Uniforms and exclusions

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Despite most students not wearing school uniform at all for the best part of a year, questions about the application of discrimination legislation to uniform issues have been rife. How, then, are tricky balancing questions around children's rights, school uniforms and school discipline dealt with by the Courts? What happens if a young person is excluded from school for breaching a school's uniform policy? This article offers a brief overview of these issues and how they have been dealt with in case law.

In 2019, the BBC estimated that 90% of English schools had uniform requirements.[1] School uniform is, for many schools, a method by which good behaviour and discipline are promoted amongst the pupil body. Indeed, in a 2017 report it was found that most teachers (9 out of 10) thought uniform had a positive effect on pupils' behaviour, and counteracted bullying.[2]

Other schools, particularly special schools, have no uniform, or highly discretional policies, given the distinct sensory needs of the school population. Ultimately, it is for the governing body of a school to decide whether there should be a school uniform policy and what it should look like. This all flows as from the statutory requirement that a governing body has policies in place that promote good behaviour.[3]

The Department for Education's uniform guidance (2013)[4] provides "*strong recommendations*" for governors setting uniform and appearance policies. It emphasises that governing bodies should consider how a uniform policy could affect each group represented in the school. Explicit in the DfE guidance is ensuring that uniform requirements on pupils do not indirectly discriminate or unjustifiably interfere with a pupil's human rights.

The Equality Act 2010 and the Human Rights Act 1998 together provide a framework for schools dealing with uniform issues with which to balance the rights of the pupil against the best interests of the school community, including upholding disciplinary standards. Where

[1] Reader questions: When were school uniforms introduced? - BBC News
[2] Research shows wearing a school uniform helps to reduce bullying - bTRU2u (trutexbtru2u.co.uk)
[3] Section 88 of the Education and Inspections Act 2006 and Education (Independent School Standards) (England) Regulations 2010.
[4] DfE advice template (publishing.service.gov.uk)

the exclusion by a school on the basis of a uniform policy constituted an unlawful act under this framework, that decision is liable to be quashed by an Independent Review Panel or, failing that, by Judicial Review. It would also constitute a cause of action that could be pursued in the civil courts or First-Tier Tribunal.

Indirect discrimination (s.19 Equality Act), for instance, occurs when a school applies a provision, criterion, or practice ("PCP") to all pupils, or to a particular group of pupils, but this has the effect of putting pupils (including the pupil bringing the claim) who share a particular protected characteristic at a particular disadvantage. Uniform policies are an example of a common PCP.

For a s.19 claim to succeed, a uniform policy must be non-discriminatory on its face and applied to everyone in the same way. The policy (or proposed policy) also needs to put, or would put, pupils sharing a protected characteristic at a particular disadvantage[5] compared to relevant pupils who do not share that characteristic. Finally, the school must be not able to show that the PCP is justified (i.e., that it is a proportionate means of achieving a legitimate aim).

An example of s.19 at play was G v Head Teacher and Governors of St Gregory's Catholic Science College [2011] EWHC 1452 (Admin). Here a child was refused a place at a school because he was unwilling to comply with the school's uniform policy which did not permit cornrows. G was successful in demonstrating the policy could indirectly discriminate against those of a particular race. Collins J was not satisfied that the school could justify the prohibition on cornrows. Interestingly, Collins J also observed that "*A [uniform] code will not be discriminatory if it applies a conventional standard of appearance. What is to be regarded as conventional may well vary as time goes by and will depend on the facts of a particular case*." [55-56] The Court accepted that cornrows for boys and girls should be regarded as conventional.

Often contentious uniform cases involve religious rights and additional consideration under the Human Rights Act 1998. In the case of R (Watkins-Singh) v Governing Body of Aberdare Girls' High School [2008] EWHC 1865 (Admin), the claimant pupil was a Sikh who was refused permission to wear a Kara bangle, one of five external articles of faith in the Sikh religion. The Court concluded that in the context of a uniform policy, there will be a particular detriment or disadvantage if the pupil is prohibited from wearing an item when that person

[5] As with direct discrimination, intention and motive are irrelevant, although they may be relevant to remedy. "Disadvantage" is not defined in the Equality Act 2010, but could include a loss of opportunity, or choice, or exclusion. It does not have to be capable of being financially valued. It is likely that a disadvantage must be something that a reasonable person would complain about, i.e., "*why can he wear his hair like that, but I can't?"*

genuinely believed, on reasonable grounds, that wearing this item was a matter of exceptional importance to their racial identity or their religious beliefs, and the wearing of this item can be shown objectively to be of exceptional importance to their religion or race, even if the wearing of the article is not an actual requirement of that person's religion or race.

In Watkins-Singh the school was unable to justify its uniform policy, because the Kara bangle was very small and unostentatious. Thus, the prohibition on wearing the Kara bangle was not a proportionate means of achieving the legitimate aim of the uniform policy.[6] Silber J, in his judgment, also considered that the Defendant school having to take efforts to communicate to other pupils the reason for the exception was not (in that case, at least) good reason for the exception not to be made. Nor was that granting the exception may expose that pupil to bullying.

Uniform policies, however, may be justified even where they appear to intersect with a pupil's right to manifest their religion under Article 9(1) of the ECHR.

In the case of Begum[7], the House of Lords considered the position in relation to a mixed faith school whose uniform policy forbade Muslim girls from wearing the jilbab. Shalwar kameeze was permitted. The school regarded its uniform policy as being in the best interests of the school and as contributing to social cohesion and harmony among the pupils. SB wore the shalwar kameeze for her first two years at the school before deciding that her religious beliefs required her to wear the jilbab. She was refused permission to attend and directed to go home and return wearing a school uniform. This could potentially have amounted to a discriminatory or unlawful exclusion. SB refused to wear the school uniform and was effectively out of school for two years. She brought a claim for judicial review, arguing that her right to manifest her religion was being limited and her right to education under Article 2 violated.

The House of Lords found that Article 9(1) was engaged because the jilbab was a sincere manifestation of SB's religious beliefs. However, SB and her family had decided that she should attend a school that they had known prohibited the jilbab. There was no evidence that SB would not have been able to attend another school where the jilbab was permitted. Accordingly, there had been no interference with her Art 9(1) right. Nor had there been any infringement of her right to education under A2P1, since that article did not confer a right to attend a particular school, and SB had not been denied access to the general educational

[6] Watkins-Singh predated the Equality Act and therefore involved human rights considerations rather than Equality Act considerations, but the reasoning in relation to justification is similar to that required under the Equality Act and it is likely that the result would be the same.
[7] R (SB) v Governors of Denbigh High School [2006] UKHL 15, [2007] 1 AC 100

provision available from the system as a whole. Even if there had been, the court held that the uniform policy had a legitimate purpose (protecting the rights and freedoms of others), the school was entitled to conclude that the shalwar kameeze was acceptable to mainstream Muslim opinion and allowing SB to wear the jilbab could have significant adverse repercussions for other pupils.

In partly dissenting judgments in Begum, Lord Nicholls and Baroness Hale effectively disputed that the analogy to the workplace cases was as clear as had been assumed by the majority. Baroness Hale pointed out that, rather than Miss Begum voluntarily attending Denbigh High School, "*the reality is that the choice of secondary school is usually made by parents or guardians rather than the child herself".* Nevertheless, at this stage a child may make moral which while not the product of "*fully developed individual autonomy*" are capable of giving rise to an interference under Article 9.[8]

That consideration is likely to be buttressed by the subsequent decision in Eweida v United Kingdom (2013) 57 EHRR 8, in which the ECtHR stressed (in an employment context) that the fact that a person subject to a uniform requirement is so subject because of a voluntary choice they have made does prevent a finding of interference with a convention right. Rather, the preferred approach is to weigh the possibility of the pupil (in school cases) attending an alternative school as part of the overall balance when considering whether or not the interference was proportionate.

It is therefore likely that courts, when faced with cases analogous to Begum, will be more likely than in the past to find interference and therefore have greater regard to questions of justification in relation to schools' decisions on uniform policies, including refusals to make exceptions to those policies for individual pupils.

In relation to both Equality Act and Human Rights Act challenges to uniform policies and exclusions based upon them, therefore, the focus of the Court is likely to be upon the same broad question: the extent to which allowing the deviation from uniform policy requested by a pupil would undermine the aim and purpose of the policy itself, as against the disadvantage or interference with rights imposed upon that particular pupil by the policy, if enforced upon them.

Where the balance is not in favour of the enforcement of policy, the policy (and any exclusion based upon it) is likely to be unlawful.

[8] Begum (n 18), [92] and [93]

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A school exclusion is a sanction of last resort that can adversely impact a pupil's life outcomes for many years after the event. The law relating to school exclusions is a complex tangle of public and regulatory law, anti-discrimination and human rights, statutory guidance, and (in relation to independent schools) principles of commercial contract and tort. It can be very difficult to know where to start, whether challenging a decision to exclude or defending one. Alice de Coverley and Charlotte Hadfield of 3PB have written a new book which offers a practical guide to the law, and aims to serve as a useful source of reference for pupils and their parents, head teachers, governing boards of schools, local authorities and practitioners in this surprisingly complex and multidisciplinary area. It is available on Amazon here for £24.99: A Practical Guide to the Law in Relation to School Exclusions: Amazon.co.uk: Hadfield, Charlotte, de Coverley, Alice: 9781912687510: Books