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LEE AND OTHERS v. DEPARTMENT OF EDUCATION AND SCIENCE

QUEEN'S BENCH DIVISION

66 LGR 211

HEARING-DATES: 16 September 1967

16 September 1967

CATCHWORDS:

Education -- School -- Controlled voluntary school -- Articles of government -- Grammar school with selective entry system -- School in existence for 400 years -- Scheme to permit unusual type of comprehensive intake to school -- Application to Secretary of State for Education and Science to vary articles to enable scheme to operate -- Representations by "persons concerned with... government of the school" -- "Opportunity of making representations" -- Time for making representations limited to less than five days -- Whether reasonable -- Whether denial of statutory rights -- Education Act, 1944 (7 & 8 Geo. VI, c. 31), ss. 17(5), 76, 111.

HEADNOTE:

The Education Act, 1944, provides by section 17(5):

"Before making any order under (inter alia section 17(3)(b) for the articles of government of a voluntary school)... the Minister shall afford to... persons... concerned with the... government of the school an opportunity of making representations to him with regard thereto..." By section 111:

"Any order made... by the Minister... under... this Act may be varied... by a further order... Provided that where the power to make... any such order... is exercisable only... subject to any conditions, no order... shall be varied... except... subject to the like conditions..."

By the effects of the Ministers of the Crown (Transfer of Functions) Act, 1946, and the Secretary of State for Education and Science Order, 1964, the functions of the Minister became exercisable by the Secretary of State for Education and Science.

A grammar school in existence for over 400 years was maintained by a local education authority as a voluntary school and was governed by reference to articles of government made under section 17(3)(b) of the Education Act, 1944, the articles providing, inter alia, for the school to be maintained with an intake selected by reference to academic ability. Pursuant to a scheme first put forward on August 31, 1967, for permitting an unusual form of comprehensive intake to the school, and consequent on an injunction restraining the implementation of the scheme as not complying with the articles, a meeting of 14 out of a total of 18 school governors by a majority of eight to six on September

13, 1967, decided to apply, and application, supported by the local education authority, was made, to the Secretary of State to vary the articles, inter alia, by deleting the words requiring maintenance of the academic ability intake so as to permit the comprehensive intake. By letter dated September 14 the Department of Education and Science informed the governors that the Secretary of State proposed, in exercising his powers under sections 17 and 111 of the Act, to amend the articles and that representations, orally or in writing, should be made in time to reach the department "not later than 12 noon on Monday, September 18". The letter was not received by at least one of the governors who were away from home.

A governor, the parent of a boy, and an assistant master at the school jointly brought an action against the department for a declaration, inter alia, in effect that the time limited by the Secretary of State was insufficient. Ex concessiis, the "opportunity" of making representations required by section 17(5) and, accordingly, section 111, had to be real and not illusory.

Held, granting the declaration, that the time allowed was wholly unreasonable and amounted to a denial to persons named in section 17(5) of the Act of the rights conferred on them by it: bearing in mind that the scheme was first mentioned on August 31, that it went to the whole character of the school as it had been known for 400 years, that the governors or groups of them might wish to consult together and formulate a collective view on what was best for the school, and that it was the holiday period, a period of four weeks from September 14 would have been reasonable, but a shorter, or any substantially shorter period would not comply with section 17(5).

Per curiam. The class of persons to whom the Secretary of State is bound to give an opportunity to make representations is limited to those who have an active part to play in the government of the school.

INTRODUCTION:

ACTION.

Consequent on the decision in *Lee v. Enfield London Borough Council* (66 LGR 195), the governors of Enfield Grammar School, as the result of a majority decision and supported by the local education authority, applied to the Secretary of State for Education and Science to vary the school's articles of government. The relevant articles provided as follows:

"Article 9(1): The local education authority shall determine the general educational character of the school and its place in the local educational system and subject thereto the governors shall, in consultation with the headmaster, have the general direction of the conduct and curriculum of the school.

"Article 11: The arrangements for the admission of pupils to the school shall be such as may be agreed between the governors and the local education authority and shall take into account the wishes of the parents, any school records and other information which may be available, the general type of education most suitable for the particular pupil and the views of the headmaster as to the admission of the pupil to the school:

"Provided that the local education authority shall determine which candidates are qualified for admission by reason of their having attained a sufficient

educational standard".

The draft order of the Secretary of State for varying the articles provided:

"The articles... shall have effect with the following variations:

"(a) the insertion, after the words 'The local education authority shall' in article 9(1) thereof, of the words 'from time to time'; and

"(b) The omission from article 11 thereof of the words from 'any school records' to the end of the article..."

By a draft claim in a proposed action entitled Edgar Morton Lee (a governor of the school), Ronald Patrick St. John (father of a boy at the school) and Kenneth Owen Lane (an assistant master at the school) plaintiffs, and the Department of Education and Science and Her Majesty's Attorney General, defendants, the plaintiffs claimed in the following terms:

"A declaration that the Secretary of State for Education and Science before making an order under sections 17 and 111 of the Education Act, 1944, in respect of Enfield Grammar School has not afforded to persons concerned with the management or government of the school, including the headmaster and other members of the teaching staff of the school, parents of pupils presently attending the school, parents of other children within the parish of Enfield (who are intended by the scheme regulating the foundation of the school to be served thereby) and the foundation governors thereof, a proper and sufficient opportunity of making representations to him with respect thereto and sufficient time in which such representations may be made;

"And alternatively a declaration that the Secretary of State... is not entitled to make such an order... until he shall have afforded to the persons aforesaid proper and sufficient time and opportunity, as determined by this Honourable Court, to make representations as aforesaid and until he shall have had proper regard to all the circumstances of the school and in particular to the trust deed and to the manner in which the school has been conducted heretofore".

On September 16, on an undertaking by the plaintiffs to issue the writ in the action, Donaldson J. heard the action inter partes between the plaintiffs and the Enfield London Borough Council, and delivered judgment for the plaintiffs with costs.

On September 18 the writ was issued specially indorsed with the claim as drafted. On September 21, pursuant to the fiat of Master Elton dated September 20, the writ was amended by deleting Her Majesty's Attorney General from the title of the action on production of written consent.

The facts are stated in the judgment of Donaldson J.

COUNSEL:

GEOFFREY HOWE Q.C. and MICHAEL UNDERHILL for the plaintiffs.

NIGEL BRIDGE for the Department of Education and Science.

PANEL: Donaldson J.

JUDGMENTBY-1: DONALDSON J.

JUDGMENT-1:

DONALDSON J. As is now well known, there is some difference of opinion in the London Borough of Enfield as to whether, and how, and when, the local schools should be reorganised upon a comprehensive basis.

The problem has been considered by the courts on two previous occasions. On the first occasion it was objected that the scheme then proposed (which is not the same as the scheme currently under consideration) could not lawfully be implemented before certain notices had been given and the leave of the Secretary of State had been obtained. This objection was upheld and the Court of Appeal in *Bradbury v. Enfield London Borough Council*, [1967] 1 W.L.R. 1311, 66 LGR 115, made an order restraining the local education authority from putting their scheme into effect, so far as eight schools were concerned. The assent of the judgments of the Court of Appeal lay in their decision that a change in the age range admitted to a school, or a change from a boys' school to a girls' school or vice versa, constituted a failure to maintain the old school and the starting of a new school.

The local education authority then prepared a new scheme which was not open to these objections. However, the new scheme came before the Court in *Lee v. Enfield London Borough Council*, 66 LGR 195, because it was objected that in so far as it affected the Enfield Grammar School it contravened the school's articles of government. The basis of that contention was that the revised scheme provided for boys to be selected for admission to the grammar school without taking into account three matters which the articles of government required to be taken into account, namely: (1) the wishes of parents; (2) the records and other information which might be available or the related matter of the general type of education most suitable to the particular pupil; or (3) the views of the headmaster as to the admission of a pupil to the school.

In a judgment which I delivered last Wednesday in *Lee v. Enfield London Borough Council* (supra), I upheld that objection and said that the revised scheme could not lawfully be implemented unless and until the articles of government had been varied. {215}

The articles of government were made by the Minister of Education in January, 1956, under powers conferred by Parliament and contained in section 17 of the Education Act, 1944. By section 111 of that Act, Parliament gave the Minister power to vary such articles of government. The power is in each case exercisable subject to certain conditions designed no doubt to ensure that the Minister was fully informed before he made new articles of government or varied existing articles. The powers of the Minister of Education are now vested in the Secretary of State for Education and Science by virtue of section 3 of the Ministers of the Crown (Transfer of Functions) Act, 1946, and paragraph 3(2) of the Secretary of State for Education and Science Order, 1964 (S.I. 1964 No. 490).

I have mentioned those earlier applications to the court because I wished to show and to stress that at no time have the courts been concerned with the merits of this educational controversy. The duty of the courts - and it is one which they will never shirk - is to be vigilant to ensure that the government of this country, whether it be local or national, is conducted in accordance with

the will of Parliament - that is to say in accordance with the rule of law. The performance of that duty is vital to the maintenance of a democratic way of life. So long, however, as the rule of law is observed, the courts take no part in controversies of that nature, leaving them to be resolved through discussion, persuasion and the ballot box.

The present application, like the previous two, is based upon an allegation that the rule of law is not being observed. Once again the court is not concerned with the merits of what is proposed but solely with its legality.

The matter arises in this way. After my decision of Wednesday in *Lee v. Enfield London Borough Council* (supra) there was a meeting of the governing body of the Enfield Grammar School. I think it took place on the same night, that is to say the Wednesday evening. The governors decided by a small majority (eight votes to six) to apply to the Secretary of State to vary the articles of government. The variation which they proposed and which was supported by the local education authority is that which the Secretary of State is now considering. It is set out in a letter dated September 14 which was sent by hand to each governor and to the headmaster. It has not yet been received by one of the governors who is expected to return from abroad today, but it has been left at his home address. As to another governor, it was sent to his holiday address but it is not known whether he has received it.

The letter of September 14, addressed as I have said, is headed "Enfield Grammar School" and states: {216}

"I am directed by the Secretary of State for Education and Science to inform you that he proposes, in the exercise of his powers under sections 17 and 111 of the Education Act, 1944, to make an order amending articles 9(1) and 11 of the articles of government of this school".

I do not think I need set out those articles in this judgment. They are in fact set out in the judgment that I gave in this court on Wednesday in *Lee v. Enfield London Borough Council* (supra) at p. 195

"The terms of those articles are set out in enclosure A to this letter and a draft of the amending order is set out in enclosure B.

"The sections of the Act referred to above require the Secretary of State before making such an order to afford to the local education authority and to any other persons appearing to him to be concerned with the government of the school an opportunity of making representations to him with respect to the order. Representations with respect to this proposed order may be made to the Secretary of State orally or in writing or both orally and in writing. If you wish to make representations orally a meeting will be arranged at the department at any time during ordinary office hours tomorrow Friday September 15 or before 12 noon on Monday September 18. I should be glad if you would inform the department preferably by telephone on the above extension, as early as possible whether you wish to make oral representations so that a meeting convenient to all concerned can be arranged. Written representations should be made in time to reach the department not later than 12 noon on Monday, September 18".

Then a prepaid addressed envelope was enclosed.

The substance, of course, of the amendment, as is well known, was to delete those aspects of the articles of government which obliged the governors to

maintain the school as a school with an intake which was selected by reference to academic ability; in other words it is an alteration which, if made, would permit the school to have what is known as a comprehensive intake.

I am told that the Secretary of State will consider extending the time for making representations, if any governor or the headmaster asks him to do so and gives a reasoned explanation of why an extension of time is necessary. One of the governors, Councillor Mrs. Watson, did in fact send a telegram to the Secretary of State on September 14 which said simply this:

"Your letter September 14 Strongly protest against disgracefully short notice to make representations and appeal for more time".

The reply which was returned to that telegram on behalf of the Secretary of State was: {217}

"In reply to your telegram I regret that the Secretary of State is not prepared to extend the time within which representations may be made to him".

It is said by Mr. Bridge on behalf of the Secretary of State, of course, that Mrs. Watson gave no reasons why she wanted more time; and I think it is implicit in the instructions that he has from the Secretary of State, which have formed the basis of the statement he made to me, that had Mrs. Watson given detailed reasons which were acceptable to the Secretary of State she would have been allowed more time. Perhaps I may be permitted to say in passing that it is perhaps unfortunate that those who wrote the letter on behalf of the Secretary of State did not say to Councillor Mrs. Watson that if she would give some reasons why she wanted more time the matter would be considered. But that is how the matter stands; and of course I fully accept the assurance I have been given that had a reasoned request been made and had the reasons seemed sufficient to the Secretary of State he would have considered extending the time.

The Secretary of State's powers to vary the articles of government are derived from sections 17 and 111 of the Education Act, 1944; and perhaps it is right that I should set out the material parts of those sections.

Section 17 provides:

"(1) For every county school and for every voluntary school there shall be an instrument providing for the constitution of the body of managers or governors of the school in accordance with the provisions of this Act... and the instrument providing for the constitution of the body of governors of a secondary school is in this Act referred to as an instrument of government".

We are, of course, concerned with an instrument of government.

"(2) The instrument of management or the instrument of government, as the case may be, shall be made in the case of a county school by an order of the local education authority and in the case of a voluntary school by an order of the Minister.

"(3) Subject to the provisions of this Act and of any trust deed relating to the school... (b) every county secondary school and every voluntary secondary school"

this of course being a voluntary secondary school

"shall be conducted in accordance with articles of government made in the case of a county school by an order of the local education authority and approved by the Minister, and in the case of a voluntary school by an order of the Minister; and such articles shall in particular determine the functions to be exercised in relation to the school by the local education authority, the body of governors, and the head teacher respectively". {218}

I need not refer to subsection (4), which relates to trust deeds; but section 17(5) is crucial to this case, and provides:

"Before making any order under this section in respect of any school, the Minister shall afford to the local education authority and to any other persons appearing to him to be concerned with the management or government of the school an opportunity of making representations to him with respect thereto, and in making any such order the Minister shall have regard to all the circumstances of the school, and in particular to the question whether the school is, or is to be, a primary or secondary school, and, in the case of an existing school, shall have regard to the manner in which the school has been conducted theretofore".

Section 111 is a fairly short section, which provides that any order made by the Minister or by various other people under the provisions of the Act may be varied or revoked by a further order made by the Minister or the other authorities as the case may be, and has this important proviso:

"Provided that where the power to make... any such order... is exercisable only upon the application or with the consent of any person or body of persons, or after consultation with any person or body of persons, or otherwise subject to any conditions, no order... made... thereunder shall be varied or revoked except upon the like application, with the like consent, after the like consultation, or subject to the like conditions, as the case may be".

There is no disagreement between counsel appearing before me that the effect of section 111, as of section 17(5), is to give the same opportunity for making representations. The time may be different, but it is essential that the same opportunity for making representations must be given on the variation as on the original making of the articles of government.

The plaintiffs in this action (which for reasons of urgency has come on in rather odd order, in the sense that I am now giving judgment in an action in which there is an undertaking to issue the writ on Monday) are: Mr. Edgar Morton Lee, who is a foundation governor and old boy of the school; Mr. Ronald Patrick St. John, who is a parent of a boy at the school and also secretary of the Enfield Parents Joint Emergency Committee, which is a body which has been formed ad hoc to concern itself with the current controversy; and Mr. Kenneth Owen Lane, who I am told is an assistant master at Enfield Grammar School and has occupied that position for a number of years.

The plaintiffs make these contentions: first, they say that the Secretary of State, in varying the articles of government, is performing a quasi-judicial function and is bound to act in accordance with the {219} rules of natural justice: and they have elaborated that to some extent. Secondly, they say, that the class of persons concerned with the government of the school, within the meaning of section 17(5), is at least wide enough to include the parents of boys at the school and the parents of younger children who may be affected hereafter,

and they go so far as to say it may include the inhabitants of the parish of Enfield. Thirdly, they say, that the time allowed so far by the Secretary of State for representations has been far too short. Fourthly, they say, that the Secretary of State has or appears to have predetermined the issue of whether or not there should be a variation.

Mr. Bridge, for the Secretary of State, joins issue upon all these contentions. As to the class of persons dealt with in section 17(5), he says that it is limited to the governors and the headmaster only. He concedes - and it may be that this is an important concession; I will be corrected if I have it wrong but I understand him to concede - that the views of parents must be considered by the Secretary of State by force of section 76 of the Act, if and in so far as they are known to him; but he says that section 17(5) does not require the Secretary of State to give the parents an opportunity to make representations. It would follow, I suppose, from that concession that if parents chose to make representations and they came to the notice of the Secretary of State he would be bound to consider them.

I am not prepared to find that the Secretary of State has predetermined this issue of whether there shall be a variation of the articles. I am told by Mr. Bridge for the Secretary of State that he has not, and there is no evidence at all which in any way displaces that assurance that he gives me.

I am not prepared to determine whether the Secretary of State, in relation to a variation of articles of government, is acting in a quasi-judicial capacity, because I consider it unnecessary to decide precisely what those words mean and whether they are apt to describe the Secretary of State's functions in this respect. Those functions are in my judgment sufficiently clearly defined in section 17(5), provided that one reads into that section, as Mr. Bridge concedes that I should, an obligation to give a real and not an illusory opportunity to make representations.

I am not prepared to define exhaustively which are the classes of persons to whom the Secretary of State is bound to give an opportunity to make representations. The words in the section 17(5) are "concerned with", and I think they are much more restrictive than "concerned at" or "concerned by" or "interest in". I incline to the view that the class described is limited to those who have an active part to play in the government of the school. I am therefore prepared to assume that Mr. Bridge is right in his submission that in the case of this school {220} those who fall within the class are limited to the governors and the headmaster.

That leaves the question of time. Mr. Bridge says that the urgency of the matter is such that the time at present allowed is sufficient. He also says that the issue is a simple one and has been the subject of debate for a long time.

First of all, as to urgency. The urgency arises from two attempts by the local education authority to put into effect unlawful schemes which would have affected the school and their failure to admit boys to the school in accordance with the existing articles of government. By "the existing articles of government" I mean, of course, those which exist unless and until varied by the Secretary of State. Urgency undoubtedly exists - that is why we are all here today when we would not normally be here - but this urgency which arises in this way does not, in my judgment, justify any abridgement of the time which

legitimate objectors should have in which to formulate their objections.

Next, as to the simplicity of the issue. I agree that this issue can be simply stated, but I am not at all convinced that it is a matter upon which representations can be made with simplicity. The ramifications of it may be, and from what I have heard in the previous action probably are, very complex. What is currently under consideration, or indeed may be said to have been decided upon, subject to the Secretary of state making variations in the articles of government, is the transformation of this school into a three-form entry comprehensive school. As I made clear earlier on, contrary to what I said by inadvertence during the argument, it is only two weeks and not six weeks since that proposal first saw the light of day, and it is a proposal which is wholly different in kind, apart altogether from the details, from the original proposal, which was to turn this school into a comprehensive school serving an age group of 14 to 18 and having a seven-form entry.

I say it is wholly different because I found myself (as Mr. Bridge conceded I was entitled to do) not upon evidence which has been given in this action but upon evidence which was given in the last action, *Lee v. Enfield London Borough Council* (supra), and given by the chief education officer, who is also the clerk to the governors of Enfield Grammar School. He made it perfectly clear to me that a three-form comprehensive school is open to very grave objections if it is to be adopted as anything other than a temporary measure. There may be others, of course, who disagree with him and feel that it is a perfectly viable proposition. But at all events it is clear that there are very unusual features about what is now proposed, and no one other than those in the education office of the local education authority has had any opportunity of considering them before August 31 of this year. No {221} one, of course, outside the education office knew until Tuesday of this week that such objections as there might be to the scheme were wholly or partly supported by the chief education officer himself.

It is clear that those objections which relate solely to a three-form entry comprehensive school, or in so far as they do only relate to a three-form entry comprehensive school, may disappear when the Court of Appeal injunction in *Bradfield v. Enfield London Borough Council* (supra) is discharged - as it will be discharged - when the conditions which attach to it, which relate to the giving of notices and a decision by the Secretary of State, are fulfilled.

But in my judgment the time so far allowed by the Secretary of State is wholly unreasonable, in the circumstances of this case, and amounts to a denial to the persons named in section 17(5) of the rights conferred upon them by that subsection.

If I am asked to decide - and there have been times when I thought I was asked to decide this and times when I was not so sure about it - I should say that bearing in mind the fact that the scheme for a three-form entry was first mentioned on August 31, the fact that what is proposed goes to the whole character of the grammar school as it has been known for 400 years, the fact that the governors or groups of governors may wish to consult together and formulate a collective view as to what is best for the school, and, lastly, the fact that this is the holiday period - taking those factors into consideration, I consider that the period of four weeks from September 14 would be reasonable but that a shorter period, or at any rate any substantially shorter period, would not be reasonable and would not comply with section 17(5).

I was not impressed by the argument that that would keep the boys away from school. So far as I can ascertain, the school can go on as a selective school until the proper steps have been taken to change its character.

Now it is clear from what I have said that I do not accede in whole to either of the alternative forms of declaration which are sought in the draft or proposed writ, and it may be that it will be thought more convenient in this particular case to leave the question of settling what the actual form of declaration should be until counsel have had the opportunity of considering it. It does emerge from the judgment that it is entirely a question of paper work hereafter. I am quite ready to listen to argument about it, but I should have thought this was the most convenient way of dealing with the matter. {222}

DISPOSITION:

Declaration granted.

SOLICITORS:

Solicitors for the plaintiffs - Oswald Hickson, Collier & Co.

Solicitors for the Department of Education and Science - Treasury Solicitor.