HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 14

on appeal from[2004] EWCA Civ 382

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Ali (FC) (Respondent)
v.
Headteacher and Governors of Lord Grey School (Appellants)

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Scott of Foscote
Baroness Hale of Richmond

Counsel

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LORD BINGHAM OF CORNHILL

My Lords,

1. Mr Ali, the respondent, is now a university student aged 18. The events giving rise to these proceedings took place in 2001-2002, when he was aged 13-14, and of compulsory school age. The issue for decision is whether his rights under article 2 of the First Protocol to the European Convention on Human Rights were infringed by the appellants between 7 June 2001 and 20 January 2002.

The agreed facts

2. In March 2001 the respondent was a pupil at The Lord Grey School ("the school"), a maintained secondary foundation school at Bletchley, where the local education authority is the Milton Keynes Council. On 8 March 2001 a fire was discovered in a classroom at the school. The fire brigade, who were summoned, considered that the fire had been started deliberately. The police were called in. The respondent was one of three pupils seen leaving the classroom before the fire was discovered. He admitted to the police that he had been present, although he attributed the blame to another. The three pupils were cautioned by the police, taken to the police station and released on bail. On 29 March 2001 they were charged with arson.

3. The school authorities judged that the respondent should not attend the school while the criminal investigation and the ensuing prosecution were in train, and he was excluded from the school for successive periods from 9 March until 6 June 2001. Since no issue in

the appeal relates to his exclusion during this period, it is unnecessary to recite the detailed facts. But certain points should be noted. First, the procedures laid down by statute and regulations to govern exclusions were not followed by the school authorities. Thus the exclusion of the respondent during this period, although obviously sensible, was not (it is agreed) lawful under the domestic education law of England and Wales. Secondly, until 14 May 2001 the school sent work, largely revision, for the respondent to do at home. His form teacher discussed this work with him on several occasions, and was concerned to ensure that he had enough work to do. Thirdly, the respondent was allowed to return to the school to sit his Standard Assessment Tests between 8 and 14 May 2001, and he did rather better than expected. Fourthly, the school told the respondent's parents on 25 May that it would continue to set work for the respondent as appropriate and asked them to make contact with the school to arrange to collect it, but they never did and no work was sent after 14 May. Fifthly, the school referred the respondent to the LEA for the provision of education otherwise than at school: the referral form, although finalised earlier, was not received by the LEA until 8 June. Reference to the Access Panel was requested by the school, but it was willing to negotiate the reintegration of the respondent if he was acquitted. Provision of materials, supervision and advice was suggested by the school as appropriate support for the respondent, described as an able student, pending his court appearance. Sixthly, the 45 day cap on the aggregate of periodic exclusions within a school year expired on 6 June 2001 (although this may not at the time have been appreciated by the school authorities). That is why 7 June 2001 (para 1 above) is a significant date. Any further exclusion after that date would, to be lawful, have had to be permanent. The school did not exclude the respondent permanently on 6 June, nor did it seek to do so, since it was awaiting the outcome of the criminal proceedings.

4. On 18 June 2001 the Crown Prosecution Service informed the respondent's solicitors (but not the school) that the prosecution would be discontinued for want of evidence, and this discontinuance was formally effected on the following day. The respondent and his brother then went to the school, which they told of this outcome, and they asked that the respondent be allowed to return to school immediately. The head teacher of the school told the brother that she would arrange for the respondent's re-entry to the school as soon as she received official notification of the discontinuance of the prosecution. She received a fax to this effect from the court on 22 June, and on 3 July received official notification from the police.

5. Meanwhile, ignorant that the prosecution had been discontinued, the LEA Access Panel met on 19 June. It recommended that the respondent be provided with tuition by the Pupil Referral Unit ("the PRU") at its Manor Road Centre while the prosecution continued and pending a decision on the respondent's future at the school. The Manor Road Centre was informed of this recommendation on 27 June and was to provide tuition until the end of term on 20 July in the first instance. The LEA also informed the respondent's parents of this recommendation and told them that the PRU would contact them to arrange a meeting. The school was told that the PRU had assumed responsibility for the respondent's education. In early July the PRU contacted the respondent's family, but they declined the offer of tuition by the PRU.

6. On 3 July 2001, having received notification from the police that the prosecution had been discontinued, the head teacher of the school wrote to the respondent's parents inviting them to a meeting with the school on 13 July "to discuss the way forward". She wrote again, repeating the invitation, on 4 July and in this letter said:

> "I am mindful of the fact that [the respondent] has been out of school for some considerable time and am therefore keen that he should return as soon as possible."

All the staff who would be involved in the reintegration of the respondent into the school were to attend the meeting, and this was the earliest date on which they could all be present. It was envisaged that the three pupils would redecorate the fire-damaged room under the supervision of a painter and decorator as part of the school's citizenship programme.

7. Neither the respondent nor his family attended the proposed meeting on 13 July. The family chose not to attend for (as the trial judge found) no good reason. One of the other two boys did attend, and was admitted back into the school. The respondent's family did not attempt to contact the school again until 6 November. On 13 July the head teacher wrote to the respondent's parents:

> "Following your failure to appear at the meeting organised this morning at The Lord Grey School, I am removing [the respondent] from our school roll and am writing to

> confirm to the Access Panel that other provision should now be made for [his] educational provision.
>
> I will not be pursuing a civil action against you regarding the arson offence, but your failure to attend the meeting confirms to me that it would be entirely unsuitable for [the respondent] to continue further at this school."

The parents were given the names and telephone numbers of those they should contact at the Manor Road Centre if they wished further clarification or wished to discuss future educational provision. The trial judge held that this letter excluded the respondent permanently from the school, although his name was not removed from the school roll until mid-October. There was no reply to the head teacher's letter.

8. When the September term began the LEA thought, and told the school, that the respondent was in Bangladesh, but this was not so, and neither made proper enquiry. The family did not contact the LEA until mid-October. At a meeting between the respondent's father and the LEA's representative on 18 October the father was unsure whether the family wanted the respondent to return to the school. This prompted the LEA to write to the father on 22 October:

> "Following our meeting on 18 October, I would like to confirm the following points:
>
> 1. I will ask Marilyn Barby, Team Leader – Pupil Support, to provide tuition for [the respondent] as soon after 29 October as possible.
> 2. In your search for a school place, be it The Lord Grey or another school, the following contact numbers may be useful to you for advice and support …
>
> I would advise you to decide quickly whether you wish [the respondent] to return to The Lord Grey School and arrange an interview there or at another school as soon as possible so that he can resume his education on a full time basis."

A letter was also written to Ms Barby on the same day, pointing out:

> "We need to provide tuition for [the respondent] as he has been out of school for a considerable time. This should be for a short period whilst he is supported back into school …
> I have advised the family that we will try to provide tuition as soon as possible after half term and given them the telephone numbers of the Education Welfare Service and Parent Partnership to help support admission back into Lord Grey or another secondary school."

The respondent and his family remained uncertain until early November whether they wanted him to return to the school but, on 6 November, the respondent's father wrote to the head teacher, seeking his son's reinstatement. He gave a reason for not attending the 13 July meeting which the trial judge, after investigation, found to be false. He pointed out that this was a very important year for his son, who had already missed ten (actually, eight) months of schooling. The school replied to the father that, having heard nothing from him, it had allocated the respondent's place to another pupil, his year group was now over-subscribed and it could not take the respondent back onto the school roll. The father was advised to contact the nearest secondary school or the LEA for a school place.

9. It appears that the father followed this advice. On 21 January 2002 the respondent began to attend another school. This explains the terminal date in para 1 above.

Article 2 of the First Protocol

10. Article 2 of the First Protocol provides:

> "Right to education
> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The article was adopted after some years of debate, during which some states, including the United Kingdom, resisted the imposition of a positive obligation. Clayton and Tomlinson (*The Law of Human Rights*, (2000), para 19.36) attribute the relative paucity of Strasbourg authority on the right to education to its limited scope.

11. The leading Strasbourg authority on the content of the article remains the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252. The case arose from the wish of French-speaking Belgian parents that their children should be taught in French, and the facts are in no way analogous with those here. But the court explored the meaning of the article in terms that remain highly pertinent (paras 2-5 of the judgment, pp 280-282, footnote omitted):

> "2. The Court will address itself first to Article 2 of the Protocol because the Contracting States made express provision with reference to the right to education in this Article.
>
> 3. By the terms of the first sentence of this Article, 'no person shall be denied the right to education'.
>
> In spite of its negative formulation, this provision uses the term 'right' and speaks of a 'right to education'. Likewise the preamble to the Protocol specifies that the object of the Protocol lies in the collective enforcement of 'rights and freedoms'. There is therefore no doubt that Article 2 does enshrine a right.
>
> It remains however to determine the content of this right and the scope of the obligation which is thereby placed upon States.
>
> The negative formulation indicates, as is confirmed by the preparatory work, that the Contracting Parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol. As a 'right' does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State.
>
> To determine the scope of the 'right to education', within the meaning of the first sentence of Article 2 of the Protocol, the Court must bear in mind the aim of this

provision. It notes in this context that all member States of the Council of Europe possessed, at the time of the opening of the Protocol to their signature, and still do possess, a general and official educational system. There neither was, nor is now, therefore, any question of requiring each State to establish such a system, but merely of guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time.

The Convention lays down no specific obligations concerning the extent of these means and the manner of their organisation or subsidisation. In particular, the first sentence of Article 2 does not specify the language in which education must be conducted in order that the right to education should be respected. It does not contain precise provisions similar to those which appear in Articles 5(2) and 6(3)(a) and (e). However, the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be.

4. The first sentence of Article 2 of the Protocol consequently guarantees, in the first place, a right of access to educational institutions existing at a given time, but such access constitutes only a part of the right to education. For the 'right to education' to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed. The Court will deal with this matter in greater detail when it examines the last of the six specific questions listed in the submissions of those who appeared before it.

5. The right to education guaranteed by the first sentence of Article 2 of the Protocol by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.

> The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights was to provide effective protection of fundamental human rights, and this, without doubt, not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the community and the respect due to fundamental human rights while attaching particular importance to the latter."

In applying this reasoning to the facts before it, the court added (para 7, p 292):

> "The first sentence of Article 2 contains in itself no linguistic requirement. It guarantees the right of access to educational establishments existing at a given time and the right to obtain, in conformity with the rules in force in each State and in one form or another, the official recognition of studies which have been completed, this last right not being relevant to the point which is being dealt with here."

12. The court's judgment in the *Belgian Linguistics (No. 2)* case has been cited and relied on in a number of later decisions such as *Kjeldsen, Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, *Sahin v Turkey* (Application No 44774/98, Grand Chamber, 10 November 2005, unreported) and *Timishev v Russia* (Application Nos 55762/00 and 55974/00, 13 December 2005, unreported). In later decisions the reasoning in that case has been followed but elaborated. It has been held that article 2 is dominated by its first sentence (*Kjeldsen*, above, para 52; *Campbell and Cosans*, above, para 40) but the article must be read as a whole (*Kjeldsen*, above, para 52), and given the indispensable and fundamental role of education in a democratic society a restrictive interpretation of the first sentence would not be consistent with the aim or purpose of that provision (*Sahin*, above, para 137; *Timishev*, above, para 64). But the right to education is not absolute (*Sahin*, above, para 154): it is subject to regulation by the state, but that regulation must not impair the essence of the right or deprive it of effectiveness (*Campbell*

and Cosans, above, para 41; *Sahin*, above, para 154). It is not contrary to article 2 for pupils to be suspended or expelled, provided that national regulations do not prevent them enrolling in another establishment to pursue their studies (*Yanasik v Turkey* (1993) 74 DR 14), but even this qualification is not absolute (*Sulak v Turkey* (1996) 84 - A DR 98). The imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils (*Sahin*, above, para 156).

13. In *Coster v United Kingdom* (2001) 33 EHRR 479, para 136, Her Majesty's Government submitted that article 2 did not confer a right to be educated at a particular school. The court did not expressly accept or reject this submission. Such an interpretation was, however, adopted by the Court of Appeal in *S, T and P v London Borough of Brent* [2002] EWCA Civ 693, [2002] ELR 556, para 9.

The domestic legislative background

14. For the last 60 years the responsibility for ensuring the secondary education of children in this country has rested on what Lord Wilberforce called "a fourfold foundation": *Secretary of State for Education and Science v Thameside Metropolitan Borough Council* [1977] AC 1014, 1046; and see 1063. While the legislation and much else has changed, that fourfold foundation has so far survived.

15. The first of the four elements identified in the Education Act 1996, which governs this case, is the parents of a child of compulsory school age. By section 7 the parents are under a duty to cause every such child to receive efficient and suitable full-time education "either by regular attendance at school or otherwise". The serious character of this duty is reflected in the criminal penalty attaching to unjustified breach of it. The second element is the Secretary of State, charged by section 10 of the Act to promote the education of the people of England and Wales. The third element is the LEA, required by section 13(1) of the Act to secure that efficient secondary education is available to meet the needs of the population of their area. The LEA is also required, by section 19(1), to

> "make arrangements for the provision of suitable education at school or otherwise than at school for those

> children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them."

A school established and maintained by the LEA which is specially organised to provide education for such children is known as a pupil referral unit: section 19(2). The fourth element consists of 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: School Standards and Framework Act 1998, section 38. The responsibility for discipline within a school is shared between the governing body and the head teacher, the former responsible for formulating policies, the latter for applying them. One available sanction is exclusion, a power which may only be exercised on disciplinary grounds: 1998 Act, section 64(4). Only the head teacher may exclude a pupil, which may be for a fixed period or periods (not exceeding a total of 45 days in a school year) or permanently: 1998 Act, section 64 (1) and (2). A pupil may not be otherwise suspended or expelled: 1998 Act, section 64(3). Where a pupil is excluded the head teacher has a duty to give certain information to a parent or the pupil (section 65), the governing body has a duty in certain cases to consider the matter (section 66) and the LEA must make arrangements for an effective right of appeal by the pupil in some cases (section 67). The head teacher, the governing body and the LEA must have regard to guidance given on exclusion by the Secretary of State from time to time (section 68).

16. 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.

The respondent's claim

17. The respondent issued these proceedings against the appellants on 27 August 2002. He complained that he had been unlawfully excluded from the school from 21 March 2001 until January 2002, in breach of his Convention right under article 2 of the First Protocol, and claimed damages not exceeding £30,000. As often happens when cases progress through the hierarchy of courts, the basis of his claim has been somewhat modified. Stanley Burnton J, at first instance, found the respondent's exclusion from 8 March until 13 July 2001 to have been unlawful, because non-compliant with mandatory requirements of domestic law, but sensible and reasonable and involving no violation of article 2: [2003] EWHC 1533 (QB); [2003] 4 All ER 1317, paras 89, 92-94, 106. In the Court of Appeal, Sedley LJ held, with the concurrence of Butler-Sloss P and Clarke LJ, that the respondent's exclusion until 6 June 2001, although unlawful, was not in breach of article 2 because, during that period, he was afforded appropriate education: [2004] EWCA Civ 382, [2004] QB 1231, paras 56-57, 70, 71. This is an analysis which the respondent now accepts, and little more need be said about it.

18. The judge held that the school was not the cause of the respondent's lack of suitable education between 13 July and the end of the summer term on 20 July because his family declined the LEA's offer of tuition: para 108. The cause of the respondent's lack of schooling or education during the autumn of 2001 was more complex to ascertain (para 109), but it was the LEA's responsibility to provide suitable education and there were educational facilities available to him (paras 110-111). Thus although the decisions to exclude the respondent and to remove him from the roll were unlawful in domestic law, and could have been challenged by judicial review, they did not give rise to a liability in damages for breach of his rights under article 2 (para 114). The Court of Appeal took a different view. It held that the respondent's right to education was denied between 7 June and 13 July, notwithstanding that the school was still offering to provide him with substitute work to do at home, a matter held to be relevant only to damages (para 61). In relation to the last phase of the respondent's exclusion, from 14 July 2001 – 20 January 2002, the Court of Appeal regarded removal of the respondent's name from the school roll as

improper, although giving rise to no separate legal consequences (paras 62 and 63). But the respondent's exclusion during this period was, as the judge held, unlawful and unreasonable (para 63). In para 64 of the judgment the Court of Appeal concluded:

> "So characterised, the exclusion of [the respondent] from 14 July until he was finally placed in a new school amounts, in my judgment, to a further denial of his Convention right to education. It was complete and it was prolonged. It was not terminated by the deletion of [the respondent's] name from the school roll because there was no lawful ground for deletion. To the extent that it may nevertheless have been acquiesced in, the damage may be mitigated. But this is not our present concern, and it will require (if the case goes that far) a factual inquiry into a number of things including the family's state of knowledge and understanding."

The court did not accept (para 68) the school's

> "… further and fundamental argument that the bare existence of the education authority's fallback duty, together with [the respondent's] right to seek to enforce it, relieves the school either of its obligations or of the legal consequences of failing to discharge them. On the contrary, it is on the two public authorities who are the present respondents (or put more realistically, the school) that the state has chosen to devolve the material elements of the obligation which it has undertaken to provide universal secondary education. It is the head teacher and the governing body who in law bear the primary duty to educate a child who has been accepted in their school and, as a corollary, not to exclude him except as authorised by law."

Thus the appeal was allowed in relation to the period from 7 June 2001 to 20 January 2002, and the case was remitted to the court below for the assessment of damages.

The parties' submissions

19. In his admirably succinct and pertinent argument for the school Mr Edward Faulks QC did not challenge the conclusion reached by both the judge and the Court of Appeal that the school authorities had acted unlawfully in excluding the respondent permanently and removing his name from the roll without following the procedures required by domestic law. But he criticised the Court of Appeal's conclusion that there had at any time been a breach of article 2. The Convention did not, he submitted, confer on anyone a right to be educated at a particular school. It conferred a right not to be denied access, in a non-discriminatory manner, to the general level of educational provision available in the member state. In the present case there had been no such denial. When asked by the school on 25 May to collect work for the respondent to do, his parents had failed to do so. When tuition was offered by the PRU in early July, the offer had been declined. When a meeting was arranged on 13 July to discuss the respondent's return to the school, neither he nor his family had attended, for no good reason. Had they done so, and sought his re-admission, there was no reason to doubt that he would have been re-admitted, as was the other boy who did attend the meeting. When the parents were offered the opportunity to approach the Manor Road Centre on 13 July, they did not reply and did not approach the Centre. When the LEA met the father on 18 October and wrote to him on 22 October, seeking the respondent's return to full-time education at school, there was uncertainty whether his return to the school was sought by the father or not. When at last, in early November, reinstatement at the school was sought and found to be impracticable, steps were taken by the LEA to find him a place at another school, which was achieved with reasonable promptness. On these facts, it was submitted, it could not be said that the respondent had been denied access, least of all by the school, to the general level of educational provision available in this country.

20. Ms Cherie Booth QC, for the respondent, laid emphasis on the extent to which the school had departed from the requirements of domestic law in excluding the respondent and removing his name from the school roll. She challenged the school's interpretation of article 2 and argued that its effect is to give the individual pupil and parent a right, not merely to the general level of educational provision available in a member state, but to compliance with the domestic educational regime and thus to education in and by the school of which a child is registered as a pupil unless and until the relationship between school and pupil is lawfully ended. During the period from 8 March to 6 June there had been no breach of article 2 for the reason given by the Court of

Appeal, that the school had given the respondent work to do. But it had not done so after 6 June, and therefore had denied the respondent's right to education and violated article 2.

Conclusions

21. For purposes of this appeal I am content to accept the proposition, accepted by both courts below and agreed between counsel, that the school excluded the respondent in breach of domestic law from 8 March onwards. But I must register some unease at this conclusion. The immense damage done to vulnerable children by indefinite, unnecessary or improperly-motivated exclusions from state schools is well-known, and none could doubt the need for tight control of the exercise of this important power. But the 1998 Act and the guidance issued under it seem to me singularly inapt to regulate the problem which confronted the school in this case and which must confront other schools in comparable cases.

22. As already noted, in the 1998 Act "exclude" means exclude on disciplinary grounds; an exclusion must be for a fixed period or permanent; and schools must have regard to guidance given by the Secretary of State. The guidance effective at the relevant time was DfEE Circular 10/99, July 1999, *Social Inclusion: Pupil Support*. This provided, in chapter 6, on "The use of exclusion":

> "A decision to exclude a child for a fixed period or permanently should be taken only:
>
> - in response to serious breaches of a school's discipline policy; and
> - once a range of alternative strategies, including those in Section 4, have been tried and have failed; and
> - if allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or of others in the school."

This was repeated in para 6.2, and para 6.3 continued:

"6.3 Before reaching a decision, the head teacher should:

- consider all the relevant facts and firm evidence to support the allegations made, and take into account the school's policy on equal opportunities. If there is doubt that the pupil actually did what is alleged, the head teacher should not exclude the pupil;
- allow the pupil to give their version of events; . . . "

Permanent exclusion was described (para 6.6) as "an acknowledgement by the school that it can no longer cope with the child". The Secretary of State did not expect a head teacher normally to exclude a pupil permanently for a one-off or first offence.

23. The fire on 8 March, if started deliberately or recklessly, involved a serious crime. The respondent, rightly or wrongly, was suspected of participation. Some of his fellow-pupils were similarly suspected. Other pupils, and perhaps members of the staff, were potential witnesses. The police began to investigate. Respect for the respondent and for the integrity of the criminal justice process in my opinion required that he should not attend the school until the matter was cleared up; that he should not be interrogated by the school about matters which were the subject of police investigation followed by prosecution; and that he should not be punished for something he was not shown to have done. But even if exclusion in such circumstances would be on disciplinary grounds, the school could not set fixed periods when the duration of the investigation was inherently indefinite, and the case was plainly not covered by the paragraph quoted above. It appears to have been agreed that on expiry of the 45 day period the school had no choice but to re-admit the respondent or exclude him permanently. But re-admission, with a criminal prosecution in train, was inappropriate. So, too, was permanent exclusion, since the school had no wish to expel the respondent; if he was cleared they wished him to return. There was no question of acknowledging inability to cope with a pupil whose disciplinary record had always been good. If, as has been found and agreed, the school acted inconsistently with the requirements of domestic law, the inadequacy of the law contributed to that result.

24. The Strasbourg jurisprudence, summarised above in paras 11-13, makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-

discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil (as in *Eren v Turkey*, Application No 60856/00 (unreported), 7 February 2006, unreported). The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils? In this case, attention must be focused on the school, as the only public authority the respondent sued, and (for reasons already given) on the period from 7 June 2001 to 20 January 2002.

25. The question, therefore, is whether between those dates the school denied the respondent effective access to such educational facilities as this country provides. In my opinion, the facts compel the conclusion that it did not. It invited the respondent's parents to collect work, which they did not. It referred the respondent to the LEA's Access Panel, which referred him to the PRU, an education provider; the PRU's offer of tuition was declined. The school arranged a meeting to discuss the respondent's re-admission, which the respondent's family chose not to attend. The head teacher's reaction to this non-attendance was criticised in the courts below as over-hasty. Perhaps so. But I am not altogether surprised that she treated this unjustified non-attendance as a repudiation by the family of the pupil-school relationship. She again gave the parents contact details at the PRU. The LEA's attempts during the autumn to secure the respondent's readmission to the school or admission to another school were thwarted by the family's uncertainty what they wanted. As soon as they made up their minds, a place (although not at the school) was promptly found. The retention of the respondent's name on the roll of the school in July, and its removal in October, although much relied on in argument, were events unknown to the respondent and his family at the time, and had no causal effect or legal consequence. It is a matter for regret when any pupil, not least an able pupil like the respondent, loses months of schooling. But that is not a result which can, in this case, be laid at the door of the school.

26. For these reasons, and those given by my noble and learned friend Lord Hoffmann, I would allow the appeal and dismiss the claim. I would invite written submissions on costs within 14 days.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

27. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. For the reasons they give, with which I agree, I too would allow this appeal.

LORD HOFFMANN

My Lords,

The Story

28. On Thursday 8 March 2001 there was a fire in an empty class room at the Lord Grey School at Milton Keynes. The fire brigade said that it has been started deliberately and suspicion fell upon three boys who had been seen running away. One of these was the respondent Abdul Hakim Ali. After an investigation by the police, the boys were charged with arson.

29. These events created a difficult situation for the school. Arson in schools is a serious problem. In 2001 the damage to schools caused by arson attacks was estimated at £65m, without taking into account the cost of disruption to the schools and the resources of the police and fire brigades. The school could not allow the boys to carry on as if nothing had happened. For one thing, it was highly undesirable that they should be in daily contact with children who might be giving evidence against them. On the other hand, their guilt had not been established and the investigation was in the hands of the police. It would have been

inappropriate for the school to conduct a parallel investigation with a view to deciding whether there were grounds to discipline them.

30. The school told the boys to stay away until the police investigation had been completed. The school sent work to the respondent's home and his form teacher kept in touch with him. It was hoped that the matter would quickly be resolved but things dragged on into May. The respondent was allowed into the school to write his SAT examination and did better than had been predicted before the fire incident. On 25 May, with the examinations over and the investigation not yet completed, the school referred the respondent to the Local Education Authority for the provision of education otherwise than at school. The LEA has a statutory duty under section 19 of the Education Act 1996 to provide education for children who, by reason of exclusion from their schools, need special arrangements to be made. The Milton Keynes LEA provides a "Pupil Referral Unit" for such children.

31. On 19 June the LEA Access Panel met and recommended that the respondent be provided with tuition at the Pupil Referral Unit. That very day, however, the Crown Prosecution Service decided to discontinue the prosecution against the three boys and he was discharged by the magistrates. The respondent's elder brother went to the head teacher and told her that he had been acquitted and should return to school. The head teacher said she would arrange this as soon as she received official notification of the court decision. So the respondent did not go to the Pupil Referral Unit.

32. On 29 June the police officially notified the head teacher that the prosecution had been discontinued. She then wrote two letters to the respondent's parents, dated 3 and 4 July, inviting them to a meeting at the school on 13 July to discuss "the way forward". She proposed that the three boys should repaint the damaged room and said that she was keen that the respondent should return as soon as possible. The parents of the other two boys received similar letters.

33. The respondent and his parents did not turn up to the meeting. The judge later found that they had offered no credible explanation and had chosen not to attend. One of the other boys also stayed away. The third came to the meeting and was reinstated. The head teacher was irritated: she thought that the reason was that the respondent did not want to help repaint the room. She wrote to the parents to say that the respondent's name would be removed from the roll and she would

confirm to the Access Panel that other arrangements should be made for his education. The letter gave the names and telephone numbers of Mr Read, the LEA's Alternative Education Manager and his assistant. A week later, on 20 July, the summer holidays began.

34. When term began in early September, the respondent made no attempt to get in touch and in mid-October his name was removed from the roll. Nor did he or his family make contact with the Pupil Referral Unit or the LEA until about the same time, when the respondent's brother spoke to Mr Read, who went round and spoke to the respondent's father. The family appeared uncertain about whether they wanted the respondent to go back to the Lord Grey School or to another school. In early November they decided that they wanted the respondent to go back to the Lord Grey School. But the school said that they were now oversubscribed. The respondent was accepted at a different school at the beginning of the following January.

Domestic law

(*a*) *The exclusion code*

35. Sections 64 to 67 of the School Standards and Framework Act 1998 contained a code dealing with the exclusion of pupils "on disciplinary grounds". It provided that a head teacher could exclude a pupil permanently or for a fixed period or periods, but not so that the fixed periods added up to more than 45 school days in a school year: section 64(1) and (2). Parents, governors and the LEA had to be informed (section 65); the governors had a duty to consider whether the pupil should be reinstated (section 66) and there was a right of appeal from the governors (section 67). Since the events in this case, sections 64 to 67 have been repealed and replaced by section 52 of the Education Act 2002, which provides in subsection (1) that the head teacher of a maintained school "may exclude a pupil from the school for a fixed period or permanently". "Exclude" is still defined to mean "exclude on disciplinary grounds" (subsection (10)) but the 2002 Act leaves the other matters which limit and regulate the exercise of the power to be provided by regulations: see the Education (Pupil Exclusions and Appeals)(Maintained Schools)(England) Regulations 2002 SI 2002 No 3178.

36. The statutory code was well adapted to the use of exclusion as a punishment for a serious disciplinary offence, imposed in the interests of

the education and welfare of the pupil and others in the school. It is far less suitable for dealing with a case like this, in which the pupil was excluded on precautionary rather than penal grounds.

37. Although the point was not argued and I am content to assume that any exclusion had to comply with the provisions of the code, I must express doubt about whether it had any application to the facts of this case. The respondent was not being excluded "on disciplinary grounds" except in the broad sense that it was thought necessary to exclude him while an allegation of a disciplinary offence was being investigated. But section 64(1), which says that the exclusion must be for a fixed period or permanently, suggests that Parliament contemplated that it would be used only when a disciplinary offence has actually been established and an appropriate "sentence" must be imposed. That was certainly the view of the (then) Department for Education and Employment when, pursuant to section 68(2), it issued the statutory guidance (Circular 10/99) on exclusion which was in force at the time of these events. Chapter 6 emphasised in bold type that —

> "A decision to exclude a child … should be taken only:
>
> - in response to serious breaches of a school's discipline policy; and
> - if allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school."

38. Likewise, para 6.3 of the Circular said:

> "Before reaching a decision, the head teacher should consider all the relevant facts and firm evidence to support the allegations made, and take into account the school's policy on equal opportunities. If there is doubt that the pupil actually did what is alleged, the head teacher should not exclude the pupil."

39. It was presumably on the basis of this guidance that an appeal panel in *R v Independent Appeal Panel of Sheffield City Council, Ex p N* [2000] ELR 700 decided, in the case of a pupil excluded pending a prosecution for sexually assaulting another pupil, that the exclusion could be justified only if the panel found, in advance of the trial, that the

excluded pupil was guilty of the offence. I entirely agree with Moses J that this cannot possibly be the law. The school can only decide, as he suggested, whether —

> "it is in the best interests of the school, all the pupils, the other pupil particularly concerned and of course the pupil who is charged, for that pupil to be excluded, bearing in mind that the truth or otherwise of the accusation cannot be determined until the criminal proceedings."

40. But what conclusion does one draw from this? How does a precautionary exclusion of this kind fit into the statutory code? One possibility is that the departmental guidance misconstrued the statute and that a pupil can be excluded "on disciplinary grounds", permanently or for a fixed period according to the code, even though he cannot be proved to have committed any disciplinary offence. For my part, I think that the departmental construction was right. A case like this cannot be shoehorned into section 64 of the 1998 Act. The school does not want to exclude the pupil for any particular fixed period and certainly does not want to exclude him permanently. If he is found to be innocent, it is likely to want him back. The school needs to exclude him for the necessarily indeterminate period which must elapse until the investigation or prosecution is completed. Section 64 provides no way of doing this except by the artificial method of a succession of periods fixed by reference to a guess as to when the investigation is likely to finish, continuing until the 45 day maximum is reached, or by permanent exclusion on some understanding that an application for readmission will be considered after an acquittal.

41. If section 64 has no application to precautionary exclusions, how can they be legally justified? Circular 10/99 gave no guidance. It made no mention of precautionary exclusion. In the Department's new Guidance, issued in 2004 after the decision of Stanley Burnton J in this case, it recognizes the problem and seems to take the view that statutory authority must be found outside the code. It suggests (in para 23) that in the case of a pupil awaiting trial he should, with the agreement of the parents, be given authorized leave of absence, or if that cannot be agreed, the head teacher should be delegated the power of the governing body under section 29(3) of the Education Act 2002 to require the pupil to "attend at any place outside the school premises for the purposes of receiving any instruction or training included in the secular curriculum for the school." Under this power, he could presumably be sent off to a Pupil Referral Unit. On the other hand, in the case of another form of

precautionary exclusion, namely when a pupil poses a risk to the health of other pupils and staff (eg by reason of a communicable disease) the Guidance does not suggest any statutory authority but says, perhaps optimistically, that "this is not an exclusion."

42. Another possibility is that the school has, as part of its general powers of management, the right to exclude a pupil on precautionary grounds, limited only by the need that it should be reasonably exercised. It is true that section 64(3) says that a pupil may not be excluded from a maintained school —

> "(whether by suspension, expulsion or otherwise) except by the head teacher in accordance with this section"

But this means only that section 64 is the sole power for exclusion as defined in the section, namely, on disciplinary grounds. It does not exclude the possibility of exclusion in the ordinary sense of that word on other grounds.

43. Although these questions do not have to be decided for the purposes of this appeal, I have discussed them because they explain the practical difficulty which the school had in applying the section 64 code and the departmental guidance then available. It may be that, as the new Guidance suggests, the problems could now be solved by the use of section 29(3) of the 2002 Act. On the other hand, the Department may wish to consider whether the question of precautionary exclusion needs further clarification.

(b) Applying the code

44. As I have said, this case has been argued on the basis that exclusion could be justified only in accordance with the section 64 code. The judge found that in several respects the school had failed to comply with its provisions. Although it had been reasonable to exclude the respondent until the prosecution had been terminated and a reintegration meeting could be held, the school had not adhered to the code. The initial exclusion was not for a "fixed period" but "until we know what is going to happen". The head teacher did not notify the parents of the matters listed in section 65(1) or the governors and LEA of the matters listed in section 65(4). The governors did not consider the matter in

accordance with section 66. The judge said, at para 93, that "[t]hese defaults flowed to some extent from the failure of the [deputy-head] to appreciate that an exclusion was involved" and the failure of the head teacher to address the same issue. I can only say that, given the state of the legislation and the departmental guidance, I am not surprised.

45. There followed periods of fixed term exclusion by which it was extended until the abortive meeting on 13 July. Here, for similar reasons, the notices were defective and the governors did not review the case as required by section 66. The judge found that this would have made no difference. On 6 June the maximum period of 45 days ran out and thereafter, if the code applied, the school had either to readmit the respondent or to decide to exclude him permanently. That the school should have been faced with these wholly impractical alternatives also shows how difficult it was to apply the code to the circumstances of the case. But the school did neither and accordingly the exclusion after 6 June could not be justified under the code.

46. The judge found that the respondent's exclusion after 13 July was not only unlawful in terms of the code but also unreasonable. I find this latter conclusion difficult to reconcile with the judge's other findings. He said that it was reasonable for the school to await formal notice of the discontinuance of the prosecution. He went on to say, at para 97, that the head teacher:

> "considered (reasonably, as I find) such a meeting crucial to the successful reintegration of the claimant."

47. Accordingly, it was reasonable to exclude the respondent until such a meeting had been held. But no such meeting took place and the reason, as the judge found, was that the claimant's parents (who were being advised by a solicitor) had decided without good reason that they would not attend. The judge criticized the head teacher for not seeking an explanation for the non-attendance, but in the light of his finding that no credible explanation had been given at the trial, it is unlikely that in July 2001 the head teacher would have received one which was truthful or satisfactory.

48. Be that as it may, the exclusion of the respondent was at all times unlawful under the code. It is however conceded that this did not give rise to any cause of action against the school or the LEA for breach of

statutory duty. These duties exist only in public law and do not create private law rights of action: see *R (B) v Head Teacher of Alperton Community School* [2001] ELR 359, 380-381.

Convention rights

49. On 27 August 2002 the respondent started an action for damages against the school in the Milton Keynes County Court. He claimed that, contrary to section 6 of the Human Rights Act 1998, the school had acted in a way incompatible with a Convention right. The right relied upon was article 2 of the First Protocol: "No person shall be denied the right to education". In essence his claim was that because his exclusion from the school had been unlawful in terms of domestic law, he had been denied the right to education.

50. Stanley Burnton J, who heard the case on transfer to the High Court, rejected the claim: [2003] 4 All ER 1317. He said, at para 83:

> "it has to be borne in mind that the duty created by art 2 of the First Protocol is imposed on the state, and not on any particular domestic institution. It does not create a right to be educated in any particular institution or in any particular manner. Expulsion from a school of a pupil who has no access to alternative educational facilities, such as enrolment in another school or education through a pupil referral unit, may cause a breach of art 2 of the First Protocol, and if so, the school authority may be liable for damages; but if the pupil is able to have access to efficient education elsewhere, no breach of his convention right will be involved. If the cause of the unavailability of alternative efficient education is the action or inaction of the local education authority, on whom duties are imposed by ss 13 and 19(1) of the 1996 Act, it will be the local education authority, rather than the school authority, that will have caused the infringement of the pupil's rights under art 2 of the First Protocol. If suitable and adequate alternative educational facilities are available, but the pupil's parents decide that their child should not use them, then the local education authority will in general not have caused an infringement of art 2 of the First Protocol."

51. Applying these principles, the judge said that after 13 July the LEA assumed responsibility for the respondent's education in the Pupil Referral Unit but their services had been declined. It could not therefore be said that the respondent had been denied the right to education. It remained available.

52. The Court of Appeal, in a judgment given by Sedley LJ (Clarke LJ and Dame Elizabeth Sloss P concurring) reversed this decision. The reasoning of Sedley LJ involved three stages. The first was contained in the following sentence ([2004] QB 1231, 1251, at para 45:

> "The realistic principle that, subject to the Convention's own limits, the right to education takes the form prescribed in each member state carries, in my judgment, the necessary corollary that any question whether there has been a violation of the right has to be answered initially in terms of the applicable domestic law".

53. Secondly, he said that until the end of the 45 day period the exclusion was unlawful but for reasons which were not material to the fact of exclusion. The school could lawfully have excluded the respondent and if there had been compliance with the requirements of sections 65 and 66 he would still have been excluded. After the 45 day period expired on 6 June, the illegality was of a different quality because he could have been excluded only by a decision to exclude him permanently. After the withdrawal of the prosecution on 19 June there would have been no grounds for permanent exclusion. He was therefore being denied a right to education under domestic law and it followed that he was denied his right under the Convention.

54. Thirdly, Sedley LJ said (at p. 1256, para 68,) that the existence of the LEA's "fallback duty" under section 19 of the 1996 Act did not relieve the school of liability. The school had the "primary duty to educate a child who had been accepted into their school, and, as a corollary, not to exclude him except as authorised by law."

55. I respectfully disagree with this reasoning and in particular with the first stage. The "necessary corollary" to which Sedley LJ referred simply does not follow. The principle, as stated by the European Court in the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 281, is that

art 2 of the First Protocol does not confer a right to an education which the domestic system does not provide:

> "all member States of the Council of Europe possessed, at the time of the opening of the Protocol to their signature, and still do possess, a general and official educational system. There neither was, nor is now, therefore any question of requiring each State to establish such a system but merely of guaranteeing to persons subject to the jurisdiction of the Contracting Parties the right, in principle, to avail themselves of the means of instruction existing at a given time."

56. This does not however guarantee access to any particular educational institution the domestic system does provide: see *Simpson v United Kingdom* (1989) 64 DR 188. Nor is there a right to remain in any particular institution. Everyone is no doubt entitled to be educated to a minimum standard (*R (Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359, 1367) but the right under article 2 extends no further.

57. Except in cases in which the applicant has been wholly excluded from some sector of the domestic educational system, the European Court's jurisprudence on article 2 of the First Protocol has never shown any interest in the procedures by which the applicant was denied entry to or expelled from a particular educational establishment. Such procedures may be relevant to rights under other articles, such as article 6 or 14, but article 2 of the First Protocol is concerned only with results: was the applicant denied the basic minimum of education available under the domestic system? For this purpose it is necessary to look at the domestic system as a whole. Thus in *Yasanik v Turkey* (1993) 74 DR 14, where the applicant had been expelled from a military academy, the Commission said that there was no denial of the right to education because the Turkish education system also included civilian establishments in which he could enrol.

58. I think that by parity of reasoning, the availability of teaching at the Pupil Referral Unit meant that the respondent had not been denied the right to education. As the necessary minimum of education was available, the Strasbourg court would not in my opinion concern itself with whether the fact that the respondent was obliged to attend the Pupil Referral Unit rather than the Lord Grey School was in accordance with

domestic law or not. I think that Stanley Burnton J summarized the European jurisprudence accurately when he said, in the passage which I have quoted in para 50 above, that if suitable and adequate alternative arrangements are available but the pupil's parents decide that the child should not use them, neither the school nor the LEA will have acted inconsistently with the child's rights under article 2 of the First Protocol, and (at [2003] 4 All ER 1337, para 84), that "this is the position whether or not the expulsion from the school is lawful under domestic law."

59. I do not think that the cases of *Timishev v Russia* (15 December 2005), upon which Miss Booth QC for the respondent relied, and *Eren v Turkey* (Application No 60856/00) (unreported) (7 February 2006), which was drawn to the attention of the House after the conclusion of the argument, support a contrary view. In the *Timishev* case the applicant's children were excluded from school because he was not registered as resident in the area. His appeal to the domestic courts was dismissed, although the Government subsequently conceded that the exclusion was unlawful by Russian law. There was no suggestion that any alternative education had been available. The court said, at p 15, para 66:

> "[T]he Convention and its Protocols do not tolerate a denial of the right to education. The Government confirmed that Russian law did not allow the exercise of that right by children to be made conditional on the registration of their parents' residence. It follows that the applicant's children were denied the right to education provided by domestic law. Their exclusion from school was therefore incompatible with the requirements of Article 2 of Protocol No 1."

60. In my opinion this does not mean that the failure to provide education was a breach of the Convention because in it was in breach of domestic law. It was a breach of the Convention because it was a failure to provide education. The court's reference to domestic law was to rebut an argument that such a failure could be justified, in accordance with the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, as being part of the Russian domestic educational system. Likewise, in the *Eren* case the applicant was wholly excluded from the Turkish university system on grounds which the European Court found to be arbitrary and lacking "a legal and rational basis."

61. In the present case, where the respondent was not excluded from school education, he would in my opinion have had no claim at Strasbourg. And if no claim can be made in Strasbourg, it follows that there cannot have been an infringement of a Convention right giving rise to a claim under section 6 of the Human Rights Act 1998: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] 3 WLR 837. It is in my view illegitimate to promote the public law duty of the school, not giving rise to a private right of action, to a duty under section 6 of the 1998 remediable by a claim for damages, by saying that in domestic law the school bore the "primary duty to educate the child". The correct approach is first to ask whether there was a denial of a Convention right. In the case of article 2 of the First Protocol, that would have required a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education. As there was no such failure, that is the end of the matter. It is only if a denial of a Convention right is established that one examines domestic law in order to discover which public authority, if any, is liable under article 6. This is an inquiry which can sometimes give rise to difficult questions of causation and which can make it necessary to ask which public authority bore the primary duty to act in accordance with the Convention. But no such question arises in this case.

62. For these reasons and those given by my noble and learned friend Lord Bingham of Cornhill, I would allow the appeal and restore the decision of Stanley Burnton J.

LORD SCOTT OF FOSCOTE

My Lords,

63. I have had the advantage of reading in advance the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann and am in complete accordance with their reasons for concluding that this appeal should be allowed. The appeal has, however, been argued before the House on the footing that Abdul Hakum Ali's exclusion from the school while the proposed criminal proceedings for arson against him and the other two boys were pending was unlawful under domestic law. Stanley Burnton J so found and the Court of Appeal agreed. Nonetheless they concluded that his exclusion during this period did not bring about a breach of his right to education

under article 2 of the First Protocol to the Convention. The reason was that during the period in question the school had made appropriate arrangements for Abdul Hakim to do schoolwork at home. The Court of Appeal took the view that Abdul Hakim's exclusion from the school after the criminal proceedings had been discontinued was not only unlawful under domestic law but also, differing from Stanley Burnton J, a breach of his article 2 of the First Protocol rights. Your Lordships have concluded that there was no such breach and that the appeal must therefore be allowed. In these circumstances the correctness of the judge's and the Court of Appeal's conclusion that Abdul Hakim's exclusion from the school was unlawful under domestic law, a conclusion not challenged before your Lordships, might seem a matter of no relevance. And it is indeed a matter that is not essential to the result of this appeal. But it is, I imagine, a matter of some importance to the school, and particularly to Ms Pavlou and Mrs Telfer. So I want, briefly, to explain why I think the conclusion, the premise on which the case has been argued before the House, to be wrong.

64. Stanley Burnton J expressed the opinion that the decision to keep Abdul Hakim away from the school while the criminal proceedings were pending, a decision taken initially by Mrs Telfer, the deputy head teacher, and confirmed and continued by Ms Pavlou, the head teacher, was a sensible and reasonable decision for the reasons he set out in paras 90 and 92 of his judgment. He found, nonetheless, that the decision was unlawful. Here, my Lords, is a puzzling paradox. The head teacher, to whom is entrusted the day-to-day management of the school, and her deputy take a sensible and reasonable decision to deal with an awkward situation, not of their making. Three boys had been charged with arson, with having started a fire in a school classroom. Other pupils at the school were potential witnesses. None of the staff of the school had been eyewitnesses to what had occurred. Ms Pavlou had been advised by the police not to question the boys about the fire. It was not possible, therefore, for her to satisfy herself of their responsibility for the fire, or, the converse, that one or other bore no responsibility. So what was she to do? Her decision to keep them away from the school while the criminal proceedings were pending and to make arrangements for schoolwork to be provided for them to do at home was obviously reasonable and dictated by common sense. So Stanley Burnton J held and he was plainly right to do so.

65. The paradoxical conclusion that to send the boys home and keep them away from the school until the criminal proceedings were resolved had been unlawful was attributable to the assumption that their exclusion from the school was an exclusion to which sections 64 to 68

of the School Standards and Framework Act 1998 applied. It was common ground that the school had not complied with the statutory requirements of a section 64 exclusion. But the assumption that the exclusion of the boys from the school was an exclusion to which section 64 applied was, in my opinion, mistaken.

66. Section 64 gives to a head teacher of a maintained school power to exclude a pupil from the school either for a fixed period or permanently (sub-section (1)). Fixed period exclusions may not exceed 45 days in any one school year (sub-section (2)). And sub-section (3) says that

> "A pupil may not be excluded from a maintained school (whether by suspension, expulsion or otherwise) except by the headteacher in accordance with this section."

But sub-section (4) says that :

> "In this Act 'exclude', in relation to the exclusion of a child from a school, means exclude on disciplinary grounds (and 'exclusion' shall be construed accordingly)."

The provisions of section 65 ("Exclusion of pupils: duty to inform parents, etc."), section 66 ("Functions of governing body in relation to excluded pupils"), section 67 ("Appeals against exclusion of pupils") and section 68 ("Exclusion of pupils: guidance") apply to exclusions on disciplinary grounds. The provisions have no application to exclusions which are not on disciplinary grounds. Nor does section 64(3) bar an exclusion which is not on disciplinary grounds.

67. The need for a strict approach to and control of the exclusion of pupils from school on disciplinary grounds is clear. The exclusion of a pupil from school on disciplinary grounds, whether for a fixed term or permanently, has a penal character. It is a sanction imposed for a disciplinary offence. It should not be imposed unless there is a fair certainty that the pupil is guilty of the offence. Provision for the pupil to appeal to the school governing body (section 66) and from the governing body to an appeal panel (section 67) underlines the character of the sanction.

68. I am unable to understand on what basis it was thought that the three boys had been kept away from the school "on disciplinary grounds". The head teacher had not concluded, and was not in a position in which she could have concluded, that any of them was responsible for the fire or guilty of any disciplinary offence. Their enforced absence from the school was a management decision. At the time the decision was taken there was nothing for which any of the boys could fairly have been disciplined.

69. It seems to me clear that the management powers of a head teacher enable him or her to keep a pupil temporarily away from the school for reasons that have nothing to do with discipline. An obvious example is that of a pupil who arrives at school one day suffering from some infectious disease. It may be necessary, in order to safeguard the health of the other pupils and the school staff, for the pupil to be sent home until he or she is not longer infectious. It is to be hoped that the pupil's parents or guardians would agree with this course. But if they did not, the head teacher (or, in the head teacher's absence, his or her deputy) would, in my opinion, have power to impose it. The situation that confronted Mrs Telfer on 8 March 2001 and Ms Pavlou shortly thereafter is, in my opinion, another example where sensible and responsible management of a school may require a pupil to be kept temporarily away from the school. It would, in my opinion, be lamentable if, by an application of sections 64 to 68 to situations to which they could never have been intended to apply, managers of schools found themselves placed in a statutory straitjacket and prevented from taking sensible decisions to deal with unusual situations.

70. For these reasons, my Lords, the exclusion of Abdul Hakim from the Lord Grey School during the pendancy of the criminal proceedings against him was, in my opinion, at no stage unlawful under domestic law. Thereafter the school did all that was reasonable to try to convene a meeting with his parents at which arrangements for his return to the school could be made. The parents did not respond to Ms Pavlou's letters of 3 July 2001 and 4 July 2001 and did not attend the meeting arranged for 13 July 2001. Ms Pavlou was given to understand by the LEA, who had been trying to make arrangements for him to have access to education at a Pupil Referral Unit, that he was in Bangladesh. In the circumstances it was understandable that Ms Pavlou concluded that they did not intend him to return to the school and that his name should be removed from the school roll.

71. While, therefore, agreeing with my noble and learned friends that for all the reasons they have given this appeal should be allowed, I would, for my part, exonerate Mrs Telfer and Ms Pavlou from the stigma of the finding of the courts below that they acted unlawfully in the decisions they took regarding Abdul Hakim. Their actions and decisions were, in my opinion, not only sensible and reasonable but also lawful.

BARONESS HALE OF RICHMOND

My Lords,

72. I wish that I found this case as plain as your lordships have done. Education plays an indispensable and fundamental role in a democratic society: see *Sahin v Turkey*, (Application No 44774/98) 10 November 2005, para 137. Without it, children will not grow up to play their part in the adult world, to exercise their rights but also to meet their responsibilities. That is why children must not be denied their right to the education which the state provides for them. On the plain facts of this case, Abdul Hakim Ali was denied the education which ought to have been provided for him under our national educational system from 13 July 2001 until he started at his new school in January 2002. No-one has suggested that this was his fault.

73. On 8 March 2001, there was a fire in a class room at his school. Abdul Hakim, then aged 13 and hitherto an able and well-behaved pupil, was one of three boys suspected of causing it. The police were involved and a prosecution brought. The school took the view that the boys should stay away from school until the criminal proceedings had been disposed of. This was sensible. Arson is a serious offence. While the criminal proceedings were pending, it would have been quite wrong for the school to question the boys or try to form a view about their guilt. Equally, their presence in school, where other pupils might be witnesses, would be inappropriate. Although initially this was not seen as a formal exclusion under section 64 of the School Standards and Framework Act 1998, from 21 March the school did so regard it, although they did not comply with all the requirements of the Act.

74. I share your lordships' misgivings about this. Section 64 is concerned only with exclusion "on disciplinary grounds". The

requirements all assume that it is imposed as a determinate sanction for a serious breach of discipline, rather than as an indeterminate precaution pending the resolution of what may or may not turn out to have been a serious breach of discipline. But the phrase "on disciplinary grounds" is not precise. One might regard a remand pending a criminal trial as part of the process of imposing the discipline of the criminal law and thus as a step taken "on disciplinary grounds". One might similarly regard a precautionary exclusion pending the resolution of criminal proceedings, especially where these involve what would undoubtedly be a serious breach of school rules as well as of the criminal law, as a step taken on disciplinary grounds. And a pupil in this situation is just as much in need of protection from arbitrary or indefinite exclusion as is a pupil excluded as a punishment. I agree, therefore, that the 1998 Act and guidance (and, as I understand it, their replacements) are inapt to cater for this situation and require urgent reconsideration by the Department for Education and Skills.

75. One reason for this is the lack of clarity about what should happen if the criminal proceedings are discontinued. The proceedings in this case were formally discontinued on 19 June 2001. Although some work had been set for them and they had been able to take their SATs during the second week in May, the boys had now been out of school for over three months. Getting them back into school should have been seen by everyone as a matter of urgency. Indeed, Abdul Hakim turned up at school with his brother that very day and asked to be allowed to return immediately. The Head decided to wait until she had formal notification and could arrange a reintegration meeting. Official notification from the police did not arrive until 3 July, more than two weeks later. A reintegration meeting was arranged for 13 July, ten days after that and only a week before the start of the long summer holiday. If he was to return to the school at all, there were obviously strong arguments for getting him back before the end of term so that he could start the new school year with a clean slate. The Head wrote on 3 July inviting "you the parents" to the meeting and followed up the next day with the following:

> "I am writing with regard to the fire incident at The Lord Grey School. We have now been informed that the Crown Prosecution Service has decided to discontinue proceedings against Abdul. A reason has not been given, though the school has been asked to consider a civil action. Should you wish Abdul to return to school, we will need to meet to discuss a way forward. I am mindful of the fact that Abdul has been out of school for some

> considerable time and am therefore keen that he should return as soon as possible. However, the room (T37) is still out of action. It is up to Abdul and his two friends to repair the damage, either through physically painting the room or paying for it to be repaired. . . "

76. The family did not attend the meeting fixed for 13 July and Stanley Burnton J found that they had no good reason for this. Nevertheless, he also said this ([2003] 4 All ER 1317, para 99) about the letter of 4 July:

> ". . . I have to say that Ms Pavlou's letter of 4 July could and should have been more gently worded, given the means, background and difficulties with English of the claimant's family. The suggestion of civil proceedings was unnecessary. The letter gave the impression that the redecoration of the room was a precondition to the reintegration of the claimant, rather than something that would be discussed at the meeting. It was entirely reasonable for the school to want the three boys to show their community responsibility by undertaking the redecoration of the room. However, the claimant and his family might have had good objections to the requirement, which should be considered by the school. A firm decision should have awaited the meeting rather than preceded it."

77. He was also critical (at para 100) of her letter of 13 July, quoted by my noble and learned friend Lord Bingham of Cornhill at para 7, the effect of which was permanently to exclude Abdul Hakim from the school:

> "While I fully sympathise with her insistence on a reintegration meeting, her response was precipitate. First, given that neither she nor [her deputy head] had spoken to anyone in the claimant's family, so that Ms Pavlou was relying on messages passed on to her, and the differences in the information she had received, it was appropriate to try to find out why the family had not attended. Secondly, there was a real risk that by acting as she did she was punishing the claimant for a decision of his parents. . . Thirdly, the school was dealing with a family whose parents knew little English. The possibility of

> misunderstanding or confusion could not be excluded. Even if it would have been very difficult to have organised a similar reintegration meeting for a later date, an explanation of the claimant's non-attendance should have been sought. If necessary, Ms Pavlou would have had to consider the possibility of a reduced meeting, or a different reintegration task for the claimant."

78. I agree with all of that. I therefore cannot agree that the school did all that was reasonable. No-one doubts that the enterprise of educating the young is a challenging one involving at times some difficult and delicate decisions. But at that stage the school owed a legal duty to Abdul Hakim to provide him with education. They also had a pastoral responsibility towards him. Yet they were behaving as if he was seeking to return after a justified exclusion on disciplinary grounds, when that was not necessarily the case. One object of a reintegration meeting would be to explore what responsibility he should properly bear for the incident and how reparation might be made for that. The school were also behaving as if he came from a family who would fully understand and accept what was expected of him and them. A reintegration meeting where clear understandings are reached both as to the past and the future is obviously good practice and much more likely to lead to a successful return to school. But it is not a legal requirement and Abdul Hakim had not presented any disciplinary problems before these events. In my view, the school let him down badly by their precipitate rejection of him on 13 July. The effect, as the judge found, was of a permanent exclusion. Yet he was offered none of the procedural safeguards attached to such a drastic action and in any event there were no good grounds for excluding him.

79. Section 6(1) of the Human Rights Act 1998 reads simply:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

The school is undoubtedly a public authority within the meaning of the 1998 Act. The simple question for us, therefore, is whether the school acted in a way which was incompatible with one of Abdul Hakim's Convention rights. The right in question is that contained in the first sentence of article 2 of the First Protocol:

"No-one shall be denied the right to education."

It was not the object of the Protocol to prescribe any particular educational system, syllabus or curriculum. It was premised on the existence of a developed educational system in each of the member states at the time. Its object was, as my noble and learned friend Lord Bingham of Cornhill has said, to guarantee fair and non-discriminatory access to the educational system established in the particular member state. But that, it seems to me, is exactly what was denied to Abdul Hakim in this case.

80. Of course, any educational system is entitled to have rules and disciplinary procedures to enforce those rules. Discipline is an integral part of the educational process. But what the school did in this case did not comply with the established system of pupil discipline. The school effectively excluded a pupil when it had no good reason to do so and without affording him any of the procedural protection afforded by the established system.

81. Of course, had he been excluded in the proper way, the responsibility would have fallen on the LEA to make some sort of fall back provision for him. Even if he was excluded improperly, I accept that the LEA may have had a fall back responsibility. But, quite apart from the stigma attached to pupil referral units, that sort of fall back is no substitute for ordinary access to the full national curriculum as a pupil at an ordinary school. The established educational system in this country expected a boy in Abdul Hakim's situation to be readmitted to the school at which he was enrolled as soon as there was no good reason for keeping him away and for him to be educated there along with his peers (we are not here concerned with the sort of exceptional situation which arose in *R (L) (A Minor) v Governors of J School* [2003] UKHL 9; [2003] 2 AC 633). Abdul Hakim had a right not to be denied the education which the established system had provided for him. The school acted incompatibly with that right. It is not plain to me that the European Court of Human Rights would regard the availability of the fall back as a justification for what the school did. We have to apply the provisions of the 1998 Act.

82. Of course, neither extreme propounded on behalf of the opposing parties in this case is correct. Not every act of unlawful exclusion is incompatible with the right contained in article 2 of the First Protocol. In my view, nothing incompatible occurred until the letter of 13 July.

Everything up until then was consistent with a rational system of school management and discipline. Equally, however, I do not accept that article 2 of the First Protocol adds nothing to the existing law. The existing law gives public law remedies for unlawful acts of a public authority and private law remedies for damage caused by professional negligence. It does not give a right of action for damages for breach of the statutory duties contained in the voluminous and ever-changing education legislation. Section 6 of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The consequences of such an unlawful act are spelled out in section 8:

> "(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. . .
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, . . . the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining –
>
> (a) whether to award damages, or
>
> (b) the amount of an award
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

The great advantage of the scheme laid down in the Act is its flexibility. It enables the courts to mark violations of the Convention rights in whatever way it considers just and appropriate. Damages are an available remedy, but only if necessary to afford just satisfaction to the claimant.

83. This case seems to me to be the paradigm of a case in which it would be just and appropriate to grant to Abdul Hakim a declaration that the school had acted in a way which was incompatible with his right to education, by effectively excluding him permanently from school without a good reason to do so. However, he brought an action for damages, not a declaration. In my view, it is not necessary to make an award of damages to afford him just satisfaction in this case. He is not to be blamed for the failure of his family to take up the various offers

which were made, or for the delay in deciding what they wanted to do, and thus in getting him into another school. But, in view of the findings of the judge, it would not be just to make the school pay damages for the consequences. It is not necessary in any event, as Abdul Hakim returned to the school system and has obviously made good use of it.

84. I would therefore allow the appeal but for rather different reasons from those given by your lordships.