

**GOVERNING BODY OF DAME ALICE OWENS
SCHOOL EX PARTE 'S', R v. [1997] EWHC Admin
928 (27th October, 1997)**

IN THE HIGH COURT OF JUSTICE CO/2843/97
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London W2A 2LL

Monday, 27th October 1997

B e f o r e

MR JUSTICE McCULLOUGH

REGINA

v.

GOVERNING BODY OF DAME ALICE OWENS SCHOOL

EX PARTE 'S'

(Transcript of the Handed-Down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD
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Official Shorthand Writers to the Court)

MR TIM KERR (instructed by Messrs David Levene, London N22 4HF) appeared on
behalf of the Applicant.

MR RABINDER SINGH (instructed by Messrs Peter Liell, Oxford OX4 1LR)
appeared on behalf of the Respondent.

J U D G M E N T
(As approved by the Court)

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1. MR JUSTICE McCULLOUGH: Dame Alice Owen's School at Potters Bar is a grant-maintained secondary school for boys and girls aged 11 to 18. In January 1997 Mr S was told that his application for his daughter S to be admitted to the school in September 1997 had been unsuccessful. S is aged 11. In any report of this case she must be referred to only as 'S'. Mr S's appeal against this decision was dismissed by the Governors' Admissions Appeal Committee in May 1997. Through him S now applies for judicial review of these decisions.

2. The arrangements for admitting pupils to the school had been determined by the school's governing body. These set out the policy to be followed in deciding admissions. It had published the particulars of these arrangements and of the relevant procedures. It had also made arrangements for appeals to an appeal committee against decisions taken in relation to the admission of pupils to the school and had published particulars of these. The governing body had fixed as the number of pupils of S's age group it intended to admit at 200. This was the admission number which had been approved by the Secretary of State. All this was as required by sections 425 and 426 of the Education Act 1996 and paragraphs 5 and 6 of the 23rd Schedule to the Act.

3. The published ADMISSIONS ARRANGEMENTS, paragraph 2, set out the ADMISSIONS CRITERIA as follows:

4. In considering applications for places at the school, the Governors will welcome applications from parents whose children are likely to make a full and committed contribution to the extra-curricular life of the school, and to benefit from the extensive additional facilities and opportunities provided by the Dame Alice Owen Foundation.

5. In the event of over-subscription, the Governors will apply the following criteria, in the order set out below, to decide which pupils to admit. ...

6. The Governors will seek to achieve the maintenance of the existing balance of ability within the school, and the preservation of the existing character of the school by admitting pupils on the following basis and in the following proportions:

7. Group A: 90 pupils. Group B: 90 pupils. Group C: Up to 20 pupils who will be admitted on the basis of proven ability in Music or Sport.

8. A Group A: Pupils will be required to take and pass the Governors' Entrance Examination and will be ranked in order of merit.

...

9. B Group B: Pupils admitted to Group B will be admitted in accordance with criteria 1 to 8 in order of priority as set out below:

1 Pupils whose brothers or sisters currently attend the school.

2 Pupils whose parents are currently employed at the school.

3 Pupils whose brothers or sisters previously attended the school.

4 Pupils whose parents previously attended the school.

5 Pupils with educational reasons for seeking admission other than reasons of academic ability or aptitude, particularly those whose parents are committed to mixed education.

6 ...

7 ...

8 ...

(In the event of over-subscription in any of the categories in Group B, the Governors will offer places to pupils on the basis of the proximity of the child's home to the school as measured by a straight line on a map.)

10. C Group C: Up to 20 pupils will be admitted on the basis of proven ability in MUSIC and/or SPORT. Candidates applying under this group will already have achieved a high standard in the subject area chosen.

11. MUSIC: The minimum standard required is a MERIT or DISTINCTION at Grade IV ... in at least one musical instrument. ...

12. SPORT: Pupils should be able to demonstrate outstanding ability in one or more sports taught at the school, with evidence of representation at District, County or National levels. Where appropriate National Governing Bodies of Sports Awards may be used in support of the application. References will be required from coaches or teachers or other recognised qualified persons, and the decision of the Head of Physical Education will be final.

13. Pupils admitted under Group C will not be required to sit the Governors' Entrance Examination. If the number of pupils admitted under Group C fails to reach the maximum, the places available will be offered to candidates applying under Group B criteria 1 to 8 in order of priority.

14. Parents may apply via Group A, Group B and Group C if they wish.

15. Paragraph 4, headed APPEALS PROCEDURE, states:

16. The Governors are not obliged to accept an application for admission to the school if:

- a. the child's admission to the school would be incompatible with the approved admission arrangements; or
- b. the child's admission would, in the opinion of the Governing Body, prejudice effective education or the efficient use of resources; or
- c ..

17. A document headed Group C Additional Information states:

....

18. Places awarded under Category C Sport will be limited to participants in team games in which the school competes. Pupils will, therefore, only be considered who excel in athletics, badminton, cricket, football, hockey, netball, rugby or tennis.

19. S's application was made on 14/10/96 under Group A, Group B category 5 and Group C. References were attached which attested her ability in 6 of the 8 school competitive sports. She did not come high enough in the Group A examination. She, with some 31 others, attended one of two sports trial on 4 and 11/11/96. On that occasion Mr ILJ Breeze, Head of Physical Education, told the candidates, though without authority, that 5 girls and 5 boys would be offered places. After the sports trials she was ranked 14th of those seeking entry under Group C Sport. On 25/11/96 she was one of 14 applicants interviewed by the Head Teacher, Mrs AT Williamson, and Mr Breeze, after which the final ranking order of the Sport applicants was decided by Mr Breeze. He put S11th.

20. The Admissions Committee met on 21/1/97. The 90 places in Group A were allocated to the first 90 in the examination. These 90 included some who had come high in the Music and Sport lists. This left 98 siblings (Group B category 1) who had not yet been given places. One of these was sufficiently high in the Music List to qualify for a Group C place. The Committee decided that, rather than exclude the 7 who lived furthest from the school, all of the remaining 97 would be admitted. This had the effect of reducing the Group C places from 20 to 13. 7 of these were then allocated for Music (one going to the pupil who was in the group of 98) and 6 for Sport. The division of 7:6 in favour of Music was because it was felt that, whereas the standard of Music applications was high, those for Sport were not as high as in the previous year. S, not being in the top 6 of those in the Sport list who had not yet been allocated places, was not offered one. The Committee further agreed that, if any in the Music or Sport lists turned down places, their vacancies would be offered, not to the

next applicant down the Music or Sport list, but to a Group B applicant. Over the following months, as offers were declined, this is what happened. 4 of the 7 offered Music places declined, as did 1 of the 6 offered Sport places. Thus, in September 1997, only 8 pupils in Group C joined the school. All applicants in Group B categories 2 and 3 were admitted, as were some in Group B category 4, according to the proximity criterion. Of the 200 new arrivals 90 were in Group A, 101 in Group B and 8 in Group C; the 200th came under a Statement of Special Educational Needs.

21. At Mr S's appeal hearing, which was on 14/5/97, he was represented by Mr DI Silas, a trainee solicitor. He submitted that the Admissions Committee had failed to apply the published Admissions Criteria, in particular by wrongly giving Group C places to applicants in Group B. This was a matter he had repeatedly been pressing in correspondence, but without success. His point was not addressed in the statement furnished by Mrs Williamson to the Appeal Committee in advance of the hearing. Its effect was simply to say that the school was both crowded and full and that to admit further pupils would prejudice the provision of effective education and the efficient use of resources. Nor was the point addressed by Mr G Randall, who presented the case for the school.

22. The Appeal Committee's decision was given by letter dated 16/5/97. This set out the decisions and reasons for them as follows:

- a. having carefully considered all the evidence which was presented to them, the committee concluded that all the available places in the relevant year group had been allocated in accordance with the Governors published criteria and admission procedures and that to admit your child would prejudice the provision of efficient education and the efficient use of resources; and
- b. they felt that the particular circumstances of your case were not sufficiently exceptional to outweigh the prejudice that would be caused to the school.

23. It is clear, from this letter and the affidavit from the chairman of the Appeal Committee, Mr HTD Marwood, that the Committee decided:

- (1) that the school was prospectively full for September 1997 (as was clearly so);
- (2) that further admissions (in the plural) would prejudice the provision of efficient education and the efficient use of resources;
- (3) that, on account of the large number of appeals before the committee (there were 47 appeals), only very exceptional circumstances would be sufficient to outweigh this prejudice;
- (4) that S's individual circumstances were not sufficiently strong to outweigh it;
- (5) that the school's admission criteria were clear and that the places had been allocated in accordance with them.

24. On behalf of Mr S, Mr Tim Kerr's principal submission is that both the Admissions Committee and the Appeal Committee were in error in thinking that the allocations had been made in accordance with the published criteria. In particular he relies on the sentence: 'If the number of pupils admitted under Group C fails to reach the maximum, the places available will be offered to candidates applying under Group B criteria 1 to 8 in order of priority.' The 'maximum' under Group C is 20. The sentence is there on account of the possibility that fewer than 20 applicants in Group C will be of the required standard. See the reference to the 'minimum standard' required in Music. Sporting ability is less easily measured; hence the need for Sport applicants to 'demonstrate outstanding ability'. It is only if the necessary standard or ability is not found in sufficient applicants that fewer than 20 places need be allocated to Group C applicants. It is clear that this is not what happened: the Admissions Committee decided - before even considering Group C - that it wanted to take all 97 of the siblings who had not secured a place under group A plus the single sibling who would clearly qualify for a Music place in Group C. That required Group B to be expanded to 97; that was why the Group C places to be offered fell initially from 20 to 13.

25. On behalf of the school committees, Mr Rabinder Singh, first draws attention to the sentence, 'The Governors will seek to achieve the maintenance of the existing balance of ability within the school, and the preservation of the existing character of the school by admitting pupils on the following basis and in the following proportions: Group A: 90 pupils. Group B: 90 pupils. Group C: Up to 20 pupils ...' This, he submits, is a statement that the Governors will merely 'seek to achieve' the admission of the stated numbers in each group; if 'the existing balance of ability' cannot be maintained or 'the existing character of the school' preserved by admitting the stated numbers, the Governors will adjust them as they think necessary to achieve those aims. I do not accept this submission. In my judgment, the sentence explains the aim behind the decision to admit the numbers stated for each group; it is not a statement that the numbers may be altered - other, of course, than as specifically provided for later in the Admissions Criteria.

26. Mr Rabinder Singh relies also on the words 'up to', appearing, as they do, before '20' and on the statement, 'If the number of pupils admitted under Group C fails to reach the maximum, the places will be offered to candidates applying under group B ...'. These, he says, give a further indication that the Governors do not undertake to admit as many as 20 applicants in Group C. I agree, but I do not accept his further submission that they may admit less than 20 for any reason other than want of that number of sufficiently able candidates. Reading the criteria as a whole, and recognising that they are addressed to, and to be applied by, not lawyers but lay people - parents and school governors, I am in no doubt that, as Mr Kerr submits, the sole reason for calling 20 the maximum is to guard against the possibility that fewer than 20 applicants in Group C should prove to be of the required standard.

27. I should also refer to a letter from the Department for Education and Employment to Mr S dated 25/7/97, to which Mr Rabinder Singh drew attention and which included the sentences 'As I have explained to you when we spoke, we are not entirely comfortable with the lack of clarity in the category C criteria or with such subjective judgments. But we cannot conclude that the school acted unlawfully either over the number of places offered to category C candidates or in the manner in which the judgments were made.' This opinion was, as the letter shows, based on the understanding that it was then - which it is not now - the school's contention that they did not have 20 applicants of the required outstanding ability.

28. The wording of the sentence, 'If the number of pupils admitted under Group C fails to reach the maximum, the places available will be offered to candidates applying under Group B criteria 1 to 8 in order of priority.' shows that the merits of the Group C applicants must be considered before any additional offers can be made to Group B applicants. The order in which the criteria are to be applied is: A, B, C, and, in the event that there are insufficient Group C candidates of the necessary ability, so that there is a shortfall in the group C places offered, B again.

29. On account of their misinterpretation of the criteria, both the decision of the Admissions Committee and that of the Appeal Committee were taken unlawfully. Unlawful too, and for the same reasons, was the Admissions Committee's further decision that, if any offered places for Music or Sport declined their offers, the vacancies would be offered to a Group B applicant, rather than to the next Music or Sport candidate of the necessary ability down the list.

30. What effect did this error have on S? She ranked 11th of those who had applied for a Sport place. The criteria do not say that there will be up to 10 places for Music and up to 10 for Sport, merely up to 20 for the two. This would allow for the admission of say, 11 Music candidates of the required standard and only 9 Sport applicants if no more than those 9 were suitably qualified. And it may well allow for the admission of unequal numbers of suitably qualified candidates if the quality of one group differs materially from that of the other. In S's year the Music applicants were assessed as being of higher quality than those for Sport. That is why, of the 13 places offered, the inevitably uneven split favoured Music, which got 7 and Sport 6. The difference, however, was no greater than made necessary by the fact that 13 was an odd number. A pointer towards a practice of admitting 10 suitably able candidates in each category is found in the minutes of the meeting of the Admissions Committee on 2/6/97, when the interpretation of the Group C criteria and the possibility of deleting the '10 places for sport' were discussed. There is no evidence that the split between Music and Sport had previously ever been other than even.

31. On the question of the quality of the Sport applicants in S's year, Mr Kerr relies on what Mr Breeze said at the end of the sports trials, namely that 5 boys and 5 girls would be offered places. Even though he had no authority to say so, the fact that he said it is an indication that he thought that there were at least 5 boys and 5 girls who would, after the interview stage, be regarded as being of the requisite standard. Further, despite the understanding of the writer of the Department's letter of 25/7/97, the Governors do not in these proceedings assert that there were less than 10 suitably qualified Sport applicants or indeed that S, lying 11th, was not of this standard.

32. For these reasons Mr Kerr submits that there can be little doubt that, but for the Admissions Committee's error of approach, there would have been 10 places for Sport, despite the view that the Music candidates were of generally higher quality. On the basis of a 10:10 division S would not initially have been offered a place, but it is a reasonable inference that, when the one of the 6 who was offered a place declined, she would have been substituted.

33. Mr Rabinder Singh submits that there is no evidence that S suffered as a consequence of the mistakes that were made; the most that one could say was that she lost an unquantifiable chance. First, he says, that, had 20 places been made available for Group C, there is no certainty that there would have been 10 for Sport. I agree, but I regard it as highly likely that there would have been. Next, he submits, that it does not follow from the criteria that, if a candidate offered a Group C place drops out, the vacancy must be offered to another Group C candidate; so, even if 10 offers for Sport were made, when one dropped out, the vacancy need not have been made to another applicant in Group C. For this he relies on the word 'admitted' in the sentence, 'If the number of pupils admitted under Group C fails to reach the maximum, the places available will be offered to candidates applying under Group B criteria 1 to 8 in order of priority.' I do not accept this; it would contradict what I take to be the clear meaning of the criteria as a whole, namely that, provided there are at least 20 suitably qualified candidates in Group C, 20 will be admitted. I do, however, accept the possibility, though on the evidence I regard it as so slight as to be almost of no consequence, that the split might have been 11:9 in favour of Music, in which case, in addition to the one of the first 6 who declined, one of those ranked 7th, 8th, 9th or 10th would also have had to drop out before S was offered a place. As to the likelihood of this there is no evidence; all that can be said is that if any of these candidates had appealed, one might have expected the fact to appear in one of the respondents' affidavits.

34. A further submission of Mr Rabinder Singh's is that, since all that is under challenge are the decisions of the two committees, the court can look only at the position as it was when the decisions were taken, and at that stage S would not have been made an offer. I do not accept this either. There is no reason why the court should not look at the consequences of this unlawfully taken decision as they have

transpired. If, as is clear, S, as a result, lost, at the least, a good chance of an offer after one or more others dropped out, that is enough to found a grant of relief.

35. The Appeals Procedure for the school does not state when an appeal is to be allowed and a child admitted. Nor does paragraph 6 of Schedule 23 to the Act require this. It merely says that '... provision as to the arrangements for appeals ...' must be made. In the case of Dame Alice Owen's school, the Admissions Arrangements say no more that is material than that the Governors are not obliged to accept an application for admission to the school if:

- a. the child's admission to the school would be incompatible with the approved admission arrangements; or
- b. the child's admission would, in the opinion of the Governing Body, prejudice effective education or the efficient use of resources.

36. An appeals committee and the parent of a child who has been refused a place - even one who clearly should have been offered a place - are in a difficult position. By the time the appeal is heard that place has been offered to, and may well have been accepted, by another. To an extent the difficulty might be lessened by keeping vacant the places of those who decline offers until all appeals have been considered. That did not happen here: by May 1997 the school was prospectively full for the following September. While it might, in some circumstances, be possible to admit one or two successful appellants, clearly the school could not physically accommodate, say, another 20. Hence paragraph b above.

37. The position which has been reached in S's case is this. It is very likely that she would have been offered a place had the error of approach not been made. On that basis her admission would not have been incompatible with the admission arrangements. The Appeal Committee, however, also found against her on paragraph b. There were two aspects of this second decision: the effect of admitting her on the school and, secondly, her own individual circumstances, which they held were not sufficiently strong to outweigh the prejudice to the school.

38. That balancing exercise was, of course, flawed, because it proceeded on the false basis that the Admissions Committee, in reducing the number of Group C places to accommodate 7 extra Group B siblings, acted lawfully. Had it not done so S would have been top of the reserves. That was a considerable further factor of prejudice that the Appeal Committee ignored.

39. This must lead, submits Mr Kerr to an order to quash the decision of the Appeal Committee, leaving it to a differently constituted Appeal Committee to consider S's appeal afresh.

40. Mr Rabinder Singh submits that this would be prejudicial to other children. First, there is the fact that the school is full and overcrowded. Second, fairness requires that the position of the other unsuccessful Sport applicants be considered along with S's and this is impracticable.

41. I do not accept that either of his arguments provides a reason to refuse relief. A reconsideration of S's case will not require that every other, or indeed any other, unsuccessful candidate's position be reconsidered. There is no evidence that any of the 7th, 8th, 9th and 10th Sport candidates appealed. Unless they now sought, and were allowed, to do so, S's case will stand to be considered on its own. To allow her appeal on a reconsideration would not require consideration to be given to the consequences of having another 10 or 15 pupils in her year, or even another two. There have been 201 pupils in the first year before, and I see nothing in the evidence to suggest that, were the decision to be taken again, it would inevitably be that 201 would prejudice effective education or the efficient use of resources, or, which is more important, that the prejudice to S was not sufficient to outweigh the prejudice to the school. On the contrary, Mr R Pryor, a governor for the last 20 years and since 10/96 their Chairman, states, 'I do not claim that the admission of one or two extra pupils would cause an instant deterioration of our educational standards, but I am sure that the restrictions imposed by our limited accommodation and fixed staff number would mean that increasing the number of admissions to any greater extent would have a disproportionately adverse effect.' If it should be that other appeals are also heard, the fact of their existence would be a factor for the Appeal Committee to take into account together with all other material considerations.

42. I have taken into account what Mr Rabinder Singh has said about delay, and I have considered R v London Borough of Redbridge ex p G 1991 COD 398, but I am not persuaded that for this or any other reason Mr S should be deprived of the relief he seeks. The decision of the Appeal Committee is quashed. There being a right of appeal to that Committee it is unnecessary to quash the decision of the Admissions Committee as well.

43. MR JUSTICE McCULLOUGH: I am sorry to keep everybody, but a certain amount of time has been saved. The decision of the Appeal Committee is quashed for the reasons set out in the judgment now handed down. It may need a little tidying up.

44. MR KARR: I apply for the costs of the application.

45. MR SINGH: I do not resist that.

MR JUSTICE McCULLOUGH: Right.

46. MR KARR: I need legal aid taxation.

MR JUSTICE McCULLOUGH: Yes.

47. MR SINGH: Can I mention one thing, given your Lordship's order? Obviously, it will be in everyone's interests if the Appeal Committee can reconvene as soon as possible. With that in mind, those instructing me have asked whether your Lordship would be minded to direct that a transcript -- I am sorry, my Lord. I do not need to make that application, my Lord. I do wonder if the official transcript could be made available as soon as possible.

48. MR JUSTICE McCULLOUGH: Yes. What actually happens, as you probably know, is I provide a copy on disk and the court reporter usually just prints that. The spacing is generally changed. Sometimes I check it in order to see if it has been changed. If it has not, I then know that there is nothing I need correct.

49. MR SINGH: I am grateful. What those instructing me say is they would wish to meet as soon as possible. They were wondering if the transcript could be made available in the week beginning 10th November.

50. MR JUSTICE McCULLOUGH: Obviously the sooner the better. I can provide a disk this afternoon----

51. MR SINGH: I think that would help.

52. MR JUSTICE McCULLOUGH: -- if that is desired.

MR SINGH: I am grateful.

53. MR KARR: May I mention that your Lordship has ordered that the decision of the Appeal Committee be quashed. I am content on the basis of that not to seek further relief. I refrain from doing so, so that the Appeal Committee----

54. MR JUSTICE McCULLOUGH: I think it is rather unnecessary to say that it is quashed. They understand they have to do it again. I do not think it necessary to say "and in addition I order you to do it again". I would not expect to have to say that to the governors of the school.

55. MR SINGH: That is going to happen, my Lord. As I say, my Lord, it will be freshly constituted.

MR JUSTICE McCULLOUGH: Right.

56. MR KARR: We are grateful to your Lordship.

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