

# Religious Education in Schools – The Implications of a Recent High Court Case

Rachel Holmes | 22 March 2016

## The case of *R (Fox) v Secretary of State for Education*

In this recent case, a group of parents and pupils challenged the lawfulness of the Secretary of State's decision to issue new GCSE subject content (**Subject Content**) for Religious Studies to be taught from September 2016 and specifically the following assertion (**Assertion**):

*"...the subject content is consistent with the requirements for statutory provision of religious education in current legislation as it applies to different types of school."*

Their concern was that the Subject Content, combined with the Assertion, gave unlawful priority to the teaching of religious views over non-religious views, permitting or encouraging those responsible for creating and teaching specific curricula to think, wrongly, that religious education can be delivered to the relevant age group with nothing more than the GCSE Religious Studies curriculum.

## The legislation

The claim was based on human rights law and its impact on the interpretation of statutory provisions applicable to state schools concerning religious education.

The Education Act 2002 requires maintained schools to provide a *"balanced and broadly based curriculum"*, which:

- (a) *promotes the spiritual, moral, cultural, social, mental and physical development of pupils and of society, and*
- (b) *prepares pupils for the opportunities, responsibilities and experiences of later life".*

The same Act requires maintained schools to provide religious education for all pupils; provisions in other legislation require schools (other than faith schools) to provide such education in accordance with an agreed syllabus. Agreed syllabi are created by Awarding Organisations, which must adhere to the content requirements published by the Department for Education.

The Human Rights Act 1998 requires this legislation to be interpreted and applied compatibly with the rights incorporated into English law by that Act. The Claimants argued that the Subject Content and the Assertion were incompatible with their rights

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in Article 9 of the ECHR and Article 2 Protocol 1.

Article 9 enshrines the right to freedom of thought, conscience and religion. Article 2 Protocol 1 sets out the 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 is in conformity with their own religious and philosophical convictions."*

### Questions for the High Court

The High Court considered the following questions in turn:

1. Should the challenge fail as being speculative, premature, or misdirected, or for some combination of these reasons?
2. If not, does the Assertion encourage those responsible for determining what is taught on GCSE courses to believe that taking a Religious Studies GCSE course containing the Subject Content will be enough to fulfil the statutory requirements for religious education?
3. If so, is the Assertion right or wrong?

### Should the challenge fail as being speculative etc?

The Court decided that it should not. Since compliance with the Subject Content is mandatory for the Awarding Organisations that create GCSE curricula, the Subject Content governs the options that are available to them and will inevitably affect what is eventually taught in schools. The Court held that it was preferable for this issue to be determined before critical choices were finalised.

### Does the Assertion encourage the reader to believe that teaching the Subject Content will, without anything more, fulfil the State's obligations under Article 2 Protocol 1 with regard to religious education?

The High Court held that it did:

*"The ordinary and natural meaning of The Assertion in this context is that a GCSE specified in accordance with The Subject Content will satisfy the state's legal obligations for [religious education]. That is likely to be influential. The defendant herself recognises that 'some schools' rely on the [Religious Studies] GCSE for that purpose."*

### Would delivery of the prescribed Subject Content satisfy the State's legal obligations for religious education?

The High Court examined four European Court of Human Rights cases on Article 2 Protocol 1. Several principles emerged from those cases:

1. Contracting States are permitted to give greater priority to majority views, provided minority views are not given qualitatively different treatment; but

2. States are not permitted to pursue an aim of indoctrination that might be viewed as not respecting parents' religious and philosophical convictions; and
3. States must take care to ensure that educational provision is conveyed in an objective, critical and pluralistic manner.

There was no suggestion that the Subject Content pursued an aim of indoctrination, and the Court acknowledged that the options within the Subject Content permitted the creation of a GCSE that would fully discharge the State's obligations. However, the Subject Content was also consistent with a syllabus that included no (or very limited) study of non-religious beliefs, and such a syllabus would not be consistent with Article 2 Protocol 1. By claiming that such a GCSE would fulfil the entirety of the State's legal obligations, the Assertion represented a breach of the duty to take care that information or knowledge in the curriculum is conveyed in a pluralistic manner.

The Court pointed out that this decision only applies to non-faith schools. It is also clear from the legislation cited that only the position of maintained schools was being considered.

#### **Announcement from the Department for Education since the judgment was handed down**

The Department for Education released a [paper](#) following the judgment, to clarify that the Assertion was never intended as an assurance to all schools without a religious character that they could always wholly rely on any possible Religious Studies Curriculum to ensure compliance with their statutory responsibilities. Rather, it was simply intended to reflect that the Subject Content is not inconsistent with schools' statutory responsibilities and may act as a possible element in complying with them.

In the DfE's view, the Court decision was on a narrow, technical point that does not affect how schools should teach religious education. The paper lists a number of Government policy points that remain unchanged, including that:

- there is no obligation for schools to give equal time to the teaching of religious and non-religious views;
- compliance with statutory requirements can be achieved across the key stages, and schools are not obliged to cover the teaching of non-religious world views (or any other aspect of the RE curriculum) at GCSE specifically. It is up to schools to determine how to discharge their duties.

It is worth noting that this last bullet point sits uneasily with comments made by the judge in the *Fox* case. The argument was made that teaching at GCSE stage should not be considered in isolation, but within the context of the RE curriculum as a whole. The judge's response was:

*"I accept the point, but it is obvious that GCSE is a vitally important stage in the development of a young person's character and understanding of the world. I do not consider that it could be said that a complete or almost total failure to provide information about non-religious beliefs at this stage could be made up for by instruction given at earlier stages."*

## Comment

Although independent schools are not directly subject to the Human Rights Act 1998 or the educational law provisions referred to in the judgment (including the duty to provide religious education), the independent school standards contain obligations concerning the "*spiritual, moral, social and cultural development of pupils at the school*".<sup>1</sup> Since the Regulations containing the independent school standards must also be read compatibly with human rights law, in our opinion it would be unwise to dismiss this court decision as being wholly irrelevant to independent schools.

Many of the duties associated with the requirement to provide for the spiritual, moral, social and cultural development of pupils<sup>2</sup> (**SMSC**) deal with political issues, such as ensuring that they are taught in a balanced, non-partisan manner, and that "British values" are promoted. However, two specific requirements may be relevant here. Independent schools are obliged to "*ensure that principles are actively promoted which –*

... *further tolerance and harmony between different cultural traditions by enabling pupils to acquire an appreciation of and respect for their own and other cultures;*

... *encourage respect for other people, paying particular regard to the protected characteristics set out in the [Equality Act] 2010...*"

The Equality Act 2010 prohibits discrimination on the grounds of a person's religion, with religion being defined as including a lack of religion. In *Fox*, the Court did not comment on whether not teaching secular philosophies could amount to discrimination against non-religious pupils, but it is not unreasonable to suggest that teaching pupils about such philosophies would "*encourage respect for*" those who subscribe to them.

The [DfE's November 2013 advice on SMSC development in independent schools](#) says the following:

*"Pupils must be encouraged to regard all faiths, races and cultures with respect. Teaching should also have a positive aspect, preparing pupils to interact easily with people of different cultures and faiths."*

Although the requirement to "*further tolerance and harmony between different cultural traditions by enabling pupils to acquire an appreciation of and respect for their own and other cultures*" was added after this guidance was published, an [update](#) issued after the standard was amended refers to this paragraph, so it is still relevant. Again, it is reasonable to suppose that including some teaching of secular philosophies within the school curriculum will contribute towards meeting this standard.

To our knowledge, the duties of independent schools in relation to teaching non-religious philosophies has not been tested in the courts, so it is impossible to say exactly what they are. However, taken together, the *Fox* case (and what it might mean

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<sup>1</sup> Part 2 of the Schedule to The Education (Independent School Standards) Regulations 2014 sets out the conditions for meeting this standard.

<sup>2</sup> The full list of associated duties can be found [here](#). The relevant portion is in paragraph 5.

about how the independent school standards should be interpreted), the DfE's response to the judgment, the SMSC section of the independent school standards and the DfE's guidance on that standard, in our opinion it would be prudent for schools – or, at least, those with no religious affiliation – to ensure that non-religious belief systems are given some attention in the curriculum.

If you require further information on anything covered in this briefing please contact [Rachel Holmes \(rachel.holmes@farrer.co.uk\)](mailto:rachel.holmes@farrer.co.uk); +44(0)20 375 7561) or your usual contact at the firm on 020 3375 7000. Further information can also be found on the [Schools](#) page on our website.

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