Therefore, in combination with the ISA proceedings, the School’s disciplinary proceedings do not engage article 6(1). In particular this is because ISA is required to exercise its own independent judgment both in relation to finding facts and assessing their gravity and significance. The decision by ISA whether to include an individual on the children’s barred list is only taken following an assessment of the full merits of each case. The absence of an oral hearing does not prevent the ISA from making its own findings of fact and forming its own view independent of the view formed by the School [70]-[83]; [87]-[92]; [97]-[101].

Lord Kerr would have dismissed the appeal. In his view, ISA could and indeed should be substantially influenced by the findings of the disciplinary tribunal. The requirement that it reach its own independent view of the facts is not inconsistent with this. The overall process involving the determination of the claimant’s civil right must be fair. In light of this, it is mistaken to concentrate substantially or exclusively on an individual stage in that process. In this case, the disciplinary proceedings were critical in testing the evidence against the claimant. To recognise his right to be legally represented at that stage is consonant with the proper safeguarding of his article 6 rights: [103]-[119].

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html