

<b>17 February 2016</b>		<b>ITEM: 6</b>
<b>Standing Advisory Council on Religious Education</b>		
<b>Judicial Review : R (Fox) v Secretary of State for Education [2015] EWHC 3404</b>		
<b>Wards and communities affected:</b> All	<b>Key Decision:</b> Non-Key	
<b>Report of:</b> Deborah Weston, Associate Adviser for Religious Education		
<b>Accountable Head of Service:</b> – Roger Edwardson, Strategic Lead, School Improvement, Learning and Skills		
<b>Accountable Director:</b> - David Archibald, Director of Children’s Services		
<b>This report is Public</b>		

## Executive Summary

On 27th November 2015, a judicial review was held in the High Court of Justice following a challenge to the legality of the Department for Education's GCSE Subject Content for Religious Studies. In his judgment<sup>1</sup>, Justice Warby upheld the claim that the following section of the content contained an error of law.

"By setting out the range of subject content and areas of study for GCSE specifications in religious studies, the subject content is consistent with the requirements for the statutory provision for religious education in current legislation as it applies to different types of school."

The judge found that this section of the content might mislead those responsible for the provision for RE in schools without a religious character into believing that irrespective of which specification they chose or route through that specification they would automatically be fulfilling their legal requirements in relation to Religious Education and that this was not necessarily true.

The Secretary of State responded to this judgment by publishing a "Guidance for schools and awarding organisations about the Religious Studies GCSE" on 28<sup>th</sup> December 2015.

In this guidance note (see appendix A), the Department of Education state, "this was not how the paragraph was ever intended to be read. We intended it simply to reflect that the subject content is not incompatible with those statutory responsibilities and may act as a possible element in complying with those responsibilities."<sup>2</sup>

<sup>1</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/r-fox-v-ssfe.pdf>

<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/488477/RS\\_guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488477/RS_guidance.pdf)

The implications of this judgment for schools in Thurrock are that they must carefully consider their GCSE offer and ensure that students at Key Stage 4 are informed about non-religious worldviews.

In addition, Justice Warby made a number of other comments about European and domestic legislation in relation to Religious Education in schools without a religious character. These comments may need to be considered by those responsible for designing the RE provision, especially as there appears to be some different interpretations about the implications of the judgment for schools.

## **1. Recommendation(s) that SACRE:**

### **1.1 That SACRE consider the report on this case and the Secretary of State's response in order to determine the implications for Religious Education in Thurrock**

## **2. Introduction and Background**

Paul Greatorex of 11KBW's Education Practice Group provides the following analysis of the case:

<http://www.education11kbw.com/2015/11/27/religious-education-and-state-impartiality/>

Religious education and state impartiality

November 27th, 2015

In *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin), Warby J held that guidance issued by the Secretary of State for Education was unlawful because it contained a statement (referred to in the judgment as “the Assertion”) that delivery of Religious Studies GCSE content consistent with subject content prescribed by the Secretary of State would in all cases fulfil the state’s legal obligations with regard to religious education. In fact, the judge held, relying exclusively on such GCSEs could be enough to meet those obligations but would not necessarily be so and some additional educational provision may be required.

For such an esoteric conclusion, the case got a surprising amount of coverage in the mainstream media (see here) but this probably reflects the high levels of interest and sensitivity surrounding the role of religion in schools. Leaving the headlines aside, the judgment repays consideration for its analysis of the law governing the teaching of, and curriculum-setting for, religious education in schools and academies. It is important to note, however, that the position in faith schools and academies is different: see [82].

So far as domestic law is concerned, the judgment reminds us at [17] that section 375 of the Education Act 1996 requires religious education to be taught according to an “agreed syllabus” which must “reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practice of the principal religions represented in

Great Britain”. At [69] is a reminder of the 2011 Census results underpinning this, which show that 59.3% of people answered the question “what is your religion?” by saying “Christian”. (At [77] some other answers that were given are recorded – none (25.1%), no answer (7.2%), Muslim (4.8%) and Buddhist (0.4%)).

The process by which the agreed syllabus is drawn up by the Agreed Syllabus Conference (ASC) and subject to ministerial control is explained at [15-19].

Crucially, the judge then considered Article 9 and Article 2 of Protocol 1 of the European Convention of Human Rights and the (almost exclusively Strasbourg) case law in this area. The judge said at [39] that the jurisprudence established the following propositions:

- In carrying out its educational functions the state owes parents a positive duty to respect their religious and philosophical convictions.
- The state has considerable latitude in deciding exactly how that duty should be performed, having regard among other things to available resources, local conditions and, in particular, the preponderance in its society of particular religious views, and their place in the tradition of the country.
- As such, the state may legitimately give priority to imparting knowledge of one religion above others, where that religion is practised or adhered to by a majority in society, but the state has a duty to take care that information or knowledge included in the curriculum is conveyed in a pluralistic manner
- Subject to certain threshold requirements, the state must accord equal respect to different religious convictions, and to non-religious beliefs, it is not entitled to discriminate between religions and beliefs on a qualitative basis and its duties must be performed from a standpoint of neutrality and impartiality as regards the quality and validity of parents’ convictions.
- The judgment does not record any consideration of (or even submissions on) section 2(1) of the Human Rights Act 1998 and the extent to which this Strasbourg case-law should be followed, which is perhaps surprising given the current debate (both judicial and political) on this point, and it was on the basis of the ECHR and Strasbourg case law that the claim succeeded.

At [74] the judge said there was no problem with section 375 and suggested the state’s duty is best described as “due impartiality”, but went on to identify the problem in this case as follows:

“74...The complete exclusion of any study of non-religious beliefs for the whole of Key Stage 4...would not in my judgment be compatible with A2P1”  
[See additional comments on this paragraph by DW below)

75. It is not of itself unlawful to permit an RS GCSE to be created which is wholly devoted to the study of religion. That is not the claimant’s case. But The Assertion tells its readers that such a GCSE will fulfil the entirety of the state’s RE duties...[T]his is a proposition that is likely in practice to be accepted and acted upon by ASCs and schools. The Assertion thus represents guidance under challenge wrongly suggested that the provision of

such a GCSE would in and of itself meet the state's obligations with regard to religious education.”

Also of interest is how the judge dealt with two other points which arose, about looking at a child's education more widely than just their GCSE years, and the parental right in section 71 of the SSFA 1998 to withdraw a child from RE:

“78. I have not overlooked [the Secretary of State's] submission that the two years of Key stage 4 should not be considered in isolation, but within the context of the RE curriculum as a whole. 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 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. Nor do I overlook [the Secretary of State's] final point: that if it turns out that the schools attended by the Children adopt a GCSE specification as the entirety of RE provision at Key stage 4, and the Parents do not want this form of RE for their children, they have the unqualified right to have their Children excused from that education. This point fails on the ground identified above: it would deprive the Parents and Children of rights they enjoy, which the state is bound to deliver. [See additional comments on this paragraph by DW below]

79. This is not to say that the state is obliged to provide a particular form of teaching, dictated by the Parents. It is to say that an opt-out is not an adequate substitute for the provision of an educational programme which accords the Parents their right to respect for their convictions. The need to withdraw a Child would be a manifestation of the lack of pluralism in question.”

#### **Additional Comments on paragraph 74**

The full text of paragraph 74 is as follows and is relied on in the DfE's guidance bullet point 4:

The Strasbourg jurisprudence shows that the duty of impartiality and neutrality owed by the state do not require equal air-time to be given to all shades of belief or conviction. An RE syllabus can quite properly reflect the relative importance of different viewpoints within the relevant society. The same would seem to follow for a region or locality. The duty might therefore be described as one of “due” impartiality. No criticism can be or is made therefore of s 375(3) of the 1996 Act. In addition, of course, a generous latitude must be allowed to the decision-maker as to how that works out in practical terms. But the complete exclusion of any study of nonreligious beliefs for the whole of Key Stage 4, for which the Subject Content would allow, would not in my judgment be compatible with A2P1.

This final sentence appears to be at odds with the DfE Guidance bullet point 5

### **Additional comments on paragraph 78**

In this paragraph the judge reminds readers that non-religious worldviews must be taught at Key Stage 4 and that it is not permissible to justify ignoring them at this key stage on the basis that non-religious views are taught in other key stages. Again this statement appears to be at odds with DfE Guidance bullet point 5.

### **3. Issues, Options and Analysis of Options**

Depending on the outcomes of SACRE discussions, they may choose to:

1. take no action
2. seek further legal advice
3. write to schools to alert them to the implications of this case.

### **4. Reasons for Recommendation**

- 4.1 SACRE has a legal responsibility to advise schools on Religious Education to be given in accordance with its Agreed Syllabus. This judgment appears to have a direct bearing on Religious Education in schools and SACRE must therefore consider its response.

### **5. Consultation (including Overview and Scrutiny, if applicable)**

- 5.1 Not applicable

### **6. Impact on corporate policies, priorities, performance and community impact**

- 6.1 Not applicable

### **7. Implications**

#### **7.1 Financial**

Implications verified by: **Shaj Sivadasan**  
**Financial Implications**

This report sets out the impact of the recent judicial review on the curriculum for Religious Education. Any costs associated with further legal advice will have to be contained within existing budgets. The schools are responsible for meeting any costs associated with implementing changes to the curriculum, and these will have to be met from their existing Individual Schools Budgets.

## 7.2 Legal

Implications verified by: **Lucinda Bell**  
**Education Lawyer**

SACRE's attention is drawn to this case for consideration

## 7.3 Diversity and Equality

Implications verified by: **Natalie Warren.**  
**Community Development & Equalities  
Manager**

The implications of this report are that raising standards in religious education in Thurrock will help students to gain more understanding of the religion or belief of people in the local and national community and therefore improve community cohesion.

## 7.4 Other implications (where significant) – i.e. Staff, Health, Sustainability, Crime and Disorder)

- Not applicable

## 8. Background papers used in preparing the report (including their location on the Council's website or identification whether any are exempt or protected by copyright):

- Not applicable

## 9. Appendices to the report

- Appendix 1 – Guidance for Schools and awarding organisations about the Religious Studies GCSE

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