Trinity Term
[2011] UKSC 30
On appeal from: [2010] EWCA Civ 1

JUDGMENT

R (on the application of G) (Respondent) *v* The Governors of X School (Appellant)

before

Lord Hope, Deputy President
Lord Walker
Lord Brown
Lord Kerr
Lord Dyson

JUDGMENT GIVEN ON

29 June 2011

Heard on 11 and 12 April 2011

Appellant
John Bowers QC
Tim Kenward
Katherine Apps
(Instructed by Y City Council Legal Services)

Respondent
Richard Drabble QC
Paul Draycott

(Instructed by Keith Levin & Co)

Intervener

Helen Mountfield QC

(Instructed by Equality and Human Rights Commission)

Intervener (Secretary of State for the Home Department)
Nathalie Lieven QC
Martin Chamberlain
(Instructed by Treasury Solicitors)

LORD DYSON (with whom Lord Walker agrees)

1. In about December 2005, the claimant commenced employment as a sessional music assistant at X school ("the school"). On 4 October 2007, the parents of M, a 15 year old boy, who was undergoing a short period of work experience at the School, went to see the head teacher. They complained that the claimant, who was 22 years of age at the time, had kissed M. They also showed the head teacher two text messages which they said the claimant had sent to M and an entry in M's diary which appeared to indicate that some form of sexual relationship had developed between the two of them. On the same day, the head teacher summoned the claimant and informed him that he was being suspended because of an incident involving a young man.

2. The school's child protection co-ordinator later provided a statement to the school in which she said that, after he had been suspended, the claimant admitted to her that he had kissed M and that he had sent a text inviting him to his house, "but was concerned that this could be misinterpreted, so he added that they could go for a drive instead".

3. On 1 November, the head teacher wrote to the claimant formally confirming his suspension on the grounds that the allegations, if proved, could constitute gross misconduct of having formed an inappropriate relationship with a child. By a further letter of the same date, she informed the claimant that he was required to attend an investigatory interview on 15 November and that he was entitled to be represented by a trade union representative or work colleague. In fact, he was not a member of a trade union. The interview was postponed several times because the claimant's solicitor had advised him that it was not in his interests to attend an interview until the police had completed their investigations.

4. By letter dated 12 December 2007, the head teacher notified the claimant that a disciplinary hearing would be convened in the new year, that the school was required to continue with its investigations and that a report would be submitted to the governing body for its consideration. She added that since the claimant continued to refuse to attend any investigatory meetings, she would be willing to include in her report any written submissions that he wished to make about the allegations. On 18 December, the claimant repeated the legal advice that he had been given that he should not become involved in the disciplinary proceedings until the police investigation was completed.

5. By 1 February, it was known that the Crown Prosecution Service intended to take no further action. On that date, the claimant's solicitors wrote to the head teacher stating that the claimant was unable to attend a meeting on 5 February. The letter included a number of "written representations to be placed before that meeting" denying the allegations and stating that no improper conduct had taken place.

6. By letter dated 6 February, the head teacher informed the claimant that the investigation was complete and an investigation report had been written. A disciplinary hearing was to take place on 21 February before a panel of governors to consider the allegations and the management case would be presented by the head teacher. A copy of the investigation report would be sent within a few days and this would be the evidence presented at the hearing. The claimant was told that he was entitled to be represented at the hearing by a trade union representative or a work colleague.

7. The investigation report was duly provided to the claimant. Attached to it was a report from the local authority's safeguarding officer, which stated that consideration should be given to referring the matter to the Secretary of State. The head teacher's report concluded: "there is strong evidence that the allegations against [the claimant] are proven. The panel should therefore fully consider his future employment ... and whether a referral to the DFES is required".

8. By letter dated 14 February, the claimant's solicitors wrote to the school seeking permission for them to represent him at the hearing. They said that in view of "the potential repercussions of an adverse finding, the potential impact on our client is such that it would be a breach of his human rights not to be represented." This request was refused by the school by letter dated 20 February. Prior to the hearing on 21 February, the claimant produced a document entitled "Statement regarding M" which disputed the allegations in some detail.

9. The panel consisted of three of the school's governors (including the Chair). They were assisted by an HR adviser from the Schools Education Advisory Team ("SEAT"). The head teacher presented the management case and she was assisted by a SEAT HR adviser. The claimant, who was accompanied by his father, represented himself. Oral evidence was given by the school's child protection co-ordinator and one other witness. The claimant refused to answer questions, stating that he believed the proceedings to be unfair for the reasons given in his solicitor's letters. Neither the claimant nor his father asked questions of any of the witnesses.

10. By letter dated 27 February, the chair of the governors informed the claimant of the outcome of the hearing. After reciting the evidence, he concluded:

> "The panel gave full and careful consideration to the evidence that was made available to them. The panel are satisfied that inappropriate contact was made with the child whilst the two of you were alone in the church. Further, that you sent a text message to the child inviting him to meet with you alone, during your own time and in doing so had instigated an inappropriate relationship…In conclusion, the panel believe that, on the balance of probabilities, it was your intention to cultivate a sexual relationship with the child. The panel are satisfied that these actions constitute an abuse of trust implicit in your position at the school and as such constitute gross misconduct. As a result, you are summarily dismissed in accordance with the school's disciplinary procedure…the panel are also concerned that you have behaved in a way which indicates you may be unsuitable for work with children and as such will be reporting your dismissal to the appropriate agencies."

11. On 4 March 2008, the claimant's solicitors gave notice of his intention to appeal against the dismissal decision. The head teacher responded that the appeal would be heard by the staff appeal committee and that the claimant had the right to be represented at the appeal by his trade union representative or work colleague. The hearing of the appeal was adjourned and it has never taken place.

12. In the light of the decision to dismiss the claimant, the school were obliged by regulation 4 of the Education (Prohibition from Teaching or Working with Children) Regulations 2003 (SI 2003/1184) ("the 2003 Regulations") to report the circumstances of the dismissal to the Secretary of State so that he could consider whether to make a direction under section 142 of the Education Act 2002 ("the 2002 Act") prohibiting the claimant from carrying out certain types of work with children (including teaching). A person subject to such a direction was, at the relevant time, placed on a list known as "List 99".

13. Accordingly, by letter dated 7 May 2008, the chair of the governors notified the Children's Safeguarding Operations Unit (POCA) of the claimant's dismissal for gross misconduct.

14. The statutory regime applicable to cases referred to the Secretary of State under regulation 4 of the 2003 Regulations ceased to apply to cases where the Secretary of State had not invited representations by 20 January 2009. The claimant's case was one such case. A new regime (to which the claimant's case applies) was established under the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act") as subsequently amended.

15. On 19 May 2008, the claimant issued judicial review proceedings seeking a declaration that, by reason of the denial of his right to legal representation, the disciplinary hearing before the school governors was in breach of his rights under article 6 of the European Convention on Human Rights ("ECHR"). He succeeded before Stephen Morris QC (sitting as a deputy High Court judge) who ordered the allegations of misconduct to be heard by a differently constituted disciplinary committee at which the claimant was to be given the right to legal representation. The school's appeal was dismissed by the Court of Appeal (Laws, Wilson, Goldring LJJ) [2010] 1 WLR 2218.

The statutory scheme

16. Section 1(1) of the 2006 Act established the Independent Barring Board. The board was renamed the Independent Safeguarding Authority ("ISA") by section 81(1) of the Policing and Crime Act 2009 and I shall so refer to it. The ISA is required to establish and maintain the "children's barred list" (section 2(1)(a) of the 2006 Act). As from 12 October 2009, a person is barred from a "regulated activity" relating to children if he is included in the children's barred list (section 3(2)(a)). Regulated activities relating to children are defined in Schedule 4 to the 2006 Act. They include "any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children" (para 2(1)(a)) and "any form of care for or supervision of children, unless the care or supervision is merely incidental to care for or supervision of person who are not children" (para 2(1)(b)).

17. Part 1 of Schedule 3 applies for the purpose of determining whether an individual is included in the children's barred list. It provides:

> "3(1) This paragraph applies to a person if—
>
> (a) it appears to [ISA] that the person has (at any time) engaged in relevant conduct, and
>
> (b) [ISA] proposes to include him in the children's barred list.
>
> (2) [ISA] must give the person the opportunity to make representations as to why he should not be included in the children's barred list.
>
> (3) [ISA] must include the person in the children's barred list if—

(a) it is satisfied that the person has engaged in relevant conduct, and

(b) it appears to [ISA] that it is appropriate to include the person in the list.

…

4(1) For the purposes of paragraph 3 relevant conduct is—

(a) conduct which endangers a child or is likely to endanger a child;

(b) conduct which, if repeated against or in relation to a child, would endanger that child or would be likely to endanger him;

(c) conduct involving sexual material relating to children (including possession of such material);

(d) …

(e) conduct of a sexual nature involving a child, if it appears to [ISA] that the conduct is inappropriate."

18. Para 16 of Schedule 3 deals with representations to ISA. A person who is, by virtue of any provision of the 2006 Act, given an opportunity to make representations must have the opportunity to make representations in relation to all of the information on which ISA intends to rely in taking a decision under the Schedule (para 16(1)). The opportunity to make representations does not include the opportunity to make representations that findings of fact made by a "competent body" were wrongly made (para 16(3)). Findings of fact made by a competent body are findings made in proceedings before one or more of the bodies specified in para 16(4) or any of its committees.

19. Para 19 of Schedule 3 gives ISA the power to require various specified persons to provide "relevant information" to it. It may require the chief officer of a relevant police force to provide any such relevant information (para 19(1)(c)). Para 19(3) provides that, for the purposes of sub-paragraph (c), relevant information

relating to a person "is information which the chief officer thinks might be relevant in relation to the regulated activity concerned".

20. Section 37 provides that the ISA may require various specified persons to provide any "prescribed information" that he or it holds in relation to a person ISA is considering whether to include in, or remove from, a barred list. "Prescribed information" is defined in the Schedule to The Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008 (SI 2008/3265). It includes information relating to the person's employment and the reasons why permission was withdrawn for him "to engage in the regulated or controlled activity in question" (para 4(h)); and information relating to the person's conduct and "any information other than that relating to [the person's] conduct which is likely to, or may, be relevant in considering whether [the person] should be included in or removed from a barred list including information relating to any previous offences, allegations, incidents, behaviour or other acts or omissions" (para 5(f)). Regulated activity providers who hold any "prescribed information" in relation to a person engaged in regulated activity provided by him must provide the information to the ISA in the circumstances specified in section 35 of the 2006 Act.

21. If the person is included in the list, he has a right of appeal to the Upper Tribunal if the Tribunal gives permission (section 4(1) and (4) of the 2006 Act). An appeal may be made only on the grounds that the ISA has made a mistake (a) on any point of law or (b) in any finding of fact which it has made and on which the decision was based (section 4(2)). For the purpose of subsection (2), the decision whether or not it was "appropriate for an individual to be included in a barred list is not a question of law or fact" (section 4(3)).

The ISA referral guidance

22. The ISA has published referral guidance for use in connection with referrals to it. Annexed to the guidance are extensive *Guidance Notes for the Barring Decision Making Process* ("the barring process"). These are public documents. The guidance notes that were in force at the time of the Court of Appeal's decision were issued in February 2009. These were superseded in August 2010 by guidance notes which made minor (and immaterial) amendments. I shall refer to the current version. It is necessary to consider these in some detail, because, for reasons that will become clear, they are central to the issues that arise on this appeal.

23. The referral guidance has no statutory force. As is stated in the introduction to the guidance notes, they are "intended to be used by case workers in the determination of decisions with regard to whether referred individuals should be barred from working with vulnerable groups". Para 2.1 states that the purpose of

the barring process is to ensure that all barring decisions follow a process which affords a "fair, rigorous, consistent, transparent and legitimate assessment of whether an individual should be prevented from working with children...based on the information available to the [ISA]".

24. The guidance notes identify five stages of the barring process. The first is the "Initial assessment". The ISA "can consider information from any source" (para 4.1.1). The second stage is "Evidence evaluation". This provides:

> "5.1 The next stage in the process is deciding, on the balance of probabilities, whether the event (or events) happened, and whether or not relevant conduct or risk of harm occurred. It can be taken as a matter of fact that, in some circumstances such as the notification of convictions, cautions and decisions by competent bodies (Appendix C), the event happened. However, in all other circumstances, including allegations, it is the assessment of all the available evidence that will assist in the determination of whether or not, on the balance of probabilities, the event happened…
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> **5.2 Referral information**
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> 5.2.1 Referral information is received from employers who have dealt with individuals through their internal disciplinary procedures. The conclusions reached by employers are reviewed to establish, on the balance of probabilities, the facts. It is the facts of the case that determine whether the case requires further consideration and not necessarily the conclusions the employer reached….
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> **5.3 Sources of information**
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> **…**
>
> 5.3.3 Referrals may be received relating to allegations that, if proven, would have amounted to 'auto-bar' offences or 'auto-bar with reps' offences. Here you must still fully examine the evidence for yourself on the basis of the 'balance of probabilities' despite the lack of a criminal conviction (see also 5.7). …

5.3.5 While the ISA does not have an investigatory function, relevant information held by other organisations, agencies and bodies may be sought….

5.5 Further information

5.5.1 The acquisition of as much relevant information as is necessary and reasonably sufficient to make a fair and defensible barring decision is all that is required…

5.9 General principles in relation to the assessment of evidence

5.9.1 When case workers have completed the process of receiving and gathering all the information, evidence must be assessed in terms of what reliance may be placed on it for the purposes of making a barring decision.

5.9.2 As mentioned already, in cases of cautions, convictions and findings of fact by competent bodies, case workers will be able to treat the facts as proved. [Lord Brown explains who "competent bodies" are at para 98 of his judgment].

5.9.3 In relation to other evidence, case workers will first need to assess each piece of evidence and judge how reliable it is. The judgment as to how reliable a piece of evidence is will determine how much weight can be placed on it. Less reliable evidence will carry less weight in a barring decision than highly reliable evidence. Some evidence will be so unreliable, for example because it is contradicted or called into question by other reliable evidence, that no lawful reliance can be placed on it at all. Such evidence must be disregarded altogether; a failure to do this could give rise to an appeal on the grounds that the ISA had made an error in its findings of fact. …

5.9.7 Case workers must always be mindful of the principles that the findings of fact that can or cannot be made in the light of the evidence may mean that case workers must re-assess which powers can be relied on to bar..."

25. Stage 3 ("Case assessment") contains detailed guidance as to the assessment of the gravity of the case and the level of risk of future harm presented by the individual. Para 6.11 states that there may be referral of particularly difficult cases to a specialist for an opinion. Such cases may include those where advice is required about issues of mental health or where the motivation of the applicant or referred person is unclear, for example, in the case of alleged "grooming".

26. Stage 4 is entitled "Representations". Para 7.1 states that, if the ISA has decided that the evidence supports a bar for the children's list (that is the "minded to bar" stage has been reached), the person must be given the opportunity to make representations as to why he or she should not be included in the list. Para 7.3 states that the request for representations that is sent to the person "draws attention to findings of fact that are material to the barring decision and the areas of risk identified so that any representation made by the applicant/referred individual can address specific areas to be explored in the case assessment". Para 7.4 is important. It provides:

> "Representations could alter a case worker's original conclusions in two areas. Firstly, in relation to the evidence, findings of facts or the value or significance of other evidence being relied on may be genuinely called into question; secondly, the conclusions reached in the structured judgment procedure [ie stage 3] may need to be reviewed in the light of further evidence or things presented in the representations. "

27. Para 7.5 provides that the representations are ordinarily expected to be in writing by the individual under consideration. But they may be made by others on behalf of the individual, provided that they are authorised.

28. The final stage of the Process is entitled "Final decision". It includes:

> "8.1 The decision after receiving representations relates to the level of potential future risk of harm to children and/or vulnerable adults taking into consideration, where applicable, any representations that have been made and all pertinent facts and any specialist opinions. The guiding principle is that the assessment of the case is based on a structured judgment regarding an individual's risk of harm to vulnerable groups whether, based on that process, it is appropriate to include any such individual in the list(s).

8.2 The 'appropriateness test' is based on the requirement to ensure children and vulnerable adults are safeguarded and that any barring decision is not tarnished by any desire to act as a sanction or punishment. A key issue is that decisions to include or not on the barred list(s) are only taken after the merits of each case have been fully considered following an assessment of all available, relevant facts and evidence, any specialist opinions and, where appropriate, any representations made. "

29. In addition to the published guidance notes, case workers have the benefit of *Case Worker Guidance* to assist them in making "balanced, factually sound and defensible decisions from stages 2 to 5 of the barring process". This guidance is not published. It is intended to supplement the guidance contained in the guidance notes. The version that was provided to the court (which is redacted) is dated April 2011.

30. There is a section headed "Assessing the reliability of the evidence". It includes:

"2.12 The judgment as to how reliable a piece of evidence is will determine how much weight can be placed on it. Less reliable evidence will carry less weight in a barring decision than highly reliable evidence. Some evidence will be so unreliable, for example, because it is contradicted or called into question by other reliable evidence, that no lawful reliance can be placed on it at all. Such information must be disregarded altogether and the reason for such a decision documented; as failure to disregard such information could give rise to an appeal.

2.13 Consider the credibility of the witnesses and the referred individual and in your assessment take account of any issues that relate to their motivation and their previous conduct. Is there anything in the background to the matter which affects anyone's credibility? Is there history of similar problems or issues relating to their honesty?

2.14 The underlying motivation of the person giving the information or the referred individual may be very important in your assessment and the weight you allot to it; especially where you consider that it involves prejudice, financial gain or malice.

2.15 You should be careful in the way you deal with the opinions of those giving information. While it is sometimes helpful to receive an interpretation of a set of circumstances or facts from, for example, a care worker or police officer, it is also important to remember that an opinion is essentially a person's belief; it is a subjective observation of statement which may or may not be supported by evidence."

31. Then at para 2.30, there is a section headed "Professional opinions and previous findings". It includes:

"Can we take at face value the findings of a referring organisation's disciplinary process?

For the most part, such findings, if supporting evidence is on the file, will be fairly straightforward to confirm as reliable.

However, there are plenty of examples where the referring organisations have either made decisions without the full facts available, or come to partial findings that have led to a dismissal…

We are in a unique position in that we are able to pull together relevant information from a range of agencies and it is therefore essential we make our own findings about the evidence available to us.

More fundamentally, in the above example, a headmaster's investigatory report to a disciplinary panel may conclude that an allegation is proven; this is not a finding of fact, so we should evaluate the evidence too. Obviously they will have a good contextual knowledge of the case (better in many cases than ourselves) but there could be any number of reasons why that finding is not defensible (they were not privy to all the information; a witness has since retracted/revisited a statement; they simply did not come to a reasoned conclusion, etc) so we should evaluate the evidence ourselves and come to our own conclusions. The only cases in which this is not relevant is when there is a finding of fact made by a competent body. "

The issue

32. The issue is whether the governors' decision not to allow the claimant to have legal representation at the disciplinary hearing violated his rights under article 6 of the ECHR which, so far as material, provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…."

33. It is common ground that the civil right with which we are concerned is the claimant's right to practise his profession as a teaching assistant and to work with children generally. There is no doubt that this right would be directly determined by a decision of the ISA to include him in the children's barred list. He does not, however, contend that the proceedings before the ISA would violate his article 6(1) rights. His case is that (i) the disciplinary proceedings would have such a powerful influence on the ISA proceedings as to engage article 6(1) in *both* of them and (ii) the consequences of being placed on the children's barred list by the ISA would be so grave for him that the right to a fair hearing vouchsafed by article 6(1) meant that he was entitled to legal representation in *both* proceedings.

34. If there is no connection at all between the disciplinary proceedings and the proceedings before the ISA, it is obvious that article 6 has no role to play in the disciplinary proceedings. Ex hypothesi, they have nothing to do with the civil right in question.

35. The principal question raised on this appeal is what kind of connection is required between proceedings A (in which an individual's civil rights or obligations are not being explicitly determined) and proceedings B (in which his civil rights or obligations are being explicitly determined) for article 6 to apply in proceedings A as well as proceedings B. Does the connection have to be so strong that the decision in proceedings A *in effect* determines the outcome of proceedings B (as Mr Bowers QC submits). Or is it sufficient that the decision in proceedings A has an effect on proceedings B which is more than merely tenuous or remote (as Mr Drabble QC submits)? Or does the connection lie somewhere between these two positions? Having considered the Strasbourg jurisprudence, Laws LJ (with whom Wilson and Goldring LJJ agreed) adopted a test somewhere along the spectrum between the two extremes. He said [2010] 1 WLR 2218, para 32 that the ECtHR approach was "likely to be met where the decision in the relevant proceedings has a substantial influence or effect on the later vindication or denial of the claimant's Convention right". He amplified this at para 37 in these terms:

> "In my view the effect of the learning (and I have already foreshadowed this) is that where an individual is subject to two or more sets of proceedings (or two or more phases of a single proceeding), and a 'civil right [or] obligation' enjoyed or owed by him will be determined in one of them, he may (not necessarily will) by force of Article 6 enjoy appropriate procedural rights in relation to any of the others if the outcome of that other will have a substantial influence or effect on the determination of the civil right or obligation. I do not mean any influence or effect which is more than de minimis: it must play a major part in the civil right's determination. I do not intend a hard and fast rule. Principles developed by the Strasbourg court for the interpretation and application of the Convention tend not to have sharp edges; as I have said, the jurisprudence is generally pragmatic and fact-sensitive. The nature of the right in question may make a difference. So may the relative authority of courts, tribunals or other bodies playing their respective parts in a case, such as the present, where connected processes touch a Convention right."

The Strasbourg jurisprudence

36. Mr Bowers (supported by Miss Lieven QC) submits that there is no support in the Strasbourg jurisprudence for the test propounded by Laws LJ and that we should reject it. It is, therefore, necessary to examine some of the decisions of the ECtHR. In *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, the Austrian District and Regional Real Property Transactions Commission refused to approve the sale of a number of plots of land. The applicant challenged the refusal alleging bias and contending that his article 6 rights were violated for that reason. The Austrian statute provided that the refusal of approval rendered the sale null and void. The ECtHR said at para 94 that "the French expression 'contestations sur (des) droits et obligations de caractère civil' covers all proceedings the result of which is decisive for private rights and obligations. The English text 'determination of ... civil rights and obligations' confirms this interpretation". A little later in the same paragraph, the court said:

> "In the present case, when Ringeisen purchased property from the Roth couple, he had a right to have the contract for sale which they had made with him approved if he fulfilled, as he claimed to do, the conditions laid down in the Act. Although it was applying rules of administrative law, the Regional Commission's decision was to be decisive for the relations in civil law ('de caractère civil') between Ringeisen and the Roth couple. This is enough to make it necessary for the court to decide whether or not the proceedings in this case complied with the requirements of article 6(1) of the Convention."

37. It is clear that the refusal of approval by the Commission (a matter of administrative law) was, as a matter of fact in that case, determinative of the private contractual rights of the parties. It did not merely influence the relations in civil law between the parties. It was dispositive of them. But it is not at all clear that the court was saying that this was the test for all cases. The words "*covers* all proceedings the result of which is decisive for private rights and obligations" (emphasis added) could mean that the circumstances in which article 6(1) is engaged include, but are not limited to, such cases.

38. It will be seen, however, that the language of para 94 of *Ringeisen* ("proceedings the result of which is decisive for private rights and obligations") has been repeated as a mantra in other cases where the facts were materially different. The next case is *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1. The applicants were suspended from practising medicine for three months by the Provincial Council of the Ordre des médecins. They appealed unsuccessfully to the Appeal Council and from there (again unsuccessfully) to the Court de Cassation. Dr. Le Compte complained to the ECtHR that his article 6 rights had been violated because the proceedings before the Appeals Council had not been conducted in public. An issue arose as to whether article 6 was engaged at all. The applicants argued that what was in issue before the Provincial and Appeals Councils was their right to continue to practise in their profession (a "civil" right). The Government argued that the decisions of those bodies had no more than an "indirect effect" on that right, since they did not review the lawfulness of the earlier suspension from practice, but merely had to decide whether breaches of the rules of professional conduct of a kind justifying disciplinary sanctions had actually occurred (para 46).

39. Following *Ringeisen*, the court said that it must be shown that the dispute (before the Appeals Council) related to civil rights and obligations, "in other words that the 'result of the proceedings' was 'decisive' for such right" (para 46). At para 47, the court said:

> "As regards the question whether the dispute related to the above-mentioned right, the court considers that a tenuous connection or remote consequences do not suffice for article 6(1), in either of its official versions ('contestation sur', 'determination of'): civil rights and obligations must be the object—or one of the objects—of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a right.
>
> Whilst the court agrees with the Government on this point, it does not agree that in the present case there was not this kind of direct

> relationship between the proceedings in question and the right to continue to exercise the medical profession."

40. This seems to be the first case in which the ECtHR contrasted the notion that the result of the proceedings must be "directly decisive" with the notion of "a tenuous connection or remote consequences". On the facts of *Le Compte*, the issue for the Appeals Council was whether the breaches of the rules of professional conduct on which the decision to suspend was based had actually occurred. But the link between the findings of breach and the decision to suspend could not have been closer. If the appeal failed, the decision to suspend would remain unimpaired. The decision of the Appeals Council was determinative of the applicants' civil right to practise their profession during the period of suspension. In my view, the court was not introducing a gloss on the *Ringeisen* test that *any* connection more than tenuous or remote would suffice. On the facts of this case (as in *Ringeisen* itself), the result of the proceedings in question was determinative of the civil rights in issue.

41. The next case is *Fayed v United Kingdom* (1994) 18 EHRR 393. This is heavily relied on by Mr Bowers as showing that "decisive" means determinative in the sense of "dispositive". The applicants had acquired the House of Fraser ("HOF"). The takeover had been opposed by Lonrho Plc which pursued a hostile campaign against the applicants through the media, including *The Observer*, a newspaper that it owned. This led to the issue of libel proceedings by the applicants. Some time later, the Government appointed two inspectors to investigate inter alia the circumstances surrounding the acquisition of HOF. The inspectors' provisional conclusions included a finding that the applicants had made material dishonest misrepresentations at the time of the takeover. The Government published the report. Following the publication of the report, the applicants abandoned their libel claims against *The Observer* newspaper on the grounds that, in the light of the report, it had become impossible to prosecute the claims with any prospects of success.

42. The applicants complained that, in violation of article 6(1), the inspectors had in their report determined their civil rights to honour and reputation (protected as part of their right to respect for private life under article 8) and had denied them effective access to a court to have those rights determined. The first question that the ECtHR had to decide was whether article 6(1) was applicable to the investigation by the inspectors. It was contended by the applicants that the result of the investigation was decisive of their article 8 rights and that the inspectors' report effectively "determined" them without respecting any of the procedural guarantees of article 6(1).

43. The court accepted that the published findings of the inspectors undoubtedly damaged the applicants' reputations, but that was not sufficient to lead to the conclusion that the inspectors had determined their civil rights. The court said:

> "61. However, the court is satisfied that the functions performed by the inspectors were, in practice as well as in theory, essentially investigative. The inspectors did not adjudicate, either in form or in substance. They themselves said in their report that their findings would not be dispositive of anything. They did not make a legal determination as to criminal or civil liability concerning the Fayed brothers, and in particular concerning the latter's civil right to honour and reputation. The purpose of their inquiry was to ascertain and record facts which might subsequently be used as the basis for action by other competent authorities—prosecuting, regulatory, disciplinary or even legislative. …
>
> Nevertheless, whilst there was a close connection between Lonrho's grievance against the Fayed brothers and the matters investigated by the inspectors, the object of the proceedings before the inspectors was not to resolve any dispute (contestation) between Lonrho and the applicants…
>
> In short, it cannot be said that the inspectors' inquiry 'determined' the applicants' civil right to a good reputation, for the purposes of article 6(1), or that its result was directly decisive for that right.
>
> 62. Acceptance of the applicants' argument … [as to the] interpretation of article 6(1) would in practice unduly hamper the effective regulation in the public interest of complex financial and commercial activities. In the court's view, investigative proceedings of the kind in issue in the present case fall outside the ambit and intendment of article 6(1)."

44. Thus it can be seen that the court accepted that there was a close connection between the findings of the inspectors and the determination of the civil right which was to be the subject of the libel proceedings, but that was not enough. *Fayed* shows that in the ECtHR lexicon, "decisive" is not the antonym of "a tenuous connection or remote consequence". The court emphasised the fact that (i) the inspectors themselves said that their findings would not be "dispositive" of anything, (ii) the object of the proceedings before the inspectors was "not to resolve any dispute" and (iii) there was an important policy reason for not applying

article 6 in investigative proceedings conducted at the instance of regulatory or other authorities.

45. In *Balmer-Schafroth v Switzerland* (1998) 25 EHRR 598 the applicants lodged an objection with the Federal Council requesting that it refuse to extend a licence to operate a power station. The council (which was the authority of first and last instance to deal with the matter) rejected the objection and extended the licence. The applicants invoked articles 6(1) and 13, arguing that they had not had access to a "tribunal" and that the procedure followed by the council had not been fair. They said that there had been a violation of their civil right to the protection of their physical integrity under articles 2 and 8.

46. The court found that article 6(1) was not engaged. At para 32, it set out the familiar test: "the outcome of the proceedings must be directly decisive for the right in question. As the court has consistently held, mere tenuous connections or remote consequences are not sufficient to bring article 6(1) into play". At para 39, it said that the question in particular was whether the link between the council's decision and the applicants' article 2 and 8 rights "was sufficiently close to bring article 6(1) into play, and was not too tenuous or remote". At para 40, it answered this question saying that the applicants were unable to establish that the operation of the power station "exposed them personally to a danger that was not only serious but also specific and, above all, imminent". Consequently "neither the dangers nor the remedies were established with a degree of probability that made the outcome of the proceedings directly decisive within the meaning of the court's case law". In the result, the connection between the council's decision and the right invoked by the applicants was "too tenuous and remote". This is an example of a case where there is only one set of proceedings in issue (ie the first and last instance authority adjudicating on the same right). In such a case, the question is whether the proceedings are decisive in the ordinary sense of being dispositive of the effective exercise of the applicant's rights. Another example of such a case is *Slovenske Telekomunikacie* (Application No 47097/99) (unreported) given 28 September 2010.

47. There is also a line of Strasbourg decisions on the question whether article 6 is engaged where an issue arising in civil proceedings is referred to a constitutional court. This question arose in particular in relation to the question whether proceedings before the constitutional court were to be taken into account in determining whether the length of the civil proceedings was reasonable within the meaning of article 6(1). Initially, the ECtHR decided that the ECHR did not apply to rights determined by a constitutional court because of their constitutional nature: see *Buchholz v Germany* (1981) 3 EHRR 597. This approach was, however, rejected in *Deumeland v Germany* (1986) 8 EHRR 448 where at para 77 the ECtHR held that, although the Constitutional Court had no jurisdiction to rule on

the merits of the dispute, its decision was "capable of affecting the outcome of the claim".

48. Since then, the *Deumeland* approach has been followed repeatedly by the ECtHR in cases where questions are referred to a constitutional court. Thus in *Poiss v Austria* (1987) 10 EHRR 231, in relation to the applicability of article 6(1), the court said: "Any decision—whether favourable or unfavourable—by the authorities dealing with the matter subsequently affected, affects or will in future affect their property rights. The outcome of the proceedings complained of is accordingly 'decisive for private rights and obligations' (see *Ringeisen*), so that article 6(1) applies in the instant case".

49. In *Bock v Germany* (1989) 12 EHRR 247, the ECtHR rejected an argument that *Deumeland* should not be followed and at para 37 said that:

> "there are circumstances in which proceedings before the constitutional court must be taken into the reckoning in determining the relevant period. It has to be considered whether the constitutional court's decision was *capable of affecting the outcome of the case which has been litigated before the ordinary courts.* The question whether article 6(1) is applicable to constitutional complaint proceedings must accordingly be treated on the merits of each case, *in the light of all the circumstances*" (emphasis added).

50. Another case involving constitutional proceedings is *Ruiz-Mateos v Spain* (1993) 16 EHRR 505. This is one of the decisions relied on by Laws LJ in support of his test of "substantial influence or effect". The applicants brought a claim for the restitution of shares which had been expropriated by legislative decree of the Spanish Government. An issue arose as to the constitutionality of the decree and this was referred to the Spanish Constitutional Court. The applicants complained of breaches of article 6(1) by reason of (i) the delays occasioned by the proceedings in the Constitutional Court and (ii) the alleged failure to accord them a fair hearing before the Constitutional Court. The Government argued inter alia that article 6(1) was not applicable in the proceedings before the Constitutional Court. The ECtHR rejected this argument.

51. The court said, in relation to the length of the proceedings, that the relevant period included the time taken in the proceedings before the Constitutional Court and was not limited to the duration of the civil proceedings. At para 35, the court said that, according to its well-established case law, "proceedings in a Constitutional Court are to be taken into account for calculating the relevant period *where the result of such proceedings is capable of affecting the outcome of the*

dispute before the ordinary courts" (emphasis added). The Commission explained at para 52 of its Opinion that "although the purpose of these constitutional proceedings was not the same as that of the civil proceedings, the length of the constitutional proceedings inevitably contributed to the prolongation of the civil proceedings."

52. As regards the allegation that the applicants had been denied a fair hearing before the Constitutional Court, the court observed that there was a "close link" between the subject-matter of the proceedings before that court and the civil proceedings (para 59). The annulment of the decree by the Constitutional Court would have led the civil courts to allow the applicants' claim. For this reason, the ECtHR held that article 6(1) applied to the proceedings before the Constitutional Court. The Commission put the point very clearly at para 87 of its opinion:

> "In effect, therefore, it is as if the applicants' case was dealt with in a single set of proceedings before the Spanish courts. Although these proceedings involved a civil stage, in the strict sense, and a constitutional stage, these stages were so closely bound up with each other that to dissociate them would be tantamount to crediting a legal fiction…. In the specific circumstances of the case, [to interpret article 6(1) as excluding the constitutional stage of the proceedings] would be excessively formalist and likely to undermine to a considerable extent the guarantees afforded to the applicants by the Convention, whereas, according to case law, the Convention must be interpreted in such a way as to ensure its efficacy and to safeguard the individual in a real and practical way, rather than a fictitious and illusory way, as regards those areas with which it deals.".

53. In relation to the question of reasonable period, unsurprisingly the ECtHR has consistently held that, where a constitutional issue arises in civil proceedings and this can only be determined by a Constitutional Court, the time taken before that court must be taken into account in calculating the length of the civil proceedings. The position should be no different from what it would be if the civil court had jurisdiction to decide the constitutional issue for itself. It is as if the proceedings before the Constitutional Court and the civil court were all part of the same proceedings. For the same reason, the guarantee of a fair hearing afforded by article 6(1) should apply to proceedings before the Constitutional Court as it does to proceedings before the civil court.

54. The next case referred to by Laws LJ was *Lizarraga v Spain* (2004) 45 EHRR 1031. This was a case similar to *Ruiz-Mateos*. At para 47, the ECtHR said that, although the proceedings before the Constitutional Court bore the hallmarks of public law proceedings, they were "decisive" of the applicants' proceedings in

the ordinary courts to have a dam project set aside. The court found that the proceedings "as a whole" may be considered to concern the civil rights of the applicants.

55. The third ECtHR case relied on by Laws LJ was the Grand Chamber decision in *Ocalan v Turkey* (2005) 41 EHRR 985. This is a criminal case. The applicant was detained and held in police custody where he was questioned by the security forces. He received no legal assistance during this period. Thereafter, he was remanded in custody pending trial and during this period he was allowed restricted access to his lawyers. He made several self-incriminating statements which were a "major contributing factor" to his conviction at trial. It was held by the ECtHR that there had been a violation of article 6(1) in conjunction with article 6(3)(b) and (c). At para 131 the Grand Chamber endorsed the following statement: "... in these circumstances, the court is of the view that to deny access to a lawyer for such a long period and in a situation where the rights of the defence might well be irretrievably prejudiced is detrimental to the rights of the defence to which the accused is entitled by virtue of article 6".

56. I agree that in such a case, the requirements of article 6(1) (criminal) and 6(3) are necessarily engaged sooner than in civil cases because of the specific article 6 right to the presumption of innocence and legal representation after charge with which it is inextricably linked. That is why I do not consider that this decision sheds light on the issue that arises in the present appeal.

57. The concept of irretrievable prejudice has, however, been used by the ECtHR in the civil context of claims for interim measures. In *Markass Car Hire Ltd v Cyprus* (Application No 51591/99) (unreported) given 23 October 2001, the domestic court had made an interim order without notice to the applicant for the delivery up of a fleet of vehicles. An issue arose as to whether article 6 applied to the interim order proceedings. The ECtHR (Third Section) noted that, unless the interim decision was reversed by the appeal court within a short time, it would affect the legal rights of the parties. The court could not overlook the "drastic effect" of the interim decision. The combined effect of the measure and its duration caused "irreversible prejudice" to the applicant's interests and "drained to a substantial extent the final outcome of the proceedings of its significance". In these circumstances, the court considered that the interim decision "in effect partially determined the rights of the parties in relation to the final claim against the applicant in [the] civil action".

58. This approach to interim measures was endorsed by the Grand Chamber in *Micallef v Malta* (2010) 50 EHRR 920. At para 74, the court said that the result of the interim proceedings must be "directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring article

6(1) into play." At para 79, they noted that a judge's decision on an injunction "will often be tantamount to a decision on the merits of the claim for a substantial period of time, even permanently in exceptional cases." At para 85, they said that the nature of the interim measure, its object and purpose as well as its effects on the rights in question should be scrutinised. Whenever an interim measure can be considered effectively to determine the civil right or obligation at stake, notwithstanding the length of time it is in force, article 6 will apply.

59. Before I attempt to distil the principles that can be derived from these cases which are relevant to this appeal, I need to refer to some recent English cases.

The English cases

60. Laws LJ derived support for his test from *Kulkarni v Milton Keynes Hospital NHS Trust* [2009] EWCA Civ 789, [2010] ICR 101. A doctor claimed that he was entitled to legal representation in disciplinary proceedings brought by his employer. Smith LJ (with whom Wilson LJ and Sir Mark Potter P agreed) said obiter at para 67 that she would have held that "article 6 is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS". She explained at para 66 why article 6 was engaged on the facts of that case. The NHS is, to all intents and purposes, a single employer of doctors for the whole country. If Dr Kulkarni was found guilty of the charge, he would be unemployable as a doctor and would never complete his training. Thus, the internal disciplinary procedure was, as a matter of fact, dispositive of his right to work in his chosen field.

61. *R (Wright) v Secretary of State for Health* [2009] 1 AC 739 was concerned with the procedure for provisionally listing a worker on the Protection of Vulnerable Adults (POVA) list under the 2006 Act. The House of Lords held that some interim measures "have such a clear and decisive impact upon the exercise of a civil right that article 6(1) does apply" (per Baroness Hale of Richmond, at para 21). Provisional listing in the POVA list was a determination of the civil right to work because it had "detrimental" and "often irreversible and incurable" effects (para 25). Thus, the procedure was, as a matter of fact, dispositive of the claimant's right to work in his chosen field.

62. Neither *Kulkarni* nor *Wright* sheds light on the meaning and boundaries of the *Ringeisen* test. They contain no analysis or discussion of the meaning of what I have called "the mantra". They are merely examples of cases where, as a matter of fact, the proceedings determined the civil right in question. We were also shown other domestic decisions where the test has been applied such as *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)*

[2003] 2 AC 430 (paras 30 and 78); *R (A) v Croydon London Borough Council (Secretary of State for the Home Department intervening)* [2009] 1 WLR 2557 (paras 37, 59 and 63) and *Ali v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2010] 2 AC 39 (paras 36 and 43). In each of these passages, the mantra of "directly decisive" is stated, but there is no analysis of precisely what it means.

Conclusions on the test for the application of article 6

63. I have found it necessary to examine the facts of the ECtHR decisions to which I have referred in some detail because, in my view, the jurisprudence contains no clear explanation of what "directly decisive" means. It is, therefore, necessary to see how the court has *applied* the *Ringeisen* test in order to see what light the cases shed on its meaning.

64. I think that the following principles can be derived from the cases. First, it is clear that it is a *sufficient* condition for the application of article 6(1) in proceedings A that a decision in those proceedings will be truly dispositive of a civil right which is the subject of determination in proceedings B. In *Ringeisen* 1 EHRR 455 and *Le Compte* 4 EHRR 1, proceedings A were, on the facts of those cases, dispositive of the outcome of proceedings B. The constitutional cases such as *Ruiz-Mateos* 16 EHRR 505 and *Lizarraga* 45 EHRR 1031 are further examples of the application of this principle. So too in the interim measures cases of *Markass* 23 October 2001 and *Micallef* 50 EHRR 37, the decision to grant interim measures was, on the facts, directly decisive in the sense that they caused irreversible prejudice to the applicants and, in effect, were wholly or at least partly determinative of the civil right in question. Article 6(1) therefore applied in all of these cases. But none of them states in terms that it is a *necessary* condition for the application of article 6(1) in proceedings A that they are dispositive of proceedings B.

65. Secondly, although the word "decisive" is contrasted with "tenuous connection or remote consequences", no decision was shown to us which states that article 6(1) applies in any case where the connection between the two proceedings is merely more than tenuous or where the consequences of a decision in proceedings A for proceedings B is merely more than remote. There is a spectrum of effect ranging from (i) merely more than tenuous and remote to (ii) dispositive. The fact that the ECtHR contrasted the two ends of the spectrum, for example, in *Le Compte* does not indicate that the court was saying that article 6(1) applies in any case where the link is merely more than tenuous or the consequences are merely more than remote.

66. Thirdly, in a number of cases the court made it clear that a link that was merely more than tenuous or consequences that were merely more than remote is *not* sufficient. How close does the link have to be for article 6(1) to apply? In *Balmer-Schafroth* 25 EHRR 598, the court said that there had to be a "sufficiently close" link. That begs the question: does the link have to be sufficient to be dispositive of the decision or is it enough that it is likely to have some influence on it? In *Ruiz-Mateos* 16 EHRR 505, the court said that the test was whether the decision of the constitutional court was capable of affecting the outcome of the proceedings in which the civil rights were to be determined. In most cases where a constitutional question which arises in the course of a civil dispute is referred to a constitutional court, the decision of that court is likely to be capable of being determinative of the dispute. *Ruiz-Mateos* was one such case. *Fayed* 18 EHRR 393 shows that, in some cases at least, the link must be very close. That was a strong case on the facts as the findings set out in the inspectors' report had a potent impact on the applicant's attempt to vindicate his article 8 right to honour and reputation. Nevertheless, the court held that the proceedings before the inspectors were not "decisive" of his civil rights.

67. Fourthly, the cases show that, despite the apparent simplicity of the mantra, the ECtHR adopts a pragmatic context-sensitive approach to the problem. It is not possible to classify all the cases into neat hermetically-sealed categories. This may be considered to be unfortunate, since it is desirable to know *in advance* whether article 6(1) applies to a procedure or not. Anything less gives rise to uncertainty and potential litigation. But the ECtHR has propounded an approach which is not sharp-edged and I do not think it is for us to introduce a rigidity which Strasbourg has eschewed. It is pertinent to note that in *Ruiz-Mateos*, the Commission referred at para 87 of its Opinion to "the specific circumstances of the case" (see para 52 above) and in *Bock* 12 EHRR 247, para 37, the court said that the question whether article 6(1) was applicable must "be treated on the merits of each case, in the light of all the circumstances" (see para 49 above).

68. Thus, in deciding whether article 6(1) applies, the ECtHR takes into account a number of factors including (i) whether the decision in proceedings A is capable of being dispositive of the determination of civil rights in proceedings B or at least causing irreversible prejudice, in effect, by partially determining the outcome of proceedings B; (ii) how close the link is between the two sets of proceedings; (iii) whether the object of the two proceedings is the same; and (iv) whether there are any policy reasons for holding that article 6(1) should not apply in proceedings A. This last factor was taken into account by the ECtHR in *Fayed* 18 EHRR 393 (see para 43 above).

69. So where does this leave the test of "substantial influence or effect" proposed by Laws LJ? He was careful to say that an applicant "*may (not necessarily will)* by force of article 6 enjoy appropriate procedural rights in

relation to any of the others [set of proceedings] if the outcome of that other will have a substantial influence or effect on the determination of the civil right or obligation": [2010] 1 WLR 2218, para 37 (emphasis added). In my view, this is a useful formulation. It captures the idea of the outcome of proceedings A being capable of playing a "major part in the civil right's determination" in proceedings B. That is what fairness requires. Anything less would be "excessively formalist" (see para 87 of the Commission's Opinion in *Ruiz-Mateos* 16 EHRR 505) and would give too much weight to the fact that the two sets of proceedings are, as a matter of form, separate. The focus should be on the substance of the matter. The court should always keep in mind the importance of ensuring that the guarantees afforded by article 6(1) are not illusory. It is clearly established that, where a decision in proceedings A is dispositive of proceedings B, article 6(1) applies in proceedings A as well as in proceedings B. That is what the right to a fair hearing in proceedings B requires. Why does fairness not require the same where the decision in proceedings A, although it is not strictly determinative, is likely to have a major influence on the outcome in proceedings B? As a matter of substance, there is not much difference between (i) an outcome of proceedings A which has a major influence on the result in proceedings B and (ii) an outcome of proceedings A which is dispositive of the result in proceedings B. In each case, the civil right of the person concerned is greatly affected by what occurs in proceedings A. If there is to be a difference in the application of article 6(1) between the two cases, it needs to be justified. There may be policy reasons (such as those referred to in *Fayed* 18 EHRR 393) based on the nature of the body charged with proceedings A which justify a different approach. But absent such policy reasons, it is difficult to see why article 6(1) should not apply in both cases. No such policy reasons have been identified in the present case. I propose, therefore, to consider whether article 6(1) applies in the present case on the basis of the test propounded by Laws LJ.

Did article 6(1) apply in the disciplinary proceedings in the present case?

70. At para 47 of his judgment, Laws LJ said:

> "It seems to me that there is every likelihood that the outcome of the disciplinary process in a case like this, where there has been a finding of abuse of trust by virtue of sexual misconduct, will have a profound influence on the decision-making procedures relating to the barred list. The governors' conclusion comprised both a finding of fact and a judgment as to where the facts lay on the scale of severity that in the particular case fell to be applied. While the ISA may bring an independent mind to bear, it is not I think suggested that it operates a procedure for oral hearings with cross-examination. The force of the disciplinary decision lies not only in the governors' view of the primary facts, but especially in their judgment as to how those facts should be viewed. Without a de novo hearing and the

possibility of oral evidence before the ISA, at the very least the flavour and the emphasis of those conclusions will remain important and influential."

71. I accept at once the gravity of the consequences for the claimant of being placed on the children's barred list. For that reason, I would agree with the courts below that, if article 6 did apply in the disciplinary proceedings, then the claimant was entitled to the enhanced procedural protection (normally associated with criminal proceedings) of the right to have legal representation at the disciplinary hearing. The more serious the allegation and the graver the consequences if the allegation is proved, the greater the need for enhanced protection: see *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, para 30, *R v Securities and Futures Authority Ltd, Ex p Fleurose* [2002] IRLR 297, para 14 (per Schiemann LJ) and *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, para 38 (per Simon Brown LJ) and para 148 (per Jonathan Parker LJ).

72. I agree with Mr Drabble that at the heart of the school's decision to dismiss the claimant were two issues of credibility: (i) whether the claimant should be believed when he denied that he "massaged" and "kissed" M when the two of them were alone in the church (the claimant's case was that he moved away when M tried to kiss him); and (ii) whether, as alleged by the school's child protection officer (but denied by the claimant), the claimant made detailed damaging admissions including that he had kissed M and massaged his back. As Mr Drabble points out, the school determined both of these issues against the claimant following his disciplinary hearing at which the child protection officer was questioned by the disciplinary panel and their head teacher's advisor from the SEAT. The letter of dismissal stated: "the panel also heard evidence from the school's child protection officer...who recalled information relayed to her by you about the incident in the church...the information [the officer] recalls corresponds with a diary entry made by the child."

73. In these circumstances, Mr Drabble submits that, even if the ISA had the capacity to make a decision for itself on the balance of probabilities on the papers, it is inevitable that they would adopt the school's credibility findings which had been arrived at after the disciplinary panel had been afforded the opportunity of seeing the claimant and the child protection officer giving oral evidence. The ISA would have had no opportunity to make a similar assessment of their credibility.

74. Laws LJ essentially accepted these submissions at para 47 of his judgment. Central to his reasoning is the conclusion that the findings of the disciplinary panel would be likely to have a "profound" influence on the decision reached by the ISA "without a de novo hearing and the possibility of oral evidence" before the ISA.

75. I have already set out in full the principal material statutory provisions and parts of the ISA guidance notes and the case worker guidance. It is necessary to emphasise certain aspects of them. They show that the ISA is required to exercise its own independent judgment both in relation to finding facts and making an assessment of their gravity and significance.

76. So far as findings of fact are concerned, apart from the automatic barring provisions contained in paragraphs 1 and 2 of Schedule 3, the 2006 Act requires the ISA itself to be satisfied that the person "has engaged in relevant conduct". The latest version of the guidance notes (August 2010) also makes it clear that the ISA is expected to make its own findings. It can consider information from any source (para 4.1.1). Para 5.1 states that, in all cases except where there has been notification of convictions, cautions and decisions by "competent bodies", "it is the assessment of *all the available evidence* that will assist in the determination of whether or not, on the balance of probabilities, the event happened" (emphasis added). Para 5.2.1 states that "the conclusions reached by employers are reviewed to establish, on the balance of probability, the facts. It is the facts of the case that determine whether the case requires further consideration and not necessarily the conclusions that the employer reached". Mr Drabble emphasised the use of the word "reviewed" and submits that this shows that the exercise which the ISA performs in relation to the facts is akin to a judicial review, rather than a de novo consideration of the facts. I cannot accept this submission. It is clear that the ISA is expected to form its own assessment of the facts on the basis of all the available evidence: the word "review" means no more than "assess" or "reconsider". This is supported by the terms of paras 5.9.3 and 5.9.7 which I have set out at para 24 above. No judge would embark on such an exercise when undertaking a judicial review of a decision.

77. Other important provisions in the guidance notes are to be found in paras 5.3.3, 5.3.5, 5.5.1, 7.3, 8.1 and 8.2. It is worth repeating part of para 8.2: "A key issue is that decisions to include or not on the barred list(s) are only taken after the merits of each case have been *fully* considered following an assessment of *all available, relevant facts and evidence, any specialist opinions and, where appropriate, any representations made"* (emphasis added). Mr Drabble draws attention to the fact that para 5.3.5 states that the ISA "does not have an investigatory function". But it is clear that it can obtain information held by other organisations and bodies: see the powers referred to at paras 19 and 20 above. Moreover, the referred person is entitled to legal representation before the ISA. It is to be assumed that the legal representative will seek and obtain all relevant information which might advance the referred person's cause and present it to the ISA.

78. Also of importance is para 2.30 of the case worker guidance (see para 31 above). I would emphasise "We are in a unique position in that we are able to pull

together relevant information from a range of agencies and *it is therefore essential we make our own findings about the evidence available to us.*…so we should *evaluate the evidence ourselves and come to our own conclusions.* The *only* cases in which this is not relevant is when there is a finding of fact made by a competent body" (emphasis added).

79. It is clear from this material that the ISA is required to make its own findings of fact and bring its own independent judgment to bear as to their seriousness and significance before deciding whether it is appropriate to place the person on the barred list. Why did the Court of Appeal conclude that, despite these procedures and, as Miss Lieven QC says, without any evidence to show that they had not been and would not be applied properly, the employer's findings and decision would still exert a profound influence on the decision-making process?

80. There are two aspects to consider. First, the ISA does not operate a procedure for oral hearings with cross-examination. There is nothing in either the statute or the guidance notes to prevent the ISA from operating such a procedure, but there is nothing which sanctions it either. I do not find it necessary to decide whether the ISA could operate such a procedure. There must be very few cases where the lack of an oral hearing (with examination and cross-examination of witnesses) would make it unduly difficult for the ISA to make findings of fact applying its own judgment to the material. It is only in very few cases that a decision-making body is faced with a conflict of evidence which it resolves *solely or even primarily* on the basis of the demeanour shown by the witnesses. There is usually something else. It may be that the account given by one person is self-contradictory or inconsistent with the account that he or she gave on a different occasion; or doubt may be cast on its accuracy by a document; or one account is supported by the evidence of other apparently credible and reliable witnesses, whereas the other stands on its own; or one account is incredible or at least improbable. In any event, as Lord Bingham said in *The Business of Judging* (2000) at p 9, "the current tendency is (I think) on the whole to distrust the demeanour of a witness as a reliable pointer to his honesty". At pp 9-13, he developed this view and supported it with references to a number of statements by judges and advocates.

81. I accept, however, that there may occasionally be a case where the critical factor which leads an employer to find that there has been gross misconduct by an employee is the demeanour shown by the employee when giving his or her account to the disciplinary panel. But Mr Drabble does not submit that article 6(1) is engaged at the disciplinary proceedings stage only in order to accommodate such cases. His submission is that the Court of Appeal was correct to hold that findings of fact made by an employer's disciplinary panel are *generally and in most cases* likely to exercise a profound influence on the decision-making process before the ISA. I do not agree. The guidance notes and case worker guidance have been

drafted in meticulous detail. They repeatedly make the point that it is for the ISA to make its own findings of fact on the basis of all the available material. Any case worker who follows the guidance notes and the case worker guidance knows that he or she should not defer to the findings of the referring body. The case worker guidance contains worked examples of evidence evaluation, including examples of both good and bad practice. I see no reason to doubt that case workers do as they are instructed.

82. The lack of an oral hearing does not prevent the ISA from making its own findings of fact. In the present case, it would have to look at all the evidence, including the investigation report and appendices, the notes of the disciplinary hearing, the notes of any appeal hearing before the governors and the representations of the claimant himself. It would also consider any other information which was made available to it. There is no reason to believe that, contrary to its statutory duty and guidance, the ISA would be unable to form its own view of the facts independently of the view formed by the school authorities and governors.

83. The second feature identified by Laws LJ is that the ISA would be influenced "especially [by the governors'] judgment as to how [the primary] facts should be viewed": [2010] 1 WLR 2218, para 47. In other words, the panel's decision that it is appropriate that the employee should be placed on the barred list would profoundly influence the view taken by the ISA as to the appropriateness of that course. But as Miss Lieven points out, it is difficult to see why this should be so. Save where there is a conviction for a specified offence, a person can be included in a barred list only if the ISA is satisfied that he has engaged in the "relevant conduct" and it appears to the ISA that it is "appropriate" to include the person in the list (paragraph 3(3) of Schedule 3 to the 2006 Act). Stage 3 of the barring process (the case assessment) requires case workers to apply the ISA "structured judgment procedure" which contains a list of detailed questions that they must ask. To assist them in the process, they can obtain specialist advice: see para 6.11 of the guidance notes. The school's disciplinary panel reaches its conclusions as part of an inquiry into a question which is different from that which is addressed by the ISA. More fundamentally, the case workers know that they are required to form their own opinion on the gravity and significance of the facts and on whether it is appropriate to include the referred person in the barred list. There is no reason to suppose that the ISA will be influenced profoundly (or at all) by the school's opinion of how the primary facts should be viewed.

Conclusion

84. For all these reasons, I would hold that article 6(1) does not apply in the disciplinary proceedings and would allow the appeal. I do not, therefore, find it

necessary to decide whether, if there is a breach of article 6(1) at the disciplinary proceedings stage, it is "cured" by the decision-making processes of ISA itself and the right of appeal to the Upper Tribunal. The "curative" or "full jurisdiction" principle is well-established by authorities such as *Bryan v United Kingdom* (1995) 21 EHRR 342 and *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295. At paras 40 to 42 of his judgment, Laws LJ held that this line of authority does not apply here. He said that this line of authority is concerned with cases where there is an administrative or executive decision which is not article 6 compliant (because the decision-maker is not independent), but it is subject to judicial review, which is article 6 compliant; and the question is whether the judicial review jurisdiction is "full" enough to satisfy article 6. Laws LJ said that the *Bryan/Alconbury* line of reasoning has no application here since the barred list procedure before the ISA does not control or correct errors of the disciplinary process and, as Laws LJ put it, it is the claimant's case that the latter will "drive" the former.

85. Mr Bowers submits that this is an artificially narrow view of the "full jurisdiction" principle. He contends that the principle extends beyond mere administrative or executive decisions by officials and recognises that procedural deficiencies may be cured by a process when viewed as a whole. These are difficult issues on which I prefer to express no opinion.

LORD HOPE

86. I would allow this appeal for the reasons given by Lord Dyson with which I am in full agreement, and for the further reasons given by Lord Brown.

87. It is quite clear, as Lord Dyson's analysis of the facts shows, that the internal proceedings before the employer and the barring proceedings before the ISA are separate and distinct from each other. Their decisions and procedures are directed to different issues. On the one hand there is the person's right to remain in employment with that employer. If the proceedings result in dismissal, as they did in this case, the decision to dismiss may be challenged in the Employment Tribunal. On the other there is a person's right to engage in activities relating to children more generally. This is the issue which must be determined by the Independent Safeguarding Authority ("the ISA").

88. The barring process that the ISA conducts under the Safeguarding Vulnerable Groups Act 2006 may be the result of a decision by the employer to dismiss. But there is no limit to the sources from which information may come that require the ISA to consider whether an individual should be included in the

children's barred list. If the ISA decides that the individual should be included in the list, he has a right of appeal to the Upper Tribunal on the grounds set out in section 4(2). Then there are the factors which may lead to an employer's decision to dismiss or not to dismiss. They may range widely. They are not limited to the matters to which the ISA is required to have regard by the statute. We are therefore dealing here with a case where an individual is subject to two distinct sets of proceedings which are not inextricably linked to each other.

89. That is not, of course, an end to the question whether the claimant's article 6(1) Convention rights were engaged at the disciplinary hearing that was conducted by his employer. Taken by themselves, those proceedings did not engage the protections afforded by that article. It was not their function to determine the civil right that was in issue at that stage, which was the claimant's contractual right to remain in his current employment at the school. Nor did any decision taken in those proceedings determine his civil right to practice his profession as a teaching assistant. It has not been suggested that, if the right to remain in his current employment were the only issue, article 6(1) required that the claimant be allowed the opportunity of legal representation in those proceedings. For that to be the case it would have to be shown, as Laws LJ observed in the Court of Appeal, that there was in some sense at least a close nexus between the disciplinary process and the barred list procedures to be conducted by the ISA: [2010] EWCA Civ 1; [2010] 1 WLR 2218, para 28.

90. The decisions of the Strasbourg court have repeatedly emphasised that a remote or tenuous connection will not do. If its effect is "decisive", the nexus will have been established. But clear guidance is lacking as to how a case is to be determined that lies between these extremes. This is such a case, because the connection between the disciplinary proceedings and the proceedings before the ISA cannot be dismissed as remote. Nor can it be said that the disciplinary proceedings are decisive. The ISA must make its own assessment and its own evaluation of the evidence. Like Lord Dyson, I would adopt Laws LJ's test, which is that the claimant may enjoy article 6 procedural rights if the decision in the disciplinary proceedings will have a substantial influence or effect on the determination by the ISA of his civil right to practice his profession: [2010] 1 WLR 2218, paras 32, 37. For the school, Mr Bowers QC said that there was no support for that test in the Strasbourg authorities. That is, of course, true in so far as the Strasbourg court has not set it out in so many words. But I think that it is possible to detect the underlying principle to which its decisions give effect. I think that Laws LJ's test captures the essence of the principle.

91. The question, then, is whether the test is satisfied in this case. Laws LJ said that his test was satisfied because, as he saw it, there was every likelihood that the outcome of the disciplinary process would have a profound influence on the decision-making processes by the ISA: para 47. As he put it, without a de novo

hearing and the possibility of an oral hearing before the ISA, at the very least the flavour and the emphasis of the governors' view of the facts would remain important and influential. He also said that that result could not be dislodged by the existence of the appellate jurisdiction of the Upper Tribunal, as the critical question was whether on the proved facts the quality of the person's act should be judged severe enough to put him on the barred list: para 49. I am unable to agree with that assessment.

92. As the ISA has not yet considered the claimant's case, we do not have before us a concrete set of facts on which to judge whether or not its procedures are fair. But the Guidance Notes and the Case Worker Guidance are there for us to read, and I agree with Lord Dyson that there is no reason to doubt that case workers do as they are instructed. The issues which they must consider under Part 1 of Schedule 3 to the 2006 Act extend well beyond those that were required to be considered by the governors. The guidance that case workers have been given makes it very clear that they must form their own view of the facts independently of the view formed by the governors. They must make their own assessment of the reliability of the evidence. They are not judging the case at second hand. Their concern is with the primary facts of the case, not with any conclusions that the governors may have formed about them. They must give an opportunity to the person to make representations as to why he or she should not be included in the list, which may be made by a lawyer on the person's behalf, and difficult cases may be referred to a specialist for an opinion. I think that we can be confident that the governors' view of the facts will have receded far into the background when the time comes for a decision as to whether the person should be included in the children's barred list.

93. As for the right of appeal to the Upper Tribunal, this is available on the grounds that the ISA has made a mistake on any point of law and in any finding of fact which it has made and on which the decision was based: section 4(2) of the 2006 Act. The final decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact: section 4(3). But I do not see this as a reason for doubting whether, taken as a whole, the procedures that the 2006 Act sets out are compatible with article 6(1). As Miss Lieven QC for the Secretary of State pointed out, the Upper Tribunal would be in no better position to form a judgment on that issue than the expert body which is the ISA. It would be open to the Upper Tribunal to remit that matter for reconsideration if it were to hold after an oral hearing with the benefit of legal representation that the ISA had made a mistake on any finding of fact on which the decision to list was based.

94. The principle, when the question of compliance with article 6(1) of the procedure before professional bodies is being considered, is to see whether they are subject to control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1): *Albert and Le Compte v Belgium* (1983) 5 EHRR

533, para 29; *Tehrani v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2001] IRLR 208; *R (Thompson) v Law Society* [2004] 1 WLR 2522. The Upper Tribunal is such a body, and had it been necessary to do so I would have been inclined to hold that any breach of article 6(1) at the initial stage was cured by the opportunity for an oral hearing that an appeal to the Upper Tribunal provides.

95. Working backwards, as it were, I would also have been inclined to hold that the better way to cure any breach of article 6(1) at the initial stage would have been to require the ISA to adopt procedures which complied with article 6(1) rather to require the employer to adopt these procedures to make good gaps in the regime that is operated by the ISA. Laws LJ's conclusion was that article 6(1) required that the claimant should be afforded the opportunity to arrange for legal representation in the disciplinary proceedings should he so choose: [2010] 1 WLR 2218, para 53. But there is a serious risk that, if that course were to be adopted, disciplinary proceedings in the public sector would be turned into a process of litigation, with all the consequences as to expense and delay that that would involve. The burden that this would impose on employers, and its chilling effect on resort to the procedure for fear of its consequences, is not hard to imagine. A good indication that it was Parliament's wish to avoid this is to be found in section 10 of the Employment Relations Act 1999 that the employee has a right to be accompanied by an official of a trade union, not by a lawyer. To require the person to be provided with legal representation before the governors would go against that intention, and it would have been the wrong remedy. Our decision that the necessary nexus has not been established avoids these very unattractive consequences.

LORD BROWN

96. Was G entitled to be legally represented before the disciplinary committee of X School which in February 2008 was investigating an allegation of gross misconduct against him? The Court of Appeal (Laws, Wilson, Goldring LJJ) [2010] 1 WLR 2218 held that he was on the basis that the disciplinary proceedings engaged the civil limb of article 6 of the European Convention on Human Rights. In common with the majority of this court I take a contrary view and would allow the governors' appeal. In the light of Lord Dyson's very full judgment in the case, with which I fully agree, I can state what I want to add really quite shortly.

97. I understand Lord Dyson's essential conclusion to be (see paras 74, 82 and 83 of his judgment) that the findings of the disciplinary panel in G's case are unlikely to have a "profound" influence on the decision yet to be reached by the Independent Safeguarding Authority ("ISA") and it is for this reason that article 6

is not engaged. As Lord Dyson makes plain, once the disciplinary proceedings (including G's proposed appeal which is presently stayed) have been concluded, the ISA's task will be to decide, by the process described by Lord Dyson at paras 16-31 (and further elaborated at paras 76-78), whether G should be placed on the barred list – that being the decision which (subject to any appeal to the Upper Tribunal) will determine G's relevant right here – the right to work with children, not the right to continue employment with X School. As Lord Dyson's judgment also makes plain, in reaching that decision – initially as to whether the ISA propose to include G in the list and, if so, following whatever representations he or his advisors may then make as to why he should not be included, as to whether or not to include him – the ISA are required both to make their own independent findings of fact and to decide whether in the light of those facts he should appropriately be included in the barred list.

98. The only exceptions to such an independent approach (neither exception being applicable here) are, first, where there has been a conviction for a specified offence and, secondly, where findings of fact have been made by a "competent body" or one of its committees: see paragraph 16(4) of Schedule 3 to the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"). It seems to me instructive to note who these bodies are: (a) the General Teaching Council for England; (b) the General Teaching Council for Wales; (c) the Council of the Pharmaceutical Society of Great Britain; (d) the General Medical Council; (e) the General Dental Council; (f) the General Optical Council; (g) the General Osteopathic Council; (h) the General Chiropractic Council; (i) the Nursing and Midwifery Council; (j) the Health Professions Council (k) the General Social Care Council; (l) the Care Council for Wales. As I need hardly observe, each of them is an "independent and impartial tribunal established by law" within the meaning of article 6(1) of the Convention and indisputably their proceedings engage that article.

99. One of the more puzzling and to my mind less satisfactory features of the Court of Appeal's decision in the present case is that, whereas it requires school disciplinary panels to allow legal representation, it does not require them to be (as, of course, they are not) independent and impartial, notwithstanding that ordinarily this is regarded as an altogether more fundamental requirement (part of the irreducible minimum guaranteed by article 6) than any requirement for legal representation. Why, one wonders, is it not permissible for the ISA to be influenced by findings of fact made without the person concerned having legal representation and yet permissible for them to be influenced by findings of fact made by a partial body such as the school governors?

100. More troubling still, however, is the stark anomaly created by the decision below as between public sector and private sector authorities. X School happens to be a (small) voluntary aided school and thus a public authority. Were a similar

situation to arise, however, in a private school – which would require a precisely similar report to the ISA pursuant to section 35 of the 2006 Act – there could be no question of article 6 applying to the initial disciplinary process. What, then, would be the consequence of a private school acting as X School have acted here ie not allowing legal representation of their disciplinary proceedings? As I see it, G must be saying either that in those circumstances the identical overall process would be fair and involve no breach of article 6 (which would surely be absurd) or that the operation of the ISA scheme must itself in those circumstances necessarily involve a breach of article 6. But this would be effectively to stigmatise and condemn the whole ISA scheme – carefully devised as this has been to avoid the fatal defects in the previous scheme revealed in *R (Wright) v Secretary of State for Health* [2009] AC 739 – without any experience whatever of its workings in practice, making assumptions as to how the ISA would treat the findings of an employer's disciplinary panel which run counter to its own guidance (both published and internal), without argument being directed specifically to the compatibility of the ISA scheme with article 6 in such cases as are referred to it other than by public authority employers, and without even the Secretary of State being a party at first instance (albeit represented as an intervener before the Court of Appeal and, most helpfully, before us).

101. To my mind it is unthinkable that the ISA scheme should be implicitly condemned in this way. Rather it seems to me that for the purposes of the present challenge we should assume that the scheme is compatible with article 6 with regard to those cases referred to the ISA by non public authority employers and, indeed, by persons acting independently of employers. If, of course, a challenge comes in due course to be made to the operation or legality of the scheme in such a case – a challenge necessarily directed against the ISA (in so far as it is said that the scheme is not, but could be, operated lawfully) and/or the Secretary of State (in so far as it is said, as in *Wright*, that the scheme is inherently incompatible with article 6) – the court will have to decide it. In doing so, it will have to consider, amongst other issues, the "curative" or "full jurisdiction" principle to which Lord Dyson refers at paras 84 and 85 of his judgment. That challenge, however, I repeat, is not presently before us. If, then, we assume, as for present purposes I suggest we should, that the overall ISA scheme is article 6-compatible in respect of references from the private sector, I fail to see how the initial disciplinary process can be incompatible in the present case.

102. For these reasons, in addition to those given by Lord Dyson, I too would allow this appeal.

LORD KERR

103. For the reasons given by Lord Dyson, I agree that the Court of Appeal correctly identified the test to be applied on the nature of the connection that is required between various stages of a process in order to determine whether article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is engaged at a point in the process other than that at which the final decision is taken. The premise of the appellants' argument was that the decisive influence that the disciplinary hearing in this case had to have on the decision of the Independent Safeguarding Authority ("ISA") must be determinative if article 6 was to apply to that disciplinary hearing. In other words, for article 6 of ECHR to be in play, the decision on whether G's name was placed on the barred list must, the appellants suggested, be dictated by the outcome of the disciplinary proceedings. Lord Dyson's authoritative survey of the Strasbourg jurisprudence has effectively demonstrated the fallacy of that argument.

104. The centrepiece of the case made on behalf of both the appellant and the Secretary of State has therefore failed. What the majority of this court has decided, however, is that although the Court of Appeal correctly identified the test, it failed to apply it properly. In the main, this involves forming a different view on the facts (and the inferences to be drawn from them) from that reached by the Court of Appeal.

105. As Lord Dyson has said (at para 76) "ISA is expected to form its own assessment of the facts on the basis of all the available evidence" and (at para 79) "ISA is required to make its own findings of fact and bring its own independent judgment to bear as to their seriousness and significance before deciding whether it is appropriate to place the person on the barred list". The question that these statements raise is whether, because ISA must reach its own view as to whether the facts, as they have found them to be, are sufficient to support the conclusion that an individual should be placed on the barred list, insulates that process from substantial influence by the earlier disciplinary hearing. Supplying an answer to that question does not involve the application of principle. It is an exercise in deduction as to what is likely to happen when the case officers of ISA consider all the available information, *including the report on the disciplinary proceedings.* On that account alone, I have grave misgivings about the propriety of this court finding that the Court of Appeal was wrong to conclude that it was inevitable that the views of the disciplinary panel *and the report of the evidence given to it* were likely to have a substantial influence on the decision of ISA.

106. It appears to be implicit in the view of the majority that it would be improper for ISA to allow itself to be heavily influenced by the findings that emerged from the disciplinary proceedings. Regretfully, I cannot subscribe to that

view. It seems to me to be entirely open to ISA to pay close attention to the findings of the disciplinary tribunal and indeed to be substantially influenced by them, so long as it keeps faith with the requirement that it reach its own independent view of the facts. There is nothing in the least inconsistent with ISA arriving at its own conclusions while acknowledging, expressly or otherwise, that those conclusions have been heavily influenced by the findings of the disciplinary hearing and by what took place at that hearing. After all, details of the proceedings before the disciplinary panel will be before ISA. Indeed, of all the material considered by ISA, the notes of the hearing are likely to be of the most pivotal importance. Why should the findings of the panel and the account of the evidence given not have a substantial influence on ISA's conclusions? It seems to me to border on the perverse to suggest that they would not have such an influence. The conclusion that they would not hold substantial sway appears to be based on the requirement that ISA must reach its own independent judgment. But a judgment is not robbed of its independent quality simply because it has been heavily influenced by a particular item of evidence or by findings made by another body that considered that evidence.

107. Lord Hope has said that the two sets of proceedings (the internal disciplinary proceedings and what he describes as 'the barring proceedings') are not inextricably linked and that they are "directed to different issues" (para 87). This is of course true in the sense that they have a different objective – the first to decide what sanction, including dismissal, it is appropriate to impose and the second whether to include the respondent's name on the barred list. But both are most certainly concerned with the same factual matrix and the conclusions reached on the factual dispute between the principal protagonists are surely central to the outcome of both sets of proceedings. In those circumstances it seems to me that the conclusions reached by the disciplinary panel and the evidence given to the panel not only could but should have a substantial influence on the decision of ISA. Could it seriously be suggested that ISA would be entitled, for instance, to leave the findings of the disciplinary panel out of account? Of course not. By the same token, it is open to ISA to decide what weight it should give to those findings. In the absence of any other remotely adversarial proceeding in the entire process, it seems to me inevitable that the disciplinary hearing is bound to have a substantial influence – or, at least, that the Court of Appeal was perfectly entitled to come to the view that it did and that this court should not interfere with that conclusion.

108. Lord Hope has expressed confidence that the governors' view of the facts will have "receded far into the background" by the time that a decision is taken as to whether the respondent should be included in the barred list (para 92). I am afraid that I do not share that confidence. Of course, as Lord Hope has said, ISA is not limited in the sources of information to which it may have recourse in reaching its decision. But can it realistically be said that the record of the proceedings before the disciplinary panel will be of peripheral importance only? In this

connection, it is, I think, important to understand that it is not simply the conclusions of the governors that are in issue on the question of the potential of the disciplinary hearing to have a substantial influence on the findings of ISA. All of the material from that hearing which touches on the truth of the allegations made against the respondent is relevant and, for my part, I would find it surprising, indeed reprehensible, if the case workers of ISA did not pay the closest attention to that material in reaching their conclusions on the facts.

109. I have said that the hearing before the disciplinary panel is the only remotely adversarial stage of the entire process. Whether ISA has power to hold an oral hearing remains imponderable – see para 80 of Lord Dyson's judgment. What is clear is that it has not in the past held one and it may safely be assumed that it will not convene such a hearing in the present case. One must proceed on the basis, therefore, that the only occasion on which oral evidence was or will be given about the extremely serious allegations which form the case against the respondent both on the disciplinary proceedings and the barring proceedings is during the hearing before the panel. In fact, of course, this was not an adversarial proceeding in any real sense for the respondent did not put any questions to the witnesses who gave evidence against him and refused to answer any questions put to him (because he considered that the proceedings were unfair).

110. Lord Dyson has said that there must be very few cases where the lack of an oral hearing would make it unduly difficult for ISA to make findings of fact and that only in very few cases will the resolution of a conflict of evidence depend on the demeanour of witnesses (para 80). It would be wrong, in my opinion, to assume that the value of an oral hearing in a case such as the present is confined to the opportunity to observe the demeanour of witnesses. Just as legal representation at an early stage is critical to the safeguarding of an accused person's interests, so legal representation for someone such as G is vital at the early stage. Ex post facto contributions from a legal adviser necessarily suffer from the handicap that they must seek to displace adverse findings rather than have the chance to pre-emptively nullify them. Legal representation, if it is required in order to achieve an article 6 compliant process, is surely required where it can be deployed not only to best effect but also to achieve a real and effective contribution to the fairness of the proceedings. This is not confined to providing an effective challenge made to the case presented against the person who is the subject of the disciplinary proceedings. It includes advising that person on how to participate in the proceedings, as well as introducing relevant further evidence that may have a crucial impact on the forming of the first views on the factual issues. The present case exemplifies the point. The passive, not to say hostile, attitude of the respondent to the proceedings may well have played a crucial part in their outcome. The lack of an oral hearing before ISA may not, as Lord Dyson has suggested, make it unduly difficult for them to reach findings of fact but the result of the only oral hearing that has taken place in this case may well lead ISA to a

different conclusion on the factual dispute from that which would have been the product of a properly conducted disciplinary hearing in which the respondent, with the benefit of legal advice, had fully and meaningfully participated.

111. It has not been disputed that the decision of ISA involves the determination of G's civil right. The particular species of conduct alleged against him is at least capable of amounting to criminal activity. It is therefore beyond argument that article 6 of ECHR requires that he must at some stage of the process be entitled to legal representation if he wishes to have it. A fair determination of his civil right cannot take place without that vital ingredient, given the gravity of the allegations made against him and the seriousness of the consequences for him.

112. It is important not to concentrate unduly on the various stages of the process in isolation from each other. And it is certainly mistaken to focus exclusively on an individual stage in order to determine whether it by itself meets the requirements of article 6. The process overall must be fair. Although the actual determination takes places at the point when ISA decides whether to include the respondent on the list, the anterior stage of disciplinary proceedings cannot be left out of account in deciding whether the overall process is fair. That does not mean that one must import all the constituent rights of article 6(3)(c) into the disciplinary hearing part of the process. It does not even mean that article 6(1) requirements must be fulfilled for that part of the process considered in isolation from the rest. What it does mean is that the conduct of the disciplinary proceedings part of the process must be examined in order to assess what impact this has had, if any, on the overarching question whether the determination of the civil right, the product of the entire process, has fulfilled the requirement of fairness.

113. It is precisely because the disciplinary proceedings provide the only occasion when the competing cases can be presented in direct opposition to each other that legal advice at that point is so crucial. That is the critical time for the testing of the evidence – not merely by observing the demeanour of the witnesses (although that may play its part in the assessment of the reliability of the respective accounts) but by the probing of the allegations against the respondent and the evaluation of the plausibility of his defence to them. It is to be remembered that this young man faced extremely grave accusations. If those were found proved, quite apart from what I consider to be the virtually certain impact that they will have on the barring proceedings, they will place an irretrievable stain on his character and reputation. To recognise his right to be legally represented at that stage, although it may give rise to administrative difficulties for the conduct of disciplinary proceedings, seems to me to be entirely consonant with the proper safeguarding of his article 6 rights.

114. Lord Brown has said that a less than satisfactory feature of the Court of Appeal's decision is that while requiring school disciplinary panels to allow legal representation, it does not require them to be independent and impartial. But this is to assume that all the requirements of article 6 must be supplied at the disciplinary proceedings stage of the process. That is not so. The need for an impartial and independent tribunal can be met at the later stage of ISA's decision. At that point a wholly objective view can be formed not only of the panel's conclusions *but also of the evidence that the panel has heard.*

115. Of even greater concern to Lord Brown was what he perceived to be the anomaly that a public authority such as the school in the present case would be subject to the requirement to allow legal representation under article 6 whereas a private school would not be. In the latter case the appellant would have to argue (Lord Brown suggests) either that, despite its shortcomings, the overall process was fair (which, he says, would be absurd – and I agree) or that the ISA scheme as a whole must stand condemned as necessarily involving a breach of article 6.

116. Again with much regret, I find myself unable to agree with this analysis. Article 6 applies to the barring process, irrespective of whether the school is public or private. The critical question is whether, at the time the allegations against an individual are heard, he is entitled to legal representation. If he is entitled to that representation then, he must have it. Simply because a private school may assert that it is not subject to the Human Rights Act 1998 ("HRA") and that it is therefore not bound to comply with a teacher's article 6 rights, it cannot be right to relieve a public authority such as a publicly funded school of the obligations which it owes to a teacher under HRA and ECHR.

117. Quite apart from that, the requirement that a teaching assistant such as the respondent is legally represented at the time that allegations are presented in evidence against him does not necessitate the condemnation of the ISA scheme for inevitable breach of article 6. That scheme does not contemplate the holding of oral hearings. But it does not forbid them. An option available to ISA is to convene an oral hearing at which the person who is the subject of the barring proceedings may be legally represented. This may require a modification of the scheme as it is currently operated but better that than its wholesale condemnation. Moreover, if it is the position that, to comply with article 6, a person subject to barring proceedings should be legally represented when allegations against him are heard, it would be open to, indeed required of, ISA to disregard evidence given and findings made at proceedings where that prerequisite had not been fulfilled.

118. I consider, therefore, that this appeal should be dismissed and that it should be held that if evidence given and findings made at a disciplinary hearing are to be taken into account by ISA in deciding whether a person such as G should be

placed on a barred list, he should be legally represented at that disciplinary hearing.

119. For the reasons given by Laws LJ at paras 40-42 of his judgment, I do not consider that this is a case where deficiencies in compliance with article 6 at the disciplinary proceedings can be "cured" by the availability of a right to appeal to the Upper Tribunal. As Laws LJ said, the reasoning in the *Bryan* (*Bryan v United Kingdom* (1995) 21 EHRR 342) and *Alconbury* (*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295) line of cases, is concerned with the review by a judicial review court of an earlier administrative or executive decision: [2010] 1 WLR 2218, para 40. A lack of impartiality at that stage may be corrected when subject to later review by an impartial tribunal in the form of a court. Here the situation is quite different. The absence of legal representation at a critical time when vital evidence is given and crucial findings are made cannot be rescued by the type of appeal that is available to the Upper Tribunal.