

The Care Standards Tribunal of England and Wales: a contribution to human rights

by David Pearl

The human rights issues that are raised by the operation of the recently created Care Standards Tribunal are considered by the author, who is President of the Tribunal.

GENERAL BACKGROUND

This paper describes the machinery that has now been put in place in England and Wales to hear appeals from those individuals who have been prohibited from working with children under the Protection of Children Act 1999, the Care Standards Act 2000, and the Education (Restriction of Employment) Regulations 2000 (SI No 2419). Initial decisions are taken as regards teachers by the Secretary of State for Education and Skills, and as regards social workers, by the Secretary of State for Health. Until recently such decisions were only susceptible to judicial review in the sense that the procedures could be investigated by the High Court. The merits of the decision however were not capable of any judicial investigation, except perhaps in the more exceptional case where it could be argued that the relevant Government department had reached a decision that no reasonable person would have reached.

Such an approach was understandable. Child protection policies inevitably were at the forefront of a strategy designed to ensure that our children are safeguarded from contact with people who are considered unsuitable because the person presents a risk to their safety or welfare. Our criminal law, our public family law and our administrative law must respond to the necessity of placing a child's safety and welfare as the paramount consideration. Teachers and social workers and others who work with children must face the prospect that they will be barred from working in their chosen profession, as a result of behaviour by them in relation to children in their care that places these children at risk.

It should be pointed out that this paper is not concerned with the criminal law, where a court can disqualify a person from working with children and young persons as part of the sentence after a criminal conviction (see Criminal Justice and Court Services Act 2000 ss 26-42). The Care Standards Tribunal will receive review applications from people in this position, but only 10 years after sentence (or

five years in the case of a person under 18 at the time of sentence).

Inevitably, however, there are major and sometimes conflicting policy issues. For example, should safeguarding children extend to protecting them from the behaviour in private of an adult whose example may be "unacceptable" (see for example para 25 of the guidance document produced by the Department for Education and Skills entitled *Preventing unsuitable people from working with children and young persons*). And what amounts to "unacceptable"? It is not possible to provide a comprehensive definition, and the Guidance for Education Staff goes no further than referring to "behaviour, which involves a breach of a teacher's position of trust, or a breach of the standards of propriety, expected of the profession (para 19(c))."

England and Wales has struggled with these dilemmas throughout most of the last 50 years. It has to be said that the difficulties may well have been increased by the need to ensure a balanced service for vulnerable children that encourages "efforts to work alongside families rather than disempower them." Thus the focus has been on the overall needs of children rather than the narrow concentration on an alleged incident ("Child protection – messages from research, 1995, London, HMSO). Inevitably, the requirement to support families in a non-threatening way has resulted occasionally in individual failures and sadly sometimes also in institutional failures to protect children. A failure by a professional requires the availability of emergency powers to remove the professional from his or her position of trust.

But we are talking here of draconian powers. The implementation of the Human Rights Act 1998, bringing European Convention standards into direct application in the domestic law, has highlighted the tension that has always existed between children's welfare on the one hand and the right to work as a professional or a volunteer in a chosen child centred profession. An example of this is the decision of the Registered Homes Tribunal (no 420,

decision available on the Department of Health website) where an individual who ran a residential care home was acquitted of sexual abuse allegations yet had his registration of the home cancelled. His appeal to the RHT was dismissed.

Principles of proportionality, so important in any consideration of the European Convention on Human Rights, must now play the critical role in these difficult and sensitive decisions, for there are two conflicting arguments, both clearly understandable, that can be persuasive.

First, it could be argued that the creation of a system that bars a person from working with children in certain situations is necessary so as to install confidence in the provision both of public child care and the educational services. The ultimate justification is the protection of children from the risk of harm; thus balance and proportionality in an individual case are not the only factors. There may be a trump card.

Secondly and in contrast, some may argue that in the context of these essentially individual decisions taken by the Government departments is the sometimes overriding need of Government to ensure that the crisis in teacher and social work numbers is not unduly accentuated. Another not wholly unconnected policy concern relates to the growing number of residential homes that become uneconomic and therefore must otherwise close because they cannot meet the exacting demands imposed upon them by the newly created National Care Standards Commission policy. (*The Times* reported on 2 July 2002 the sad story of a lady aged 108 who was moved to a new care home when her old one had to close because it was unable to meet the more exacting standards of the Care Homes Act 2000. This was obviously a traumatic move for a lady of this advanced age and she died within a month, apparently after refusing food in her new home). These are matters that cannot be wholly ignored by decision makers, either at first instance or on appeal.

In weighing these policy issues, it is argued here that proportionality and balance must be a key link to ensure that the correct approach is taken and thus that possibly conflicting policy considerations are placed in the appropriate balance.

Indeed, case law prior to the introduction of statutory safeguards, when only a non-statutory framework was in place, gave balance a central position. Thus in *R v Secretary of State for Health ex parte C* [2000] EWCA 49, Hale LJ said:

“Underlying this issue is the balance to be struck between two important interests. One is the interest of any individual in safeguarding his reputation and livelihood against the serious interference which inclusion on anything like an official ‘blacklist’ may entail. The other is the interest of children living away from home, and the interest of the community which seeks to safeguard its vulnerable members, in effective protection from abuse and neglect and other risks to which they are subject. . . .”

This particular case did not conclude at that stage. The case before the Court of Appeal concerned a review of the decision to place C on the then non-statutory “consultancy” index maintained by the Department. His name was transferred on to the statutory list when the Protection of Children Act 1999 came into force. An appeal was heard by the Tribunal and his appeal was allowed [0037]. The Department appealed on a point of law to the High Court, and the appeal was heard by Scott Baker J in early June 2002. The appeal was dismissed (*C v Secretary of State for Health* [2002] EWCH 1381 (Admin)). A subsequent appeal to the Court of Appeal overruled Scott Baker J and remitted the case to the Tribunal for rehearing: [2003] EWCA Civ 10.

Newman J, in *R v Worcester County Council, Secretary of State for the Department of Health ex parte “S.W.”* [2000] EWHC Admin 392 said much the same as Hale LJ in *R v Secretary of State for Health ex parte C*. The judge said:

“Assuming as I do that the consequences of being included on the index is to interfere with employment, I see no ground for concluding that the index [the former non-statutory list maintained by the Department of Health] is . . . disproportionate to the objective to be obtained.”

In *Secretary of State for Health v C* [2002] EWHC 1381 (Admin), Scott Baker J refers to the listing under the statutory scheme as involving a difficult balancing exercise between the safety of children and the rights of individuals to have their livelihoods and reputations safeguarded.

THE NEW TRIBUNAL AND POLICY CONSIDERATIONS

The Care Standards Tribunal came into existence in England and Wales from 1 April 2002. It incorporates two existing Tribunals, the old Registered Homes Tribunal and the newly created Protection of Children Act Tribunal. It has been given wider powers as a result of the Care Standards Act 2000 and the Education Act 2002.

The purpose of this paper is to consider the human rights issues that are raised by this new jurisdiction. It is true to say that the Act itself is a response in a sense to the Human Rights Act 1998, in the need to ensure that administrative decision making is compliant with the European Convention. All Government departments audited their procedures in the light of the implementation and it was concluded that the procedures barring individuals from working with children were wanting. The creation of the Protection of Children Act Tribunal introduces an independent tier of merits review of administrative decisions in this field (Protection of Children Act 1999, s9). It was felt that judicial review of administrative action was not sufficient to comply with the Convention provisions, in particular, Article 6. Whether this approach was unduly cautious is of little consequence any more. In any event, judicial pronouncements in the analogous field of housing law suggest that compliance

based on judicial review alone cannot be taken as read. Laws LJ in *Runa Begum v Tower Hamlets LBC* [2002] 2 All ER 668, upheld in the House of Lords [2003] 1 All ER 731, set out a framework for analysing when administrative schemes might or might not be compliant. At one end of the paradigm would be those cases where a scheme's subject matter involved the resolution of primary fact, whilst at the other end would be those cases where the subject matter generally or systematically required the application of judgment or the exercise of discretion, especially if it involved the weighing of policy issues and regard being had to the interests of others who were not before the decision maker.

According to Laws LJ's approach, in the latter situation the court would be satisfied, for the purposes of Article 6, with a form of inquisition at first instance in which the decision-maker was more of an expert than a judge, and the second instance appeal was in the nature of judicial review. In contrast, in the former situation, involving fact finding, a judicial review jurisdiction might not suffice. Where within the spectrum would fall decisions taken by the Department of Health, Department of Education and Skills, or the now created National Care Standards Commission, in relation to preventing individuals or organisations from working with children, can only be open to conjecture. There is certainly fact finding required for all decisions in this area, and thus it is likely that Article 6 considerations would demand a full merits appeal of the decision.

One final matter of policy requires a mention. The jurisdiction of the Tribunal has been established to provide a merits appeal of decisions, for example, to place individuals on the statutory lists barring them from working with children or to cancel registration of proprietors of care homes. There is no merits appeal for relatives and others who, having complained of the conduct of particular individuals, find that the complaint does not result in a barring decision. It could be argued that the absence of any appeal in this situation sends an unfortunate message to those who expect an even-handed approach to child protection issues. The relatives faced with a rejection of their complaints against particular individuals have no satisfactory remedy at the present time.

THE CASE LAW OF THE TRIBUNAL

There is an important statutory difference between the social work cases and the education cases. In the case of social workers, there is a two fold test laid down by Statute, namely, misconduct and unsuitability. In the education cases, it is not necessary as such to have to prove unsuitability to work with children. This was accepted by the Tribunal in the education case of *M v Secretary of State for Education and Skills* [2002.11.PC] where the Tribunal decided that M had downloaded child pornography on to his home computer, but where there was no suggestion that he had misbehaved in any way in school. He had been

convicted by a Magistrates' Court of a criminal offence but the conviction had been set aside by the Crown Court. The Tribunal of course applied a "balance of probability" test rather than a "beyond reasonable doubt" test, and the Tribunal had before it more evidence than the material that had formed the basis of the criminal procedure.

Misconduct, medical reasons, or that "he is not a fit and proper person to be employed as a teacher" will do, and it is implied that the teacher is unsuitable if one of these grounds is made out.

First to be considered are some of the social work cases that have been decided by the Tribunal. The Tribunal's powers in relation to social workers who are placed on the list as being unsuitable to work with children is contained in section 4(3) of the Protection of Children Act 1999 as amended by section 99 of the Care Standards Act 2000. The section reads as follows:

"If on an appeal or determination under this section the Tribunal is not satisfied of either of the following, namely – (a) that the individual was guilty of misconduct (whether or not in the course of his duties) which harmed the child or placed the child at risk of harm; and (b) that the individual is unsuitable to work with children, the Tribunal shall allow the appeal or determine the issue in the individual's favour and (in either case) direct his removal from the list; otherwise it shall dismiss the appeal or direct the individual's inclusion in the list."

The burden of proof is on the Secretary of State, the standard of proof being the civil standard of a balance of probability. The Tribunal has followed Lord Nichols' approach in the child care case, *Re H and ors* [1996] 1 All ER 1 where he said:

"Where the matters in issue are fact, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. . . . When assessing the probabilities the court have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred, and hence, the stronger should be the evidence before the court concludes that the evidence is established on the balance of probability."

Lord Hoffman said much the same in a national security case, *Secretary of State for the Home Department v Rehman* [2002] 1 All ER 122:

"It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that he was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has. . . behaved in some. . . reprehensible manner."

An interesting case that illustrates the human rights perspective of the jurisdiction of the Tribunal is *Barnes v Secretary of State for Health* [0070] (and reproduced in *Care Standards Legislation Handbook*, Pearl and Hershman,

Jordans, 2002). The facts of this case relate to events that occurred in children's homes managed by the former Clwyd and Gwynedd County Councils in North Wales in the 1970's and 1980's. A major police investigation had been begun in 1991, and this resulted in a number of residential social workers being convicted of serious sexual and physical abuse. Other social workers, although not prosecuted, were also named in the major report into the abuse of children who had been placed in residential care homes in these areas (*Lost in Care* : the Waterhouse Inquiry HC 201, HMSO, 2000). One of these was Mr Barnes, and thus on 4 January 2001, the Department wrote to Mr Barnes informing him that his name was being included in the statutory list barring him from working with children. A flavour of the approach taken by the Waterhouse Inquiry in relation to Mr Barnes is given by the following extract from *Lost in Care*, para 13.56:

"...we are satisfied that Barnes was viewed by some of the residents as a remote, unfriendly and arrogant figure and that he was responsible for instituting, or at least maintaining, what they saw as an oppressive and authoritarian regime..."

The Department identified nine particular instances of misconduct. Of these nine, the Tribunal was satisfied that he harmed a child or placed a child at risk of harm on two of these occasions. The Tribunal then went on to consider whether, in consequence of these two findings, Mr Barnes was unsuitable to work with children. The Tribunal said as follows:

"There will of course be cases where it necessarily follows that a finding of misconduct carries with it the inevitable finding of unsuitability. There will be other cases where a finding of misconduct does not carry with it this consequence... It must be said that context, in this situation, is very important indeed. We have found proved two allegations of excessive discipline that occurred more than twenty years ago. Mr Barnes had responsibility, on any showing, for some very disturbed youngsters... We have placed in the balance our findings as to misconduct, when they happened and the context in which they occurred, as against his career as a social worker extending over many years... It is our view that the Protection of Children Act 1999 obliges us to adopt a proportionate response to our findings of misconduct. In this case, having heard all that has been said on behalf of Mr Barnes, and taking into account the two findings of misconduct, we are not satisfied on a balance of probability that Mr Barnes is unsuitable to work with children."

The appeal was therefore allowed and the Department was directed to remove his name from the list. In an earlier case, *Hall v Secretary of State for Health* [0003], the allegations were of a serious sexual nature and the Tribunal concluded that the allegations, if proved, were of such seriousness that it would be a clear indication that he is unsuitable to work with children. In the result, in that case, the allegations were proved, and in consequence the appeal was dismissed.

A second case arising out of the events in North Wales is *Joan Glover v Secretary of State for Health* [0077]. Mrs Glover was found by the Inquiry, and the Tribunal, to have physically assaulted a number of children in her care. She admitted that "she used a slap as a last resort" across the legs or the bottom. Once she slapped a child across the face. On the basis of these admissions, the Tribunal had no difficulty in making findings of misconduct that harmed a child or placed a child at risk of harm. As to unsuitability today, the Tribunal said:

"The Tribunal accepted that it does not follow that the applicant remains unsuitable to work with children in 2002 simply because she was unsuitable to work with children in 1979 or 1981. However, defects of character and temperament are not easily changed and do not usually change unless they are specifically addressed. There was no evidence that the applicant had taken any steps to confront or to modify her character or temperament."

The appeal was dismissed.

Woodcock v Secretary of State for Health [2002.4.PC] is another case that raised issues based on allegations going back many years, in this case between 1987 and 1992. As in other cases, a substantial volume of written and video evidence had by now been lost or destroyed. The allegations against him related to inappropriate sexual touching of young boys in his care. The Tribunal was satisfied as to the most serious of these allegations. It went on to say:

"Given the seriousness of the allegations which we have found proved, we have no doubt that Mr Woodcock is unsuitable to work with children. We reached this conclusion both because of the seriousness of the misconduct and the fact that Mr Woodcock has consistently denied that misconduct and has hence no opportunity for treatment which might have led us to a different conclusion."

A similar approach was taken in *Jackson* [0061], where Mr Jackson had been acquitted of sexual assault. The Tribunal, applying a balance of probability test rather than the criminal test of beyond reasonable doubt, decided that it was more likely than not that he was guilty of the sexual assault, and that he was in consequence unsuitable to work with children.

Evidence in these cases is always difficult to produce, and there are two cases that both illustrate the point. *C v Secretary of State for Health* ([0037] and reported in Family Law, July [2002]) related to allegations of rape by a foster parent back in 1983, and certain allegations that his own children and step-children had been mistreated by him when they were young. The police and the Crown Prosecution Services investigated a late complaint, but no further action was taken. C was however placed on the list barring him from working with children and young persons. The Tribunal referred to the fact that in considering C's appeal against the decision to bar him from

working with children, C was “entitled to a fair hearing by an independent and impartial tribunal established by law.” The allegations could not be tested by live evidence, because the person who made the allegation was not called to give evidence. C also did not give live evidence. The Tribunal allowed the appeal, stating:

“Findings can only be based on evidence and we must not speculate. That would be unfair to all those involved... The evidence that he is guilty of misconduct is simply not there.”

The Secretary of State appealed and his appeal was dismissed (see [2002] EWHC 1381 (Admin)). The Administrative Court said that the Tribunal was right to have allowed C’s appeal and there had been no error of law on the part of the Tribunal. The court said that it would be slow to interfere with the decision of a Tribunal “composed of particular members selected for their expertise.” The issues faced by the Tribunal had been issues of fact that the Tribunal had been in the best position to decide. The Court of Appeal, by contrast, took the view that the Tribunal was in error not to have considered whether to draw adverse inferences from the fact that no evidence had been given in person by the appellant. The matter has now been remitted to a new Tribunal: [2003] EWCA Civ 10.

A similar result to that in C, although for differing reasons, occurred in *Black v Secretary of State for Health* [0087]. Allegations were made by “A” that back in the 1980’s, whilst in residential care, he had been sexually abused by Mr Black. The disclosure was made in 1998. As with most of these cases, no criminal prosecution took place. Nevertheless, Mr Black was eventually placed on the list as a person who was unsuitable to work with children. He appealed. The Tribunal heard a great deal of live evidence in this case, in contrast to that in C where no live evidence was presented. “A” was deemed to be a “vulnerable adult” and his evidence, in accordance with the Rules, was given by live video link. The Tribunal looked in particular at the circumstances surrounding the disclosure and the conflicting evidence that was presented about “A’s” truthfulness. In the final analysis, they concluded that his evidence was unreliable, and in consequence the appeal was allowed.

Those are two cases where findings of fact went in favour of the appellant. If the findings of fact go against the appellant, the Tribunal must turn its attention to unsuitability. Here, the Tribunal must assess risk and inevitably a failure to undergo treatment to address the various concerns is an important and possibly overwhelming factor. Thus in *Miles v Secretary of State for Health* [0047], yet another case concerning excessive discipline of children in residential care a number of years ago, the Tribunal suggested that the evidential burden was on the applicant to show suitability:

“... the fact of the matter was that Mr Miles had not undergone any treatment of any kind to address the issue and without some psychiatric or medical evidence to show that Mr

Miles was no longer a risk to children, the Tribunal could not find that Mr Miles was now suitable to work with children.”

In *Swindells v Secretary of State for Health* the applicant had been in weekly therapy for three years, but there was no information regarding the results of the therapy, and thus the Tribunal was unable to satisfy itself that the applicant, convicted in Germany of distributing child pornography, no longer posed a risk of reoffending. In *Woodcock*, the Tribunal referred to the fact that Mr Woodcock had consistently denied the misconduct and “hence had no opportunity for treatment which might have led us to a different conclusion (on unsuitability).”

A similar approach was taken in *Glover* [0077] where the Tribunal, in dealing with a lack of any supporting statements for Mrs Glover, said:

“The burden was not upon the applicant to establish her suitability. The legal burden remained upon the Secretary of State to establish unsuitability. However, having been found, in terms, to have been unsuitable to work with children in the past, the applicant did have some obligation to adduce positive evidence of change or difference, from professional colleagues or supervisors. The tribunal was troubled by her failure to do so.”

Two of the education cases are worth a brief look. In *Mason v Secretary of State for Education and Skills* [0078], Mr Mason had formed a consensual sexual relationship with a 16 year former pupil. The relationship began during the summer holidays after the pupil had left the school. In the autumn, with the relationship still continuing, she went to a senior school that shared the same site and had the same headmaster. The Tribunal decided that his name should remain on the list and his employment restricted, and said:

“We have no doubt that Mr Mason now realises that he made a serious error of judgment in his relationship with pupil X. However, we are not convinced that Mr Mason has yet developed the maturity to understand fully why boundaries should be set and how and where to obtain appropriate advice should difficulties occur.”

The education area is different from the social work field in that a teacher can be placed on the list for medical reasons. The Guidance refers to medical conditions such as drug or alcohol abuse or mental illness that significantly impairs his or her abilities to discharge their responsibilities as a teacher (see *Preventing unsuitable people from working with children and young persons*). The first case where an appeal has been heard after a person has been placed on the list for medical reasons is *MacBride v Secretary of State for Education and Skills* [0080] where the medical evidence suggested chronic anxiety symptoms, both generalised and specific. The Tribunal formed the view on the basis of the evidence before it that the medical condition of this teacher was such that the welfare of children being taught by her was likely to be at risk. It therefore dismissed the appeal.

CONCLUSIONS

The Care Standards Act 2000 is a wide ranging statute. It establishes a new independent regulatory body for social care and private and voluntary health care in England, the National Care Standards Commission. In Wales, these services are now under the control of the National Assembly for Wales. An independent Council has also been established to register social workers and to set standards in social work. An independent Children's Commissioner has been established in Wales, and it may well be that a similar scheme will be introduced in time in England as well. Childminders and day care providers are now also regulated. There is an expanded statutory list of those unsuitable to work with vulnerable adults. Appeals in these areas are brought before the Care Standards Tribunal.

It is likely, in the light of ongoing reforms of the administrative justice system in England and Wales, that the specialist education and health Tribunals will draw closer together. These early decisions will provide a framework for the developments in the future, maintaining the central policy that the safety and welfare of our

children must be protected, whilst at the same time ensuring that an individual's human rights are not ignored whenever decisions are taken to prohibit people from working with children and young people. The early history of the Care Standards Tribunal makes clear that decisions of Government Ministers are not simply "rubber stamped". Although the decisions of the Tribunal are of course individual decisions on particular facts, the indications are that it has begun to lay down guidance that will help in the formulation of standards in this sensitive area of social policy.

All Care Standards Tribunal decisions are available on the Tribunal website, www.carestandardtribunal.gov.uk 

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This paper was presented at the 11th World Conference of the International Society of Family Law at Denmark from 2–7 August 2002, as well as a public lecture at the Institute of Advanced Legal Studies in May 2002.

The constitutional rights of children

by Geraldine Van Bueren

The significant difference between modernity and past eras is that modernity emphasises choice and autonomy and the past relied upon fate. This is an enquiry both into the effectiveness of constitutions in seeking to protect the autonomous rights of children and whether a global culture of children's constitutional rights is beginning to develop. Children's civil and political constitutional rights are analysed as well as their economic, social and cultural constitutional rights, as it is the poorest children, who many unthinkingly dismiss as being beyond the scope of justiciability and the courts.

My focus is principally, although not exclusively, on the constitutions of states which are in the process of transformation, as the constitutional courts in these countries appear more open to newer approaches and ideas. This is an openness from which we in the more established democracies may have much to learn.

REASONS FOR DEVELOPING A CONSTITUTIONAL CULTURE OF CHILDREN'S RIGHTS

The cultural identity of a compassionate, democratic society is in part assessed by how accessible lawyers and

Constitutions are to the most vulnerable in our community. Because of the limited direct access to international human rights fora, constitutional rights of children are particularly important because a supreme or constitutional court may offer the highest form of remedy. The United Nations Convention on the Rights of the Child, unlike the International Covenant on Civil and Political Rights or the Convention on the Elimination of Discrimination Against Women, still does not have a mechanism through which children may have their complaints against a state adjudicated. An attempt was made during the drafting of the Convention by Amnesty International but this did not