Trinity Term
[2010] UKSC 33
On appeal from: [2008] EWCA Civ 364

JUDGMENT

A (Appellant) *v* Essex County Council (Respondent)

before

Lord Phillips, President
Lady Hale
Lord Brown
Lord Kerr
Lord Clarke

JUDGMENT GIVEN ON

14 July 2010

Heard on 24 and 25 March 2010

Appellant
Nicholas Bowen QC
Shu Shin Luh
Duncan Fairgrieve
(Instructed by Children's Legal Centre)

Respondent
Edward Faulks QC
Andrew Warnock

(Instructed by Weightmans)

Intervener (The National Autistic Society)
Ian Wise QC
Stephen Broach
(Instructed by Clifford Chance LLP)

LORD CLARKE

Introduction

1. This appeal concerns the scope and content of the right to education under Article 2 of Protocol 1 ('A2P1') of the European Convention on Human Rights ('the Convention').

2. A was born on 3 July 1989 and is now 21 years of age. At the time the relevant events occurred, between January 2002 and July 2003, he was 12 and 13 years of age. His problems during that period can be summarised in this way. He was autistic and had serious learning difficulties and a severe communication disorder. His behaviour was challenging. He suffered from epilepsy, frequently having 10 to 15 short epileptic fits a day despite medication. He was doubly incontinent, had no concept of danger and required constant supervision. He was dependant upon adults for every need.

3. A claims damages against the respondent ('Essex') as the local authority with statutory responsibility to assess and provide for his educational and social welfare needs. He does not claim damages for breach of a duty of care owed to him at common law or for breach of statutory duty. Nor is his claim otherwise based upon any public law duty imposed on Essex by the Education Act 1996. His claim is put solely under the Human Rights Act 1998 ('the HRA'). In short, his case is that in the period between January 2002 and July 2003, when he lived at home with his parents and three siblings, he was not at school and he was not provided with any significant education of any other kind such that he was deprived of even the minimum education to which he was entitled under A2P1. It is submitted that Essex acted in a way that was incompatible with his rights under A2P1 and thus unlawful under section 6(1) of the HRA; that he is a victim and entitled to bring proceedings against Essex under section 7(1); and that it would be just and appropriate for the court to award damages against Essex under section 8(1) because such an award is necessary to afford him just satisfaction within the meaning of section 8(3).

4. A issued these proceedings on 5 May 2005. Essex sought an order that the claim be dismissed under CPR 24 on the basis that it had no real prospect of success. On 13 July 2007 Field J ('the judge') granted the application and dismissed the claim: see [2007] EWHC 1652 (QB). He also refused an application on behalf of A to extend the period of one year provided for in section 7(5) of the HRA. He refused permission to appeal. Three similar applications were heard by

the judge in other actions at the same time. He reached the same conclusion in each. None of those is the subject of this appeal. A appealed to the Court of Appeal with the permission of that court. The appeal was dismissed on 16 April 2008: see [2008] EWCA Civ 364. The court upheld the decision of the judge that the claim had no real prospect of success and did not consider the limitation point. The only substantive judgment was given by Sedley LJ, with whom Ward and Hughes LJJ agreed. The Court of Appeal refused permission to appeal to this court. This court subsequently granted permission to appeal.

The statutory framework

5. A2P1 is entitled "Right to education" and provides:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The critical part of A2P1 is the first sentence. A's case is in essence, as Sedley LJ put it at para 3, that, for want of even minimally suitable provision for his education, he was shut out of the state system for 18 or 19 months.

6. The principal domestic statute is the Education Act 1996 ('the 1996 Act'), which replaced and re-enacted the Education Act 1993, which in turn replaced and re-enacted the Education Act 1981. The relevant legislation governing special educational needs at the relevant time is summarised in paras 3 to 12 of the judgment of the judge, which (with very slight variations) are set out in the Appendix to this judgment.

7. As appears in the Appendix, in A's case Essex were subject to two particular statutory duties: first, a duty under section 324 to make and maintain a Statement of Special Educational Needs and to arrange that the special educational provisions specified in it were made for him; and secondly, a duty under section 19 to make arrangements for the provision of suitable education either at school or otherwise than at school on the basis that, by reason of his illness, exclusion from school or otherwise, he would not receive suitable education unless such arrangements were made for him. However, as I have already said, A does not rely upon a breach of these duties as giving him a cause of action against Essex. He relies only upon A2P1.

The legal principles

8. The critical provision is the first sentence of A2P1, which provides that "No person shall be denied the right to education". It is not in dispute that that provision confers a right upon everyone. The right has been considered in a number of cases. The most important of them is *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363.

9. The issue in the *Lord Grey School* case was not the same as the issue here because the facts were very different. The dispute was between the claimant and the school which had excluded him. While excluded, the pupil was regularly provided with school work and was offered a place at a pupil referral unit which was rejected. He remained out of education for 10 months. By a majority, Baroness Hale dissenting, the House of Lords rejected the submission that there was a breach of A2P1 on the ground that an alternative package of education was on offer and not taken up. Those differences do not in my view affect the legal principles set out by Lord Bingham at para 24 as follows:

> "The Strasbourg jurisprudence, summarised above in paras 11-13, makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil (as in *Eren v Turkey* (Application No 60856/00) (unreported) 7 February 2006). The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils? In this case, attention must be focused on the school, as the only public authority the respondent sued, and (for reasons already given) on the period from 7 June 2001 to 20 January 2002."

Lord Bingham then said that the question, therefore, was whether, between those dates, the school denied the pupil effective access to such educational facilities as the country provides.

10. There was some discussion in the course of the argument as to the significance, if any, of the fact that, unique among the Articles in the Convention, the right contained in the first sentence of A2P1 is expressed in negative terms. It was submitted on behalf of A that there is no significance in the negative formulation and that the right to education is an important positive right. By contrast, it was submitted on behalf of Essex that the negative formulation was deliberate and underlines the fact that the Convention does not contain an absolute right to education and, in particular, unlike some other human rights instruments, does not confer social and economic rights. In my opinion, the point is clearly and sufficiently addressed by Lord Bingham in para 24 of the *Lord Grey School* case quoted above and there is no need to embellish his analysis. It is an approach which is entirely consistent with that of the European Court of Human Rights ('ECtHR'), namely that any limitations on the right must not curtail it "to such an extent as to impair its very essence and deprive it of its effectiveness": *Leyla Şahin v Turkey* (2005) 44 EHRR 99, at para 154.

11. Some reliance was placed upon the recent decision of the Grand Chamber of the ECtHR in *Oršuš v Croatia (Application no 15766/03)* delivered on 16 March 2010. As I read it, the case does not advance the above analysis. It was concerned with the schooling arrangements of Roma children in Croatia. It recognised that Croatia had a margin of appreciation but held (at para 182) that the State must have sufficient regard to the special needs of Roma children as members of a disadvantaged group. It held (at paras 185 and 186) that Croatia had violated their rights under Article 14 taken together with A2P1 and that it was not necessary to examine the complaint under A2P1 standing alone.

12. In short, in my opinion Lord Bingham's para 24 sets out the relevant legal principles for present purposes. Save to a very limited extent, I do not think that it is necessary for me to refer further to the Strasbourg cases because Lord Bingham has summarised them and his summary is set out by Lord Kerr. It was suggested in the course of the argument that there was a difference or, as Sedley LJ put it at his para 13, a possible tension between the analysis of Lord Bingham and that of Lord Hoffmann in the *Lord Grey School* case. I do not accept that that is so. Lord Nicholls and Lord Scott both agreed that the appeal should be allowed for the reasons given by Lord Bingham. Baroness Hale took a different view of the facts of the case but, as I read her speech, she did not disagree with the principles stated by Lord Bingham.

13. What then of Lord Hoffmann? He concluded his judgment by saying that for the reasons he had given and those given by Lord Bingham he would allow the appeal. So the ground for a suggestion that they were applying different principles does not seem to be fertile. With the possible exception of two points, it appears to me that Lord Hoffmann was saying precisely the same as Lord Bingham. Thus he stressed at para 57 that the question to ask is whether the pupil has been denied the basic minimum of education under the domestic system. He had said both in para 56 and earlier in para 57 that there is no right to be educated in a particular institution. He was principally concerned to reject the submission that, if a failure to provide education was a breach of domestic law, it was necessarily a breach of A2P1: see paras 60 and 61.

14. The two points are these. In para 56 he said that everyone is no doubt entitled to be educated to a minimum standard and referred to *R (Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359 at 1367. And in para 61 he rejected the suggestion that it was legitimate to promote the public law duty of the school, not giving rise to a private law action, to a duty under section 6 of the HRA remediable by a claim in damages. He added that the question to ask was whether there was a denial of a Convention right, which would have required "a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education".

15. As I see it, the critical point in all the speeches is that under A2P1 of the Convention a person is not entitled to some minimum level of education judged by some objective standard and without regard to the system in the particular State. The question is that posed by Lord Bingham, namely whether the pupil was denied effective access to such educational facilities as the country provides. As Lord Hoffmann stressed, that is not the same question as the question whether the relevant authority was in breach of a duty imposed by domestic law, as for example by failing, in breach of section 324 of the 1996 Act, to comply with educational provisions set out in an SSEN.

16. The question is then whether the pupil has been denied effective access to the system in place. That question will only be answered in the affirmative where his right to education has been so reduced as to "impair its very essence and deprive it of its effectiveness". Lord Hoffmann's reference to systemic failure must be viewed in the context of the education system provided. So too must the decision and reasoning in *Holub*, in which Tuckey LJ gave the judgment of the court, which also comprised Schiemann LJ and Sir Swinton Thomas. The question in the part of the appeal in *Holub* which is relevant for present purposes was whether the A2P1 rights of the applicants' daughter would be infringed if she were returned to Poland and thus not educated in the United Kingdom. The court held that they would not.

17. In the course of the judgment Tuckey LJ referred (at para 23) to *X v UK* (1980) 23 DR 228, where the Commission accepted the interpretation of the ECtHR in the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 at 281-283, which it summarised as follows:

> "The negative formulation of the right indicates that the contracting parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. … There never was, nor is now, therefore any question of requiring each state to establish a system (of general and official education) but merely of guaranteeing to persons subject to the jurisdiction of the contracting parties the right, in principle, to avail themselves of the means of instruction existing at a given time. The Convention lays down no specific obligations concerning the extent of those means and the manner of their organisation or subsidisation. … The first sentence of article 2 of the Protocol consequently guarantees in the first place, the right of access to educational institutions existing at a given time. This right requires, however, regulation by the state 'regulation which may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention.'"

18. Those principles are the same as those summarised in para 24 of Lord Bingham's speech in the *Lord Grey School* case. However in *Holub* at paras 24 and 25 the Court of Appeal accepted a submission made by counsel that if the right was to have any content it should at least encompass the provision of an effective education. In doing so, it accepted the following passages from what is now the third edition (2009) of *Human Rights Law and Practice* by Lester, Pannick and Herberg:

> "4.20.4 The general right to education comprises four separate rights (none of which is absolute):
>
> (i) a right of access to such educational establishments as exist;
>
> (ii) a right to an effective (but not the most effective possible) education;
>
> (iii) a right to official recognition of academic qualifications.
>
> ….

> 4.20.6 As regards the right to an effective education, for the right to education to be meaningful the quality of the education must reach a minimum standard."

19. It is important to note that the authors are careful to say in that summary that none of the rights identified is absolute. Much of A's case is designed to support a submission that his right to a minimum standard of education is absolute. I would not accept that submission. I do not think that the court in *Holub* can have meant that there must be a minimum standard of education regardless of the system in place in a State Party to the Convention. Such a conclusion would be inconsistent with the reasoning in the *Belgian Linguistic Case (No 2)*. The minimum standard must have regard to the system in place. The examples given by Lester, Pannick and Herberg seem to me to make that clear. Thus the note to para 4.20.4(ii) simply says that in *Eren v Turkey* (2006) 44 EHRR 619 the annulment of a student's examination results, which resulted in his being denied access to university, was held to violate A2P1. And in the note to para 4.20.6 the authors refer to para 5 of the *Belgian Linguistic Case (No 2)*:

> "the right to education would be meaningless if it did not imply in favour of its beneficiaries the right to be educated in the national language or in one of the national languages, as the case may be."

Reference was also made to *Cyprus v Turkey* (2001) 11 BHRC 45, where it was held that the abolition by the Turkish authorities of the Greek language secondary schools in Northern Cyprus constituted a breach of A2P1.

20. In my opinion none of those cases is of assistance in the present case. The correct approach is that identified by Lord Bingham at para 24 of the *Lord Grey School Case* quoted above and the question for decision which he formulated, as applied to this case, is whether A was denied effective access to such educational facilities as the State provides for such pupils. A was only denied effective access if he was deprived of the very essence of the right.

21. As I see it, the answer to that question must be given by reference to all the relevant circumstances of the case. In the instant case, as appears below, A could no longer continue at the school he was at. Given his very considerable problems, it was necessary for a proper analysis to be carried out as to what was best for him. It is inevitable that in a case of this kind there may be delays and interim measures may be difficult to put in place. As Lord Bingham put it, the test, as always under the Convention, is a pragmatic one to be applied to the specific facts of the case. Was A deprived of effective access to such educational facilities as the State provided for pupils like him? One of the real problems is that there are very few, if

any, pupils like A and it seems to me that that is a factor which can fairly be taken into account before it is held that Essex infringed A's rights under the Convention. It is important to appreciate, however, that the question in this appeal is not whether Essex infringed A's rights but whether he has a real prospect of establishing such an infringement at a trial.

22. It is also important to appreciate that that is not the same question as the question whether it is arguable that Essex could have done better or that Essex was in some way at fault in not doing more than it did in the interim period between January 2002 and July 2003, when a residential school was ultimately found to suit A's needs. I recognise that there has been no trial of A's allegations but, if the position is that, taking the facts at their highest from A's point of view, his case that Essex infringed his rights under A2P1 cannot succeed, it follows that his claim has no real prospect of success and the appeal must be dismissed.

The facts

23. The relevant facts were set out by the judge and, as so set out, were incorporated into Sedley LJ's judgment. The parties agreed a Statement of Facts and Issues. However, shortly before the hearing of this appeal those advising A produced further factual material upon which reliance was placed. Some of that material was disclosed to them recently and it was submitted that the court should have regard to it because it will or would be available at a trial and the question for the court at this stage is simply whether A has a real prospect of success at a trial. This position is far from satisfactory because the whole purpose of an agreed statement of facts and issues is that the parties should prepare and reach agreement on such a document well in advance of the appeal. However, I propose to have regard to the agreed statement as supplemented by the further material.

24. Essex maintains a community special day school for children with severe learning difficulties called LS School ('LS'). Pursuant to section 324 of the 1996 Act, Essex made and maintained an SSEN for A and named LS in Part IV. It was originally issued on 1 July 1993. A accordingly began his statutory schooling at LS in 1995. In about May 2001, when he was approaching his 12th birthday his behaviour started to deteriorate. As part of the Annual Review process the school reported concerns about the unpredictability of his behaviour and asked Essex for more resources to cope with him. Concerns were expressed by the school, not only about his behaviour, but also about its ability to manage it. In a letter dated 17 September 2001, after observing A at school at lunch time, a consultant paediatrician said that he required two adults to hold him but that, in spite of that, he would lash out and bite or scratch those assisting him. The teacher had told him that he was running out of ideas as to how to control A. In November 2001 the SSEN was amended but LS remained the school named in Part IV.

25. A's behaviour deteriorated further and on 17 January 2002 A's parents were invited to and attended a meeting with representatives both from the school and from Essex and with his community consultant paediatrician to discuss his placement. His parents were advised that the school could not cope with him and that his continued presence in class posed a risk to the health and safety of other pupils. The school felt that his underlying medical and psychiatric problems needed to be addressed satisfactorily before he would be able to benefit from the education it provided. His parents were asked not to bring him into school for health and safety reasons until an urgent medical assessment in a hospital setting was carried out. They agreed, no doubt because they felt that they had no alternative. The position was confirmed in a letter from the head teacher dated 18 January in which he assured A's parents that the medical, educational and social services would continue to work together to find a solution for A. The letter expressly said that he would be in contact with them to arrange some home support while A was off school.

26. The intention of the professionals, including the school, was for A to receive an urgent medical assessment at the National Centre for Young People with Epilepsy ('NCYPE) at St Piers. However, it became clear that it might be quite some time before a residential assessment could be arranged and carried out. A's mother expressed concern as to how she would be able to cope. On 13 February a meeting took place to discuss the position at which a large number of professionals was present and A's situation was discussed in detail. It was reported to the meeting by Dr Yousif, who was a psychiatrist with the Learning Disability Outreach Team, that A had been accepted for an initial assessment at Chalfont or St Piers but that they were awaiting a date for it. The half day assessment would be the basis for a residential medical assessment which would last 5 days and which it was hoped would take place in April or May. In the event it did not take place until mid-September 2002.

27. Under the heading 'Ongoing Support', the note of the meeting says that the school was sending work for his parents to do with A. It also says that LS would if possible arrange for A to continue to access speech and language therapy sessions at school, with transport to be provided, and that both his class teacher and his social worker would keep in regular contact with his mother. Family care workers were said to be unable to provide respite support due to the risks involved. An occupational therapy assessment of A's room had begun with the aim of providing equipment and padding in order to protect him from self harming.

28. The initial medical assessment took place on 28 February. A consultant paediatric neurologist and an epilepsy nurse from the NCYPE made an outreach visit. Their report shows just how disturbed and difficult to cope with A was. They recommended a 5 day interdisciplinary assessment at St Piers, the aims of which would be to monitor seizure types and frequency, to advise on medication, to

assess behaviour and its possible relationship with epilepsy, to assess communication, to assess mobility and self-help skills and to advise on future educational placement. It can thus be seen that A required assistance from a number of different disciplines and it was sought to arrive at a cross-disciplinary solution to his problems.

29. On 4 March the head teacher of LS wrote to A's parents inviting them to bring him in to the school for speech therapy sessions beginning that week. Speech therapy sessions started on or about 20 March on a weekly basis. At first they were 30 minute sessions, which for a time were reduced to 15 to 20 minutes in about May.

30. On 20 March there was a further meeting at which very many professionals were present. The minutes show that many aspects of A's problems were discussed. Concerns were expressed about A's deteriorating behaviour and how his family could cope, especially since at least two residential homes had indicated that they could not provide him with respite care. Attempts continued to arrange a medical assessment.

31. On 14 April A's solicitors, the Children's Legal Centre, were instructed by his parents on his behalf. On 1 May a further meeting of professionals, described as a Partnership Meeting, was held at LS. It was attended by representatives of Essex's social services and education departments, staff from LS, A's parents and others. A's parents had been given two boxes of activities - touch books and bubbles – for them to do with A at home. However, A's mother said that A had become bored after a few sessions. It was noted at the meeting that the boxes of activities were 'not acceptable education'. Although LS reiterated their reasons for A not being in school, namely health and safety, it was acknowledged that A's educational needs were not being met. However, Essex's education department stated that there was no home tutor who was qualified to meet A's needs. LS was asked to consider whether there was any possibility of providing A with a teacher for home tuition or offering some tuition at school. The head teacher said that he would discuss with the class teacher and teaching assistants how best to do that. However, although that might meet A's short term needs, his long term educational needs also required to be addressed. Alison Stanford of the Special Educational Needs and Psychology Service ('SENAPS') stressed the need to await the recommendations of the residential medical assessment. By the time of that meeting, joint funding for a 5 day residential assessment, which would cost over £10,000 had been agreed between Essex Learning Services (Education), Essex Social Services and Essex Health Authority. Unfortunately the assessment could not take place until September 2002.

32. By this stage A was exhibiting increasingly challenging behaviour. Although his parents tried hard to support him at home, they were struggling to cope with his behaviour. In a report dated 18 June 2002 a community nurse specialist with the Children with Disability Team stated that A's behaviour was due to "(i) lack of sensory stimulation, boredom and lack of meaningful occupation; (ii) inability to clearly communicate his needs and be clearly understood by those around him". She said that she had therefore referred A to an occupational therapist and social services had agreed to pay for some of the equipment which the occupational therapist had recommended. She had also referred A to his doctor who had prescribed him with the anti-psychotic drug Chlorpromazine with a view to calming his behaviour in the hope of reintegrating into activities, including attendance at school.

33. A review of A's SSEN on 19 June noted that A had been out of school since January but did not seek to amend the SSEN to name a different school. In a letter to A's parents written somewhat later, on 31 July, referring to the SSEN, a member of the Special Educational Needs and Psychology Service, Clare Taylor, said that the school had developed a structured programme for A pending the outcome of his assessment at St Piers. She added that the Social Services Outreach Team would also continue to support the school in meeting A's needs. Her letter was to some extent at least based on the information in a letter to her dated 21 June that there were a significant number of planned session times for A during the remainder of the summer term. They were for 45 minutes every Tuesday except for 9 July, which was Sports' Day, an hour every Wednesday and 15 minutes on two Thursdays. These were all activity sessions while his parents attended Makaton sessions. A also attended planned sessions in September and October 2002.

34. The residential medical assessment took place at St Piers from 8 to 13 September. A was observed by an inter-disciplinary team of professionals. An oral report was made on 13 September which, as noted at the time, included the following:

> " • It was felt by St Piers that A's epilepsy is not the overriding issue of concern at present. The overriding concern noted was that due to A's exclusion from school since February, he has spent many months at home, and his educational, emotional, social, psychological and developmental needs are clearly not being met. It was noted that although Mr and Mrs W clearly try hard to support A at home, that it is very difficult for them to meet A's comprehensive needs. This has resulted in A being hugely under stimulated, and him being effectively 'sensorily deprived'. This may be a causative factor for his self-injurious behaviour. St Piers stated how it is common for

self-injury to be seen in children with little sensory stimulation."

It was recorded that there was a notable improvement in A's behaviour during the 5 days and that his main disability was his learning disability as opposed to his autism. The note then included the following:

> " • In light of the above, it was clearly indicated that A's needs are not currently being met. The conclusion from St Piers [is] that it is strongly in A's best interests to be placed in a 24-hour residential school placement. This would be at a school specifically for children with high levels of challenging behaviour such as A. It is noted that by attending such a placement for an initial period of 1 year, this may have the eventual benefit of A becoming more easy for his parents to support at home in the long term. A would also be able to return home at weekends and during school holidays. St Piers recognised that Mr and Mrs W are very unhappy with this recommendation, however they stressed that they feel this placement would be strongly in A's best interest. …"

35. The very detailed report from St Piers followed. It included reports from each discipline including (but not limited to) an Education Report. A was diagnosed with "generalised seizure disorder; severe learning disability and challenging behaviour (aggressive and self-injurious behaviour)". The report recommended a residential programme offering the benefit of a 24-hour curriculum with consistent behavioural strategies at a specialist school with expertise in managing very challenging behaviours in order to meet A's complex needs. He needed 1:1 (sometimes 2:1) supervision and support at all times. He was described as a very sad and anxious young man who had been under-stimulated. His behavioural problems were said to be long-standing and to have deteriorated over the previous 15 months during which he had become more impulsive and aggressive to other people, kicking, biting and throwing objects at people, leading to his exclusion from school. His self-harming behaviour had also intensified by the time of the St Piers assessment, characterised by slapping himself constantly or head-banging. His parents reported that his self-harming behaviour had deteriorated, the timing of this being shortly after he began his treatment with Chlorpromazine. At the time of the assessment his parents had to hold his hands constantly while he was awake to stop him from self-harming.

36. The report described A's difficulties as a combination of his severe learning difficulties, severely challenging behaviour and his epilepsy, as well as a result of poor management of his needs. It recommended that Chlorpromazine be

discontinued and that the dose of another drug be increased. It also made a number of other recommendations and concluded in this way:

> "A would benefit from a residential placement where an individual programme can be provided to enhance his play, social interaction, and self-help skills and to improve sensory integration. A residential programme would offer the benefit of a 24-hour curriculum, with consistent behavioural strategies. In view of the severity of A's current behaviour difficulties, placement should initially be at a specialist school with expertise in managing very challenging behaviours. Whilst the team understand Mr and Mrs W's reservations with regard to a residential placement and their commitment to him within the family, it is felt that this would offer the most positive way forward in developing A's skills at this critical time as a teenager and in transition to adulthood. As A grows, there is a real concern that behaviours could lead to a serious management problem if not addressed urgently."

37. As can be seen, A's parents were initially opposed to a residential solution. However, they accepted the recommendations and in October 2002 discussions took place as to inter-departmental funding for a placement for A and on 10 October joint funding between education and social services was approved. Between 16 October and 17 December Essex wrote to no fewer than 26 schools seeking a placement for A, but without success.

38. At a meeting in 2003 professionals acknowledged that his home environment was having a negative impact on A's behaviour because he remained under-stimulated and bored and needed to be supported appropriately. In January 2003 A started to receive respite sessions three mornings a week at the Limbourne Centre, where he was also offered tuition. He continued to attend sessions at LS as before. On 10 January A's solicitors wrote to Essex threatening a possible application for judicial review on the grounds that A was not receiving an education in accordance with his SSEN.

39. On 9 February Kisimul School offered a place for A at a cost of £223,589 per annum which Essex agreed to pay. A's parents accepted the offer on 9 April. However the placement did not become available until 28 July 2003 because of construction work at the school. In the meantime at a meeting of professionals on 23 May it was reported that the sessions at LS were not very positive, in that A's behaviour had deteriorated in relation to self-injury. The school felt that it was minding him rather than teaching him. The specialist teacher at Limbourne Centre also reported that he was finding it difficult to engage A at any meaningful level. A's behaviour at home continued to deteriorate.

40. On 30 May A's solicitors sent Essex a letter before action in contemplation of an application for judicial review alleging that the educational provision for A was inadequate along with a demand that an appropriate residential placement be provided immediately and that there be an urgent re-assessment of A's special educational needs. They also applied for funding from the Legal Services Commission ('LSC'), which was refused on the basis that an appropriate school place was going to be available from the end of July 2003.

41. A took up his place at Kisimul School, where he progressed well. His overall health and behaviour improved. He received an appropriate education and his self-harming very much reduced. He left the school in the summer of 2008 and now lives in residential therapeutic accommodation in Halstead in Essex. He will need to spend the rest of his life in this kind of accommodation. He is able to visit his family regularly. It can thus be seen that, although there were on any view unfortunate delays between January 2002 and July 2003, his education thereafter has been a considerable success, albeit at a cost of over £1.2 million to the public purse.

A's case in this appeal

42. In para 4 of the amended particulars of claim A accepts that his education at LS satisfied his rights under A2P1. Although para 46(i) seems to say something different, A's case and the oral argument in this appeal focused on the period after 17 January 2002. A further accepts that his education at Kisimul School satisfied his rights under A2P1 as from 28 July 2003. His essential case is that his rights were infringed between 18 January 2002 and 28 July 2003. In short his case is that he received no effective or meaningful education during that time. In this appeal it was submitted on his behalf that he has a real prospect of establishing that case at a trial and that his case should be permitted to go to trial, especially since it has been accepted by the LSC as a test case.

43. A's case may be summarised in this way. As was recognised by many professionals at the time, A did not receive even a minimum education for 18 or 19 months. He was provided only with some educational toys, once weekly speech and language therapy sessions from March 2002, some activity sessions at LS during May and June 2002 and from 25 June 2002 some planned classroom time at LS. Then, in and after October 2002 some further activities were made available as set out above. Whether taken individually or together this did not amount to even a minimum education and denied him, or deprived him of, the very essence of his right to education under A2P1.

Discussion

44. I would not accept that the case should go to trial because it is said to be a test case. Where the relevant principles of law are developing, it is sometimes appropriate to determine those principles (especially where the issue is whether a duty of care is owed) only after ascertaining the facts at a trial; but this is not such a case. The relevant principles seem to me to be reasonably clear and the question is simply whether A has a real prospect of success. That question can be answered by taking the facts most favourable to A and deciding whether, on that footing, A could succeed at a trial.

45. Was A deprived of an effective education during the relevant period? I recognise that if that question is asked by reference only to what he was provided with between January 2002 and July 2003, it could be answered in the affirmative. However, as Lord Bingham observed, the correct approach is the pragmatic one adopted by the ECtHR. It was recognised on all sides that what A required was a satisfactory long term solution for his various problems. It was also recognised at an early stage that, in the absence of a considerable improvement in his condition and behaviour, A could not go back to LS. I agree with the judge and the Court of Appeal that any other view is unarguable.

46. All the professionals agreed that A required a multi-disciplinary assessment and that the only place where that could be done was St Piers. Unfortunately it was not possible for that assessment to be carried out until September 2002. When it was carried out, it took account of the many and varied problems that beset A and indeed his family. Thereafter Essex agreed to the recommendations reasonably quickly, notwithstanding the very considerable costs involved. There were then further delays because, although Essex wrote to some 26 schools, none of them was able to assist until Kisimul School made its offer on 9 February 2003. There was then a yet further delay because of construction work at the school and it was not until July that A was able to take up his place. Thereafter all was well.

47. It seems to me that, however A's case is put on the facts, in terms of long term education for A the only realistic solution was a residential placement of the kind recommended in September 2002 and achieved in 2003. That was surely the critical step so far as A was concerned and in that regard it cannot be said that he was deprived of it. A long term solution was required and it is surely not surprising that it took some time to achieve. The solution was moreover strikingly successful.

48. Since it was a long term solution that was required, the logic of the case for A is that he needed a residential solution of the kind recommended by St Piers immediately and that, since he did not receive it for some 18 months, the failure to

provide it was an infringement of his rights under A2P1. If that was what was required and if he had an absolute right to it under the Convention, it follows that he was deprived of it between January 2002 and July 2003, that whether Essex was in any way at fault or open to criticism is irrelevant and that his rights under A2P1 were infringed because his right to education was in fact denied.

49. The case was not, however, put in that way on behalf of A, no doubt because such a case would be far from the pragmatic approach adopted by the ECtHR. As Lord Clyde put it in *Brown v Stott* [2003] 1 AC 681 at 727 F, it must be remembered that the Convention

> "is dealing with the realities of life and it is not to be applied in ways which run counter to reason and common sense."

A's case focuses therefore, not on what was really required, namely the residential placement eventually recommended by St Piers and arranged and paid for by Essex, but on the interim measures.

50. The fact that it was not said that there was an infringement of A's A2P1 right to a long term solution immediately shows that the correct approach is to consider the problem in the context of the system available and to recognise that solutions take time and money to put in place, sometimes a considerable amount of both time and money, as here. In my opinion the same approach should be adopted to the interim measures. All the professionals were working towards the long term solution, hoping that it would be achieved sooner rather than later. Some interim measures were put in place in the period from January 2002 to July 2003. It is said with apparent force that A was deprived of any meaningful education in that period and, indeed, that A's condition and behaviour deteriorated during that period. Moreover, the account of the facts set out above shows that, at any rate on A's case, there were grounds for criticism of Essex in not providing more than they did.

51. The question is not, however, whether Essex were at fault but whether the limitations on A's education impaired the very essence of his right to education and deprived his right of effectiveness or, as Lord Bingham put it, whether he was deprived of effective access to education. The answer to that question (or those questions) must have regard to the fact that the problems were correctly seen to be short term problems pending a multi-disciplinary 5 day examination of A in order to achieve a long term solution.

52. Even taking A's case at its highest, considerable efforts were made by LS and others to assist A in various ways. They were not limited to the somewhat ineffectual provision of two boxes of educational toys, which were described as 'not acceptable education'. Essex were faced with considerable difficulties. There was no home tutor who was available to meet A's needs. Residential respite care was not available but A was referred to an occupational therapist. However the school did provide a significant number of speech therapy and activity sessions described above. I nevertheless recognise that A's condition and behaviour deteriorated in the period before the assessment in September 2002 and that the St Piers' report referred to 'poor management of his needs'.

53. Lord Kerr (whose judgment I have seen in draft) says that the level of A's need, as disclosed in the report, finds a stark and sorry contrast with what had actually been provided for him in the preceding 9 months. I agree that that is so but the report does not identify any solution other than that A should be provided with long term residential care, which was not available before that.

54. After delivery of the report and its acceptance by both A's parents and Essex there was a further period of waiting, while Essex tried to find a school and, when they did, while construction work was carried out at the new school. During that period the activity sessions at LS continued and in January 2003 A started to receive respite sessions three mornings a week at the Limbourne Centre because his behaviour at home continued to deteriorate. He was also offered tuition there.

55. The interim efforts made by Essex were far from perfect and it is arguable that Essex were both in breach of duty under domestic law in various ways and more generally open to criticism for not doing more than they did but, once one takes account of the fact that what was needed were interim measures pending the long term solution, I do not think that A can succeed at a trial. I agree with the Court of Appeal (and with the judge) that, as Sedley LJ put it at para 12, it is not possible "to spell out of this unhappy interlude, with its undoubtedly adverse consequences for both A and his parents, either a failure of the education system or a denial of access to it."

56. It is I think relevant to note that, although A's solicitors were instructed on 14 April 2002, no legal action was taken. It was not suggested during the period between January and September 2002 that Essex were in breach of statutory duty or that they were infringing A's A2P1 rights. On 10 January 2003 the solicitors threatened a possible application for judicial review on the ground that A was not receiving an education in accordance with the SSEN. Unsurprisingly no such application was made because there was no realistic prospect of A returning to LS at that time. Subsequently, on 30 May 2003 the solicitors sent the letter before action described above, which came to nothing because the LSC refused funding

because a residential place was pending. So far as I am aware, no allegation was made that Essex were infringing A's A2P1 rights in the interim.

57. As I see it, viewed in the round, A was not arguably denied the very essence of his right to education. On the contrary, he was ultimately provided with high quality education at very considerable cost. I do not accept the submission made on behalf of A that he was abandoned by the educational authorities after his parents were persuaded to withdraw him from school. On the contrary, Essex were doing their utmost to have A properly appraised and thereafter did their utmost to arrange residential care, for which they paid. While the interim measures are at least arguably open to some criticism, that is not the question and their shortcomings do not arguably amount to a denial of A's right to education. In this regard I agree with the judgment of Lord Brown which I have seen in draft. I also agree with Lord Phillips on this part of the case. It follows that I would dismiss the appeal.

58. This analysis makes it unnecessary to consider the limitation point. However, I agree that the appeal should be dismissed on that ground too, for the reasons given by Lord Kerr.

APPENDIX

Summary of the 1996 Act as set out by the judge:

3. By section 312 a child has ‘special educational needs’ if he ‘has a learning difficulty which calls for special educational provision to be made for him’. A child has a ‘learning difficulty’ if, amongst other things, he ‘has a significantly greater difficulty in learning than the majority of children of his age’ or ‘he has a disability which either prevents or hinders him from making use of educational facilities of a kind generally provided for children of his age in schools within the area of the local education authority’.

4. By section 321 of the Act a local authority is to exercise its powers with a view to securing that of children for whom they are responsible, they identify those who have special educational needs and for whom it is necessary for the authority to determine special educational provision. The local authority is ‘responsible’ for, amongst others, children within the authority's area who either attend a school maintained by the authority or attend an independent school with fees paid for by the authority.

5. Pursuant to section 323, where the Local Education Authority (‘LEA’) considers a child may fall within section 321, they are required to make an assessment of his needs, after having taken into account any parental representations. Under section 329, a parent may also initiate the process, by requesting an assessment under section 323. If such a request is made, the authority must comply with it if no such assessment has been made within the previous six months and it is necessary for the authority to make an assessment under section 323. Under section 329A (as inserted by section 8 of the Special Educational Needs and Disability Act 2001), the head teacher of a school may also request an assessment.

6. If as a result of an assessment under section 323 the local authority decides it is necessary for the local authority to make special educational provision for the child, then by section 324 the authority must make and maintain a Statement of Special Educational Needs (‘SSEN’). Section 324 provides for the contents of such a statement. In particular, it must: give details of the educational needs and the provision required to meet them; specify the type of school or institution which the authority considers appropriate to meet those needs; and name any school or institution which is considered to be appropriate. The Education (Special Educational Needs) (England) (Consolidation) Regulations 2001 (SI 2001/3455) (the Regulations) prescribe in more detail the form and content of the statement.

7. The Regulations also make detailed provision for the assessment process. They specify (at regulations 7 to 11) that the authority must seek: (a) advice from the child's parent; (b) educational advice (usually from the head teacher of the child's school); (c) medical advice from the health authority; (d) advice from an educational psychologist employed by the authority; (e) advice from social services; and (f) any other advice which the authority considers appropriate for the purposes of arriving at a satisfactory assessment. The authority must also take into account any evidence submitted by or at the request of the child's parent. Once the

assessment is complete, the authority must either provide the parents with a copy of a proposed statement of special educational needs (or amended statement if the child already has one) within 2 weeks, or inform them that they have decided not to make a statement or amend an existing statement within the same time period and inform the parents of their right to appeal (regulation 17).

8. If a proposed statement has been issued, there then follows an 8 week period during which the parent has the right to make representations as to the content of the Statement (Schedule 27 of the Act and regulation 17). At the end of the 8 week period, the authority must issue a complete statement unless certain defined exceptions apply.

9. Once a statement is made, the local authority has a statutory obligation to arrange that the special educational provision specified is made for the child – section 324(5). The Statement must also be reviewed annually (regulation 18 of the Regulations).

10. Parents are given rights of appeal to the Special Educational Needs and Disability Tribunal ('SENDIST') against decisions made by the authority see eg sections 329(2), 325(3) and 326.

11. Appeals from the SENDIST lie to the High Court on a point of law (Tribunals and Inquiries Act 1992 section 11, as amended by section 181 of the Education Act 1993): Subsequently replaced by the procedure under the Tribunals, Courts and Enforcement Act 2007.

12. By section 19, a local authority is under a duty to make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them. This duty arises only where it is not reasonably possible for a child to take advantage of any existing suitable schooling *(R(G) v Westminster City Council* [2004] EWCA Civ 45; [2004] 1 WLR 1113).

LORD PHILLIPS

Introduction

59. The appellant, "A", is a young man who was born on 3 July 1989. He claims that during a period of 18 months, starting in January 2002, when he was 12 years old, he was denied the right to education guaranteed by Article 2 of the First Protocol ("A2P1") to the European Convention on Human Rights ("the Convention"). He seeks a declaration and damages under section 7(1)(a) of the Human Right Act 1998 ("HRA"). His claim was dismissed by Field J on 13 July 2007 under CPR Part 24 on the ground that it had no reasonable prospect of success. At the same time an application on his behalf under section 7(5)(b) of the HRA for an extension of the one year time limit for bringing such a claim on the grounds that this would be equitable was dismissed by Field J [2007] EWHC 1652 (QB). On 16 April 2008 the Court of Appeal dismissed his appeal against summary judgment and did not deal with the time bar point [2008] EWCA Civ 364. A appeals to this Court against each of the decisions against him.

60. A is autistic and has a severe learning disability. He also has a severe communication disorder and challenging behaviour. He suffers from epilepsy, frequently having 10-15 short epileptic fits a day, despite medication. He is doubly incontinent, has no concept of danger and requires constant supervision. He is reliant on adults for his every need. Under the Education Act 1996 ("the Education Act") he had, at the material time special educational needs.

61. A's claim was brought together with similar claims by three other young people with special educational needs. Their claims were also out of time. They suffered the same fate as A's claim. Only A has appealed, with support from the Legal Services Commission on the basis that his claim should be treated as a test case. The National Autistic Society ("NAS") has been given permission to intervene and its submissions of principle have been to the same effect as those advanced on behalf of A.

The principal issues

62. A's case has been advanced by Mr Nicholas Bowen QC. His submissions were clearly set out in his written case and supported in oral argument, albeit that this ranged rather wider than his case at times. His primary contention has been that A2P1 imposes on the State an absolute obligation to provide effective education to a minimum standard for a child with special educational needs. He

submits that this obligation is recognised by the Education Act and makes submissions as to how the duties under A2P1 and the Education Act have to be complied with by a local authority.

63. The principal issues have been agreed as follows in the Statement of Facts and Issues:

> "(i) Does Article 2 Protocol 1 guarantee a child an absolute minimum standard of education? If so, how is to be measured?
>
> (ii) If A2P1 does guarantee an absolute minimum standard of education how, in a case where a child has a statement of special educational need under EA96, and against what criteria, is an acceptable minimum to be judged? Should (as the Appellant argues) the breach contended for be judged on the same basis as the requirements of domestic law whereby an education authority is obliged to make and maintain the provision in part 3 of the statement as contained in the duty in section 324 EA96?"

The subsidiary issues

64. The subsidiary issues have been agreed as follows in the Statement of Facts and Issues:

> "(iii) Can Essex be said to have denied the Appellant's right to an education under A2P1 on the facts of this case?"
>
> (iv) Did Field J err in refusing to extend time for the bringing of this claim?"

The facts

65. Most of the material facts in this case are not in dispute. They have been set out in detail in the judgments of Lord Clarke and Lord Kerr, and I need not repeat them. Their essence can be summarised as follows. A's special needs were very demanding. By January 2002 LS, the State maintained special primary school which A attended, could no longer cope with the demands made by A's behaviour.

He was removed from LS to spend his days at home and ceased to receive the education that was needed to cater for his special needs. Indeed he was provided with very little support that could be described as educational at all. It took 18 months to arrange for and carry out a medical assessment of A's current needs and to find a residential place for him in a special school where those needs could be met.

The problem

66. Special educational needs have been defined as a learning difficulty. A primary role of education is imparting knowledge. Ability to receive knowledge, or to learn, varies according to cognitive ability and some children are unable to keep up with their classmates. Their special educational needs may require special educational provision. But there are some barriers to learning that have nothing to do with cognitive ability. The sensory deprivation of blind or deaf children inhibit their learning in a conventional school. They also have special educational needs. A had profound learning disability, but this was exacerbated by the physical and psychiatric problems that I have described above. He was and is profoundly disabled. From the age of six it was possible to cater for his needs at LS School, a community special day school for children with severe learning difficulties. As he approached the age of 12, however, his behaviour deteriorated to the extent that the school was no longer able adequately to protect him from himself and the other pupils from him. This was the reason why he had to leave the school, rather than any cognitive inability to cope with the teaching.

67. At this stage an assessment of A's medical and psychiatric problems was necessary before any long term plans could be made for his continuing education. This involved an initial assessment, followed by a five day residential medical assessment by an interdisciplinary team of professionals. It did not prove possible to arrange for this assessment to be carried out until 8 months after his exclusion from LS. A further ten months elapsed before A could be placed in Kisimul School, a special residential school where he was able to receive the 24 hour a day supervision that he needed. He has now finished his schooling, but his needs are such that he will have to live in residential therapeutic accommodation all his life.

68. A's predicament is an extreme example of a widely experienced problem, as evidence placed before the Court by NAS has demonstrated. One child in a hundred suffers from an autism spectre disorder ("ASD") of some kind. ASD is an umbrella term which covers autism, Asperger syndrome and a range of other disorders. Many of these children are successfully educated in the mainstream educational system, but many are not. "Make school make sense: Autism and education: the reality for families today" published by NAS in 2006 recorded at p25 that one in five children with autism have been excluded from school, 67%

more than once and 16% more than ten times. 24% of excluded children are excluded permanently.

69. NAS has placed in evidence a statement of Gillian Roberts, the Principal of the Robert Ogden School in support of the proposition that with sufficiently trained and experienced staff it is possible for schools to meet the needs of children across the autism spectrum. The Robert Ogden School is owned by NAS. It is the largest independent special school for children and young people who have been diagnosed with ASD. It currently has 105 pupils and a staff of 282. The school is residential and an Ofsted report of September 2008 commends it highly, commenting that the quality of the curriculum is outstanding because it is designed effectively to meet individual pupils' needs.

70. The evidence adduced by NAS, and the facts of this case, suggest that there are insufficient trained staff in the education system and insufficient special schools of the requisite quality and expertise to cater satisfactorily for the demands made by children with ASD.

A's case

71. A2P1 provides:

> "*Right to education*
>
> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

Mr Bowen's first submission was that implicit in the provision that no person shall be denied the *right* to education was the positive obligation on the State to provide a minimum of effective education for each individual child. Where the child had special educational needs the State had to cater for those needs to the extent necessary to achieve the minimum standard of education, otherwise the education would not be effective. Mr Bowen described this repeatedly in his printed case as an economic and social right. He submitted that this was an absolute right. Failure to provide the minimum standard of education, or delay in providing it, could not be excused on the ground of lack of resources.

72. Mr Bowen described the case law in this area as "undeveloped". He nonetheless sought to derive support for his submissions from the decision of the Strasbourg Court in the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252. The applicants in that case were French speaking Belgian parents who contended that article 2 entitled their children to be educated in French. The Court observed, at p 280:

> "3. By the terms of the first sentence of this article, 'no person shall be denied the right to education'. In spite of its negative formulation, this provision uses the term 'right' and speaks of a 'right to education'. Likewise the preamble to the Protocol specifies that the object of the Protocol lies in the collective enforcement of 'rights and freedoms'. There is therefore no doubt that article 2 does enshrine a right."

73. Mr Bowen relied on this passage. He also relied on the following statement, at p 281, in support of his contention that education must cater for the special educational needs of the individual child in order to be "effective":

> "4.…
>
> For the 'right to education' to be effective, it is further necessary that, inter alia, the individual who is the beneficiary should have the possibility of drawing profit from the education received".

74. Mr Bowen drew attention to the fact that Lord Bingham had referred to the right to "effective" access to educational facilities in *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14; [2006] 2 AC 363 at para 24 and to the following statement in the judgment of the Court of Appeal in *R (Holub) v Secretary of State for the Home Department* [2001] 1 WLR 1359, 1367, at para 25, quoting from *Lester & Pannick, Human Rights Law and Practice* (1999), para 4.20.6:

> "As regards the right to an effective education, for the right to education to be meaningful the quality of the education must reach a minimum standard."

75. When these passages are read in their context they do not support the proposition that A2P1 imposes on contracting States a positive obligation to provide education that caters for the special needs of the small, if significant, portion of the population which is unable to profit from mainstream education. On

the contrary the authorities assume, correctly, that all contracting States have a system of education and limit the positive obligation imposed by A2P1 to regulating education in such a way as to give access without discrimination to that system.

76. Thus para 3 of the judgment in the *Belgian Linguistic* case continues, at pp 280-281:

> "The negative formulation indicates, as is confirmed by the preparatory work, that the contracting parties do not recognise such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level. However, it cannot be concluded from this that the state has no positive obligation to ensure respect for such a right as is protected by article 2 of the Protocol. As a 'right' does exist, it is secured, by virtue of article 1 of the Convention, to everyone within the jurisdiction of a contracting state. To determine the scope of the 'right to education', within the meaning of the first sentence of article 2 of the Protocol, the court must bear in mind the aim of this provision. It notes in this context that all member states of the Council of Europe possessed, at the time of the opening of the Protocol to their signature, and still do possess, a general and official educational system. There neither was, nor is now, therefore, any question of requiring each state to establish such a system, but merely of guaranteeing to persons subject to the jurisdiction of the contracting parties the right, in principle, to avail themselves of the means of instruction existing at a given time. The Convention lays down no specific obligations concerning the extent of these means and the manner of their organisation or subsidisation. In particular, the first sentence of article 2 does not specify the language in which education must be conducted in order that the right to education should be respected. It does not contain precise provisions similar to those which appear in articles 5(2) and 6(3)(a) and (e). However, the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be."

While the last sentence might suggest that A2P1 imposes positive requirements as to the education that a State must provide, it can also be read as dealing with access to an existing system of education, for this is bound at least to include education in a language of the State.

77. The statement in para 4 of the *Belgian Linguistic* case, at p281, that the individual who is the beneficiary of education should have the possibility of drawing profit from the education received did not impose an obligation to make special provision for those with special needs. It dealt with the obligation to ensure official recognition of studies that had been completed.

78. The passage of his judgment in which Lord Bingham referred to "effective access" in the *Lord Grey School* case reads:

> "24 The Strasbourg jurisprudence, summarised above in paras 11-13, makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil (as in *Eren v Turkey* (Application No 60856/00) (unreported) 7 February 2006). The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?"

79. These passages make it plain that the value of the right conferred by A2P1 depends upon the system of education that is in place in the particular State concerned. Volume VIII of the *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights* (1985) explains why, uniquely, a negative formulation was used to describe the right in A2P1:

> "While education is provided by the State for children, as a matter of course, in all member States, it is not possible for them to give an unlimited guarantee to provide education, as that might be construed to apply to illiterate adults for whom no facilities exist, or to types or

> standards of education which the State cannot furnish for one reason or another".

Contracting States that provide facilities for the education of adult illiterates are obliged by A2P1 to ensure that adult illiterates have access to those facilities. Those States that do not have such facilities are not required by A2P1 to establish them.

80. The cost of providing for the needs of a child such as A are enormous. The fees charged for providing him with a place at Kisimul were £223,589 a year. It may well be that some contracting States are not able to contemplate expenditure on this scale to cater for the needs of an individual child. It is plainly highly desirable that a State should make provision for the educational needs of those who are disabled, but the signatories to A2P1 did not commit themselves to establishing educational facilities that did not exist in their countries.

81. For these reasons I reject Mr Bowen's first submission. A2P1 does not impose a positive obligation on contracting States to provide effective education for children who have special educational needs.

82. Mr Bowen's second submission was linked to the first. The starting point was the statement of Lord Bingham at para 24 of the *Lord Grey School* case. A2P1 guarantees "fair and non-discriminatory access" to the system of education maintained in the particular state. The system of education maintained in England and Wales requires that provision is made for children with special educational needs. This was the system to which A2P1 guaranteed access. The system was one which provided the measure of the minimum standard of effective education that had to be provided for children with special educational needs.

83. Mr Bowen placed at the heart of his argument the requirement of section 19 of the Education Act:

> "(1) Each local education authority shall make arrangements for the provision of suitable … education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.
>
> (6) In this section 'suitable education', in relation to a child or young person, means efficient education suitable to his age,

> ability and aptitude and to any special educational needs he may have."

This was an unqualified obligation. He also relied on the obligation of a local authority to arrange that the special educational provision specified in a statement of special educational needs is made for the child – section 324(5)(a)(i) of the Education Act. He submitted that financial constraints were no answer to these obligations. There had been a failure to satisfy the statutory obligations under the Education Act and this constituted a denial of A's right to education under A2P1. The obligations were absolute; there was no defence of "all reasonable endeavours".

84. The *Lord Grey School* case shows that a failure to satisfy the educational requirements of domestic law will not automatically constitute an infringement of A2P1. But in that case the House of Lords held that the claimant had been provided with education that satisfied the requirements of A2P1. He was not deprived of access to the minimum standard of education provided by the State. In this case, during the 18 month period, there was a failure to comply with the requirements of the Education Act and a failure to provide any significant education to A. Does it follow that there was an infringement of A2P1?

85. It does not. It is not right to equate a failure to provide the educational facilities required by domestic law with a denial of access to education under A2P1. The reason why A was, for 18 months, denied the very special schooling that his needs required was that there was not immediately available the resources required to carry out the medical assessment that he needed nor, thereafter, a place in a school that would satisfy his needs. Field J analysed the position in this way at para 101 of his judgment. The reality is that, in a case such as this, a local education authority may be unable, through lack of resources, immediately to satisfy the obligations imposed by section 19 of the Education Act.

86. Article 2 guarantees the right to "to avail themselves of the means of instruction *existing at a given time*"; "the right of access to educational establishments *existing at a given time.*"- paras 3 and 7,at pp 281 and 292, of the *Belgian Linguistic* case. Insofar as a State's system of education makes provision for children with special needs, Article 2 guarantees fair and non-discriminatory access for those children to the special facilities that are available. But if the facilities are limited, so that immediate access cannot be provided, the right of access must have regard to that limitation. Thus the right of access to education conferred on A by A2P1 had to have regard to the limited resources actually available to deal with his special needs. These caused the delay in catering for his special needs. In these circumstances that delay did not constitute a denial of his right to education.

87. There was some debate as to whether Field J was correct to attribute all of the 18 month delay in placing A at Kisimul to the limited resources available. A's case was not advanced, however, on the basis that there had been a failure to take all reasonable steps to cater for his needs. It was advanced on the basis that A2P1 imposed an absolute obligation to cater for them, and to do so timeously. Where there has been maladministration, resulting in a failure to provide access to education for a period, there can be difficulty in deciding whether this is so significant as to amount to a denial of education in breach of A2P1. Had part of the delay in this case been caused by maladministration I would not, on the facts of this case, have held that this amounted to a denial of A's right to education under A2P1. In this respect I agree with the reasoning of Lord Brown at paragraph 128-132 and Lord Clarke at paragraph 57.

88. For these reasons I reject Mr Bowen's second submission.

89. In the course of submissions, encouraged perhaps by interventions from the court, there was some discussion about the paucity of educational provision that was afforded to A during the 18 months that he was out of school, living with his parents. His special educational needs could not be met at home, as his assessment ultimately showed, but it is possible, indeed likely, that the failure over 18 months to meet those needs might have been mitigated by the provision of significantly more educational assistance than was in fact provided. I agree with Lord Kerr that there might, dependent upon facts that have not been explored, be a case for saying that, during this 18 month period, A was deprived of such educational provision as could have been made available and that this deprivation violated A2P1. In this I also agree with Lady Hale.

90. Such a case would be fact specific and would not raise the issues of principle that have been pursued on A's behalf. A's primary case has not been that he was denied access to what was available but that A2P1, coupled with domestic law, imposed an absolute obligation under the HRA to provide what A needed. I do not think that it would be desirable to permit A an extension of time to pursue this alternative case, which, even if successful, would resolve no issue of principle and be unlikely to sound in significant damages.

91. There has been considerable debate, here and below, as to the implications of the following observation of Lord Hoffmann in the *Lord Grey School* case at para 61:

> "The correct approach is first to ask whether there was a denial of a Convention right. In the case of article 2 of the First Protocol, that would have required a systemic failure of the educational system

> which resulted in the respondent not having access to a minimum level of education. As there was no such failure, that is the end of the matter."

That observation is not of general application. It was made in the context of a case where a child was excluded from his school, but not from the educational system as a whole, which was held by the majority to have provided him with the "basic minimum of education available under the domestic system" – para 57. Lord Hoffmann's observation does not cover the position where a pupil is denied access to the system, nor to a case such as this where a pupil has special needs that can only be satisfied by special educational provision.

92. This case has highlighted a problem for parents of children with severe disabilities. If there is not currently available in the system the special educational facilities that their child needs and that domestic law requires, a court may be reluctant to make a mandatory order that such facilities be provided. The Lamb Inquiry into Special Educational Needs and Parental Confidence, which was commissioned by the Government, has called for "major reform of the current system". This may well be highly desirable. So far as A2P1 is concerned, it takes the system as it finds it.

Disposal

93. I would answer the first two agreed issues by holding that A2P1 does not guarantee that a child with special educational needs will receive the special educational provision required by the Education Act. I would answer the third issue by saying that the failure during the period of 18 months to cater for A's special needs did not constitute a denial of A's right to education under A2P1. I would answer the fourth issue, "no", thereby precluding A from pursuing a claim that he was denied such educational provision as was available in the 18 month period, albeit that this would not have been adequate to meet his special needs.

94. For these reasons I would dismiss this appeal.

LADY HALE

95. The main focus in this case has always been on the period from 18 January 2002 to 28 July 2003. During those 18 months, a child (aged 12 when it started and 14 when it ended) with very special educational needs was (a) denied access to the schooling to which he was legally entitled in domestic law, and (b) supplied with

hardly anything to make up for it. The issues are (i) whether there is a triable case that this was also a breach of his right to education under article 2 of the First Protocol of the European Convention on Human Rights, and (ii) whether the judge erred in refusing to extend time for bringing the claim. On issue (i), I agree with Lord Kerr and Lord Phillips that there is indeed such a triable issue. On issue (ii), I am in a minority of one.

The Right to Education

96. We are asked to decide whether Article 2 of Protocol 1 guarantees a child an absolute minimum standard of education and, if so, how this is to be measured. My answer is that we have been referred to no authority in Strasbourg which has met this question head-on. We cannot therefore be clear that the answer is "yes"; but equally we cannot be clear that the answer is "no". Fortunately, however, we do not need to answer this question in order to decide this case.

97. In its most recent decision on Article 2 of Protocol 1, *Oršuš v Croatia*, App no 15766/03, 16 March 2010, at para 146, the Grand Chamber repeated the basic proposition derived from all the cases dating back to the *Belgian Linguistic* case:

> "The right to education, as set out in the first sentence of Article 2 of Protocol No 1, guarantees everyone within the jurisdiction of the Contracting States 'a right of access to educational institutions existing at a given time', but such access constitutes only a part of the right to education. For that right 'to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed' (see Belgian Linguistic Case (No 2) (1968) 1 EHRR 252, paras 3 – 5; *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, para 52; and *Leyla Şahin v Turkey* (2005) 44 EHRR 99, para 152)."

98. Undoubtedly, it is an important part of making the right effective that pupils and students are entitled to the certificates or other qualifications which they have earned as a result of the studies which they have been able to complete. But the Grand Chamber said that this was '*inter alia*', thus acknowledging that there may be other rights entailed in making the basic right of access effective. The Chamber in *Oršuš*, in their Judgment of 26 June 2008, at para 58, stated that:

> "The right to education is principally concerned with primary and secondary schooling and for this right to be effective the education provided must be adequate and appropriate."

Oršuš was concerned with the segregation of Roma children into separate classes, ostensibly because their Croatian was not good enough for them to take part in classes with the other children. The Chamber held that their education was nevertheless adequate and appropriate. The Grand Chamber did not consider Article 2 of the first Protocol on its own, because it concluded that the segregation was unjustified racial discrimination.

99. I accept, therefore, that the European case law does not at present lay down any minimum standards for what must be provided. But the possibility that it will do so in future certainly cannot be ruled out. Despite the wide margin of appreciation given to Member States to design and regulate their own systems of education, some failures may be so serious as to amount to a denial of the right. Lester, Pannick and Herberg, *Human Rights Law and Practice*, 3rd edition, at para 4.20.1, for example, comment that article 2 would not be violated by the inclusion or exclusion of a particular subject within the National Curriculum, "unless the subject's addition or omission were to be so serious as to preclude the provision of proper education". We cannot be sure that they are wrong.

100. Be that as it may, I have never dissented from the basic proposition laid down by Lord Bingham in *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363, at para 24, that the primary purpose of article 2 was to guarantee fair and non-discriminatory access to the established system of state education within the member state in question. Thus,

> "The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?"

In that case, I disagreed only in the application of that test to the particular facts. This case is very different.

101. I agree with Lord Justice Sedley, in this case at [2008] EWCA Civ 364, para 10, that there is a "possible tension" between Lord Bingham's reference to "such educational facilities as the state provides for such pupils" and Lord

Hoffmann's reference to "the basic minimum of education available under the domestic system" (para 57) and later to "a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education" (para 61). I do not think that there is any requirement that the failure be "systemic" in the usual sense of applying throughout the whole system. An individual child who is denied access can complain even though the system as a whole is working reasonably well. In *Timishev v Russia* (2005) 44 EHRR 776, Article 2 was breached because the applicant's children were denied access to their school for an invalid reason. Lord Hoffmann's words have to be seen in the context of the facts of the *Lord Grey* case. The school had excluded the pupil but the system had then offered him alternative tuition – in my view this was a denial of the education provided for pupils such as him, in the particular circumstances of that case, but in the view of the majority, the system as a whole had not let the pupil down. If it had, the fact that the system had not failed other pupils would not have prevented their finding a breach in A's case.

102. More relevant for our purposes is the possible tension between what is provided for "such pupils" and the "basic minimum". I disagree with Lord Justice Sedley's view that this tension does not affect the present case, because it is one of total exclusion. The question has to be, "exclusion from what?". This is where the fact that, unlike the pupil in *Lord Grey*, the appellant has such very special educational needs comes into play. The effect of exclusion for "such pupils" can be so much more serious than for other children. A denial of access which would have no long term impact upon an ordinary pupil may be catastrophic for a pupil with special needs. I respectfully endorse everything which Lord Kerr so movingly says, in para 139 of his judgment, about the particular meaning and importance of education in this case.

103. This country has for a long time now recognised that disabled children have a right to education. There was a time, before the Education (Handicapped Children) Act 1970, when children who were suffering from a severe disability of mind could be declared "unsuitable for education at school" (see Schedule 2 to the Mental Health Act 1959). There was then no duty upon local education authorities to provide for them. But under the 1970 Act it was accepted that no child should be labelled ineducable. As the Warnock Report, *The Report of the Committee of Enquiry into the Education of Handicapped Children and Young People* (1978, Cmnd 7212, para 1.7) explained:

> "Though the general concept of education may remain constant, its interpretation will thus be widely different in the case of different children. There is in our society a vast range of differently disabled children, many of whom would not have survived infancy in other periods of history. In the case of the most profoundly disabled one is bound to face the questions: Why educate such children at all? Are

> they not ineducable? How can one justify such effort and such expense for so small a result? Such questions have to be faced, and must be answered. Our answer is that education, as we conceive it, is a good, and a specifically human good, to which all human beings are entitled. There exists, therefore, a clear obligation to educate the most severely disabled for no other reason that that they are human. No civilised society can be content just to look after these children: it must all the time seek ways of helping them, however slowly, towards the educational goals we have identified. To understand the ways in which help can be given is to begin to meet their educational needs. If we fail to do this, we are actually increasing and compounding their disadvantages."

104. Our present system of identifying and providing for the special educational needs of disabled children, contained in the Education Act 1996, is the outcome of the recommendations of the Warnock Report, first legislated in 1981, and based on that philosophy. This is not to suggest that everything is rosy in the education of children with special educational needs. The interveners' case shows very clearly that it is not. The routes to achieving that basic human rights philosophy are controversial (as is shown in Haines and Ruebain (eds), *Education, Disability and Social Policy*, forthcoming). But that the education system in this country recognises the right of any child, however disabled in mind or body or both, to an education "suitable to his age, ability and aptitude and to any special educational needs he may have" (see Education Act 1996, s7) is not controversial.

105. The European Court of Human Rights, concerned as it is with fair and non-discriminatory access to education, recognises that this may mean that different children have to be educated in different ways. To return to the Grand Chamber in *Oršuš*, at para 149:

> "According to the Court's well-established case-law, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. . . However, Article 14 does not prohibit a member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14 . . ."

106. The appellant has not pursued a case under Article 14 before this Court. I was rather surprised to learn that it was not suggested to the Court of Appeal that it took longer to find new places for children with special educational needs who were excluded from school than it did for other children (see [2008] EWCA Civ

364, para 18). The appellant was out of school, and deprived of any real educational input, for more than 18 months. If that is at all typical of the length of time for which ordinary children are kept out of school, it is a sorry state of affairs. For very out of the ordinary children, such as this child, it can be catastrophic. This could well be a case in which a failure to treat such a child better than other children amounted to discrimination. The question then would be whether this could be justified, precisely because of the very real difficulties in finding a suitable placement for him.

107. I say all this, not to adjudicate upon an Article 14 claim which is not before us, but to point out that the content of the right to education may indeed differ from child to child, as Lord Bingham indicated in the *Lord Grey* case. A Roma child may require special help to learn the Croatian language (but that does not mean that he should be arbitrarily segregated in a different class simply because he is Roma). A disabled child may require two to one attention even though most children do not. Just as the Croatian system attempted, but clumsily, to cater for the special needs of the Roma children, so does our system make elaborate and some may think generous attempts to cater for the special needs of disabled children.

108. The question then is whether there is a triable case that the appellant was unjustifiably denied access to the education which our system provides for children like him. I have to accept, from the *Lord Grey* case, that the mere fact of illegality in domestic law is not enough. But his case goes far deeper than that. The appellant cannot, and does not, complain about the excellent schooling which was eventually provided for him. But he does complain, first, that not enough was done to prevent things getting to such a pitch that his first school was unable to cope with him. Prevention is always better than cure, no more so than in catering for special educational needs. Secondly, he complains that he should not have been denied any real education for the 18 months that he was out of school. Should it have taken the authorities so long to assess his needs and find the right place? More importantly, in my view, should they have left him without any alternative while that was taking place?

109. These are factual issues which have not been fully investigated. If a new place could have been found sooner, or if there is more that could reasonably have been done for the appellant in the meantime, I find it hard to see how the effective denial of any education could be justified. What legitimate aim could it serve and how could it be proportionate to such an aim?

110. I am perfectly prepared to assume that the local authority meant no harm. But that is not the test. A local authority which interferes unjustifiably in family life may mean no harm, indeed may mean nothing but good, but it has still acted

incompatibly with human rights. A prison governor who relies upon a mistaken interpretation of the law to keep a prisoner longer than the law in fact allows may mean no harm, but he has still acted incompatibly with the prisoner's human rights. A hospital or care home which detains a patient or a resident for her own good without complying with the elaborate safeguards laid down in the Mental Capacity Act 2005 may mean nothing but good, but it has still acted incompatibly with the patient or resident's human rights. We have to protect people from well-meaning interferences with their human rights by public authorities as much as from those who mean them ill. Indeed, I would assume that most public authorities in this country do mean well and certainly that Essex County Council does so. But that is not the point.

111. The second question put to us, about the nature of the minimum obligation, assumed an affirmative answer to the first, which we need not answer. The third question put to us was whether Essex can be said to have denied the Appellant's right to an education on the facts of this case. The answer is that we do not know until the facts are tried. In agreement with Lord Phillips and Lord Kerr, and for the fuller reasons given by Lord Kerr, I would allow the appeal on that ground.

The limitation issue

112. There is little to say about this as the other members of the Court can find no error of principle in the judge's exercise of his discretion. There is still very little case law on the principles applicable to limitation in human rights cases and so I think it right to express my reservations about the approach adopted by the judge and by others in this Court.

113. Proceedings under the Human Rights Act must be brought within a year, beginning with the date on which the act complained of took place or such longer period as the court considers equitable having regard to all the circumstances (s 7(5)). Where there is a continuing violation, as is alleged here, time runs from when the breach was ended rather than when it began (*Somerville v Scottish Ministers* [2007] UKHL 44). The alleged breach ended on 28 July 2003. The year therefore expired on 27 July 2004. The proceedings were begun on 5 May 2005, just over nine months later. This is not a long delay in making a claim which relates to the past rather than seeks a remedy for the future.

114. "Equitable" must mean fair to each side. There is nothing to suggest that the delay caused any prejudice to the local authority. The letter before action was sent on 6 February 2004, well within the limitation period. The evidence is mostly documentary but it is also unlikely that the professionals' memories of this very

unusual child will have dimmed over the ensuing years. A fair trial of the factual issues will still be possible.

115. On the other side of the coin, the action would almost certainly have been started within the limitation period had funding not been refused in March 2004. It was not until a year later that funding was approved. This was because of the high public interest in the legal issues despite the fact that the appellant was now back at school. Difficulties with funding are often regarded as a good reason to extend time unless there is real prejudice to the other side.

116. The judge placed at the forefront of his account of the relevant legal principles that "there is a significant public interest in public law claims against public bodies being brought expeditiously" (para 119). That is of course true in judicial review, when remedies are sought to quash administrative decisions which may affect large numbers of people or upon which other decisions have depended and action been taken. It is normally a prospective remedy, aiming not only to quash the past but also to put right the future. Expedition is less obviously necessary in a claim for a declaration in vindication of the claimant's human rights, upon which nothing else depends, or of a claim for damages. These are retrospective remedies, aimed at marking or compensating what has happened in the past. Public authorities are no longer in any different position from other defendants in the general law of limitation (see limitation Act 1980, s 37(1)). This claim is more akin to a tort claim than to judicial review.

117. Had judicial review proceedings been launched before the appellant went back to school, with a claim for damages included, there would have been no problem. I do not think it fair to blame the appellant for not having tried to launch judicial review proceedings earlier. It is not obvious to me that the right approach to difficult problems such as this is to rush off to the administrative court. Most people try to resolve their difficulties over access to public services by negotiation and agreement with the authorities. Very few have the knowledge or the resources to approach the administrative court. If all the people who were trying to persuade public authorities to comply with their legal obligations did so, the court would soon be swamped. Better by far to try and achieve a negotiated solution. Indeed, while negotiations are going on, the court may well refuse leave on the ground that the application is premature.

118. But if, once the problem is solved, it appears that there has indeed been a violation of human rights, then it may be important that these are vindicated, whether by a declaration or by an award of damages or both, so that lessons can be learned. This is especially so in a novel situation such as this where the court may be able to lay down principles which will guide the authorities' approach to such

cases in future and thus benefit others as well as the particular people involved. That is, after all, why the House of Lords granted leave to appeal in this case.

119. In my view, therefore, the judge erred in principle by approaching this as if it was a judicial review case and by minimising the importance of vindicating the human rights of the individual claimant and setting standards for others in a position similar to this. I venture to speculate that, if he had thought that the case raised a triable issue, he would have had little difficulty in extending time so that it could be tried.

120. For these reasons, which fall some way short of what the appellant was hoping to achieve in this litigation, I would allow this appeal.

LORD BROWN

121. The appellant, now aged 21, claims that the respondent Council, during an 18 month period from January 2002 to July 2003, violated his right to education under article 2 of the First Protocol to the Convention (article 2). Other members of this Court have amply set out the facts of this case, all the relevant jurisprudence both domestic and from Strasbourg, and indeed the full terms of article 2. None of this need I repeat.

122. I do, however, wish to put in my own words why I for my part regard this claim as having been rightly struck out summarily at first instance for having no realistic prospect of success – this being the principal ground upon which I would dismiss the present appeal.

123. It is difficult to exaggerate the degree of learning difficulty suffered by this appellant during the period in question and the extent of the problem faced by the respondent Council on this account. Perhaps some small measure of this can be gleaned from the huge expense involved in finally meeting the appellant's educational needs: five years' placement in a special residential school, Kisimul, at the cost of £223,589 per annum.

124. I readily acknowledge that the appellant's (and indeed his parents') situation was very far from satisfactory during the eighteen month period leading up to that five year placement. One obvious feature of this (much relied upon by Mr Bowen QC for the appellant) was the respondents' continued naming of LS, a community special day school, as the suitable school for the appellant's special educational needs pursuant to section 324 of the Education Act 1996 long after it

became apparent to all that that school could no longer hope to cope with the appellant's increasingly aberrant behaviour. Let it be assumed that this was in breach of the respondents' public law duty under that section (and that the respondents were also in breach of their more general duty under section 19 of the Act). As, however, Sedley LJ observed in the court below (at para 13), "this was a child with needs so profound that it took the system a considerable time to adjust and cope".

125. I am quite prepared to assume too that, considerable though the efforts made by the respondents to cope with the appellant's worsening difficulties evidently were, they are open to criticism for not having done yet more to resolve, or at least temporarily ameliorate, the deepening crisis in the appellant's (and his parents') life. As Sedley LJ also observed (at para 13):

> "No doubt [the Council] could and arguably should have moved faster, once it had become clear that LS School should not have been, or at least should not have remained, the school stipulated in the SSEN".

Finally let it be assumed that, but for the respondent's failures to move faster and/or do more, the appellant's difficulties would not have intensified to the extent they did by the time his residential placement finally began.

126. Would such assumed failings on the part of the respondents put them in breach of article 2? That critically is the question now before the Court.

127. I understand Lord Kerr to answer that question in the affirmative. At paragraph 162 of his judgment, for example, he appears to suggest that unless the respondents can show that the entire eighteen month period was reasonably required to find a new school to meet the appellant's needs and that in the meantime they did all they could to mitigate the position by considering other less ideal options, they would be in breach of article 2. Indeed, paragraph 163 infers that liability would be established here unless a trial "revealed that there was nothing more that the County Council could have done". To my mind, however, such an approach puts the threshold for establishing a breach of article 2 far too low.

128. I simply cannot accept that article 2 is breached whenever an education authority fails to do all that it possibly could do to ensure that a child is receiving the education he needs – here, as Lord Kerr correctly explained at paragraph 139, training in the particular skills that will allow and encourage him to function to the

best of what will inevitably be his restricted ability. In my opinion altogether more is required to be shown before article 2 is breached. Indeed Lord Kerr seems to me to come closer to identifying what could be regarded as a breach of article 2 in the broad illustrations he gives at paragraph 161: if the authority "takes no action to supply any alternative" to schooling which has been discontinued or "if it knows that a pupil is not receiving [education] and engages in a completely ineffectual attempt to provide it".

129. This essentially is the approach to article 2 which, albeit in a very different educational context, the House of Lords took in *A v Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363. Article 2 was, Lord Bingham suggested at paragraph 24, "intended to guarantee fair and non-discriminatory access" to any given member state's "established system of state education" by those within that state's jurisdiction. The test to be applied in any given case is: "have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?" Lord Hoffmann asks essentially the same question at paragraph 57: "was the applicant denied the basic minimum of education available under the domestic system?" Returning to the point at paragraph 61, Lord Hoffmann said:

> "The correct approach is first to ask whether there was a denial of a Convention right. In the case of article 2 of the First Protocol, that would have required a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education."

Like Lord Kerr I see no significant difference between the approach of Lord Bingham and that of Lord Hoffmann. Each, moreover, agreed with the other's reasoning and Lord Nicholls and Lord Scott each agreed with the reasons of both. Only Lady Hale disagreed with the reasoning in the case although not with the result.

130. Some uncertainty has been expressed in later cases as to precisely what Lord Hoffmann meant by "a systemic failure of the educational system". Again, like Lord Kerr, I do not understand Lord Hoffmann to be saying that, for a breach of article 2 to be established, the authority's system generally must have failed. Article 2 can be breached by a systemic (i.e. wholesale) failure even in an individual case. It seems to me that Sedley LJ captured the concept admirably when he observed (also at paragraph 13), a propos of his above cited acknowledgment that the respondent council here no doubt could and arguably should have moved faster: "But that is a long way from the system either breaking down or abandoning the child."

131. The facts of this case are now before us in very considerable detail – much additional material having been adduced even since the Court of Appeal hearing. On no possible view of this material could a court reasonably conclude that the council took no action to supply the appellant with the education he required (after he ceased to attend LS school) or that their attempts to provide it were "completely ineffective" (Lord Kerr's paragraph 161 illustrations of Convention breach), given the magnitude of the problem confronting them and the difficulties of its solution. Nor can it reasonably be said that the appellant was denied "effective access to such educational facilities as the [UK] provides for such pupils" (Lord Bingham's test in the *Lord Grey* case): "such pupils" are inevitably difficult to accommodate within the system and it is not sufficient for establishing a violation of article 2 to show merely a breach of the education authority's domestic public law duties or even maladministration. Denial implies a substantially higher degree of blameworthiness than this: as I would hold, something akin to an abandonment of the particular child's plight (a refusal to engage with its needs) or a complete breakdown (not merely shortcomings) in the authority's handling of the individual child's case.

132. Nothing in the Strasbourg jurisprudence to my mind encourages a less exacting approach than this to the application of article 2 and I can think of few things more unfortunate in this field of law than that our own courts should adopt a looser approach. With the possibility of a damages award at the end of the road, many fresh claims would be generated, all at considerable public expense. Better by far that any serious shortcomings in the handling of an individual child's education should be the subject of a prompt public law challenge so that they may be corrected in good time.

133. Inevitably, if one felt the least doubt as to whether the respondent Council's handling of this case could properly be characterised as a violation of the Convention, there would need to be a full trial. If, however, I am right as to the proper approach to article 2, this is unnecessary. There is a close parallel here with the cases concerning the existence or scope of a common law duty of care. As to these, it is worth recalling what Lord Hope said in *Mitchell v Glasgow City Council* [2009] 1 AC 874, 883 (at para 12):

> "There will, of course, be cases where the existence or scope of a duty of care cannot safely be determined without hearing the evidence. But no advantage is to be gained by sending a case to proof when it is clear from the averments that, even if everything that the pursuer avers is proved, the case must fail. That is likely to be the case where the issue on which the case depends is one of principle or, as Lord Reed put it in para 135 of his opinion, of legal analysis. In such cases, it is not just that there would be no advantage in sending the case to proof. It would be unfair for the defenders to

> be required to spend time and money on what will obviously be a fruitless inquiry. Lord Reid's comments in *Jamieson v Jamieson* [1952] AC 525, 550 on the value of the procedure for disposing of cases on relevancy without inquiry into the facts remain just as true today as they were when they were made nearly 60 years ago."

134. As I observed at the outset, it is principally upon this ground that I would dismiss the appeal. Had it been necessary, however, I would, for the reasons given by other members of the Court, have dismissed it on the limitation ground also.

LORD KERR

135. A, a severely disabled child, launched an action for damages against Essex County Council for breach of his human rights, particularly in relation to Article 2 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. This provides, among other things, that no person shall be denied the right to education. A's action was dismissed by Field J by way of summary judgment [2007] EWHC 1652 (QB) on the ground that it had no realistic prospect of success. The judge further held that, since the claim had been brought out of time, it should be rejected on that account also.

136. A's appeal was dismissed by the Court of Appeal [2008] EWCA Civ 364, Sedley LJ holding that the facts asserted on A's behalf were not capable of amounting to a breach of Article 2 of the First Protocol. In particular, he found that it was not possible to spell out of those facts either a failure of the education system or a denial of access to it. The claim had also been made both before Field J and the Court of Appeal that the respondent had acted in breach of A's Convention rights under Article 3 (protection from inhuman and degrading treatment) and Article 8 (the right to respect for family and private life) and Article 14 (protection from discrimination) but these claims were not pursued before this court.

The facts

137. A is severely autistic. He suffers from epilepsy and has grave learning difficulties. He attended L S School, a Community Special Day School for children with serious problems with learning, from 1995 until 17 January 2002. In May 2001 teachers at the school expressed concern about his behaviour and the school's ability to deal with him. He had inflicted harm on himself and had no concept of danger. His condition was deteriorating and he was considered to

represent a significant danger not only to himself but also to others who attended the school.

138. In January 2002 A's parents were contacted by the school. They were asked to keep him at home while a medical assessment of his condition was made. This was considered to be necessary because of his propensity for violence against other pupils and staff. A's parents agreed to this request and he remained at home for many months before the medical assessment could be arranged. In fact, it did not take place until September 2002. In the meantime his condition deteriorated markedly. He was sent 'work' in the form of two boxes of educational activities – touch books and bubbles. Speech and language therapy was provided on Wednesday and Thursday mornings from March 2002 and an occupational therapy assessment of A's home was carried out. In May and June 2002 he attended activity sessions at L S School and from about the end of June 2002 until 24 July 2002 he went to the school for individual teaching sessions each of which lasted 45 minutes. But he was significantly under stimulated during this period and this led to intensification of his self harming and other aberrant behaviour. Indeed, by late 2002 or early 2003 A's condition had deteriorated to the extent that he was required to wear arm splints to prevent from gouging his face. He also had to wear a helmet such was the force with which he struck his head on solid objects. This was such an acute problem that experts feared that he might fracture his skull. It is now clear – not least because of what occurred after A was finally given a suitable placement – that the absence of virtually all forms of education during this period was directly linked to the striking deterioration in A's condition.

139. In this context it is important to remember that education for A cannot be regarded in the same way as conventional learning undertaken by a child of normal capability. Rather than the usual education given to a child who does not suffer from the type of difficulties that A has, in his case 'education' involves training him in the particular skills that will allow and encourage him to function to the best of what will inevitably be his restricted ability. But because of the severe disabilities from which he suffers, the need for such 'education' is, if anything, far more important than for a normal child. A normal child whose education is neglected is condemned to ignorance and a lack of the means to realise his full potential. For someone such as A the absence of proper education can have far more serious consequences – as, indeed, his case has so graphically illustrated.

140. The medical assessment of A finally took place between 9 and 13 September 2002 at the St Piers National Centre for Young People with Epilepsy. He was diagnosed as suffering from "generalised seizure disorder; severe learning disability; and challenging behaviour (aggressive and self injurious behaviour)". A report following the assessment recommended a residential programme. This would provide a 24 hour curriculum with 'consistent behavioural strategies' at a specialist school. It was concluded that A needed supervision and support at all

times on a one to one basis. Indeed, the view was taken that on occasions this would need to be on a two to one basis. This report's findings are highly significant in the debate as to whether A's proposed action for violation of Article 2 of the First Protocol was entirely bereft of any prospect of success. The level of his need, as disclosed by the report, finds a stark and sorry contrast with what had actually been provided for him during the nine months that preceded the assessment. He had been left virtually continuously in the care of his parents who had no expertise whatever in dealing with his condition. They were also required to care for A's siblings some of whom also had special educational needs. It is not difficult to understand why A's condition worsened so dramatically during this period.

141. The County Council became aware of the outcome of the assessment on 13 September. Commendably, by 10 October 2002 they had put funding in place for a residential placement. There then began a protracted search for a school that would meet A's needs. The Council wrote to no fewer than twenty six schools between 16 October 2002 and 17 December 2002, seeking a placement for A. Eventually, on 9 February 2003 Kisimul School offered a place for him. This would cost the Council what Sedley LJ correctly described as the colossal sum of £223,589 per annum. Once again to its credit the County Council was immediately willing to pay this amount. But, for understandable reasons, A's parents asked if they could continue investigating other possibilities. Finally, it was decided to accept the place at Kisimul School. As it happened, however, the further investigation that his parents has asked for made no difference to the start of A's placement there because it was not possible for him to begin his course until 28 July 2003 since there were ongoing building works at the school.

142. A has now completed his course at Kisimul school. He progressed well there. His overall health and behaviour improved. He received appropriate education, and his self-harming reduced considerably. In a report of 23 November 2006, a Consultant Community Paediatrician stated that there was no doubt that A's development achievements regressed during the period that he was away from school. His behaviour had deteriorated because of the lack of demands made upon him and the fact that, in consequence, he had been markedly under stimulated. Despite this, it was considered that the effects on his learning and general development were temporary. The paediatrician expressed the fear, however, that there may have been a more permanent effect on his behaviour. In light of this report and the other evidence, Field J found that the nineteen months during which A was away from school had an adverse impact not only on him but also on his parents. That finding has not been challenged.

The evolution of A's claim

143. Field J described the claim made by A in the proceedings before him in the following paragraph of his judgment: -

> "**[25]** A claims that in breach of his A2P1 rights he was denied an effective and meaningful education whilst at L S School between May 2001 and 18 January 2002, and thereafter until 27 July 2003. He also claims that his exclusion from L S School was in breach of his A2P1 rights."

144. The focus of the claim was, therefore, on the exclusion of A from the LS school and the adequacy of the education that he had been receiving there. Before the Court of Appeal that focus seems to have shifted somewhat. Sedley LJ stated that the "essential case" made on A's behalf was that, for want of even minimally suitable provision for his education, he was shut out of the state system, although he also said that the "foundation of the claim" was that A ought to have remained in L S School until July 2003 when his successful placement at Kisimul School began.

145. Before this court, a simpler and more direct case has been made. It is to the effect that this young man had been abandoned by the educational authorities after his parents were persuaded to withdraw him from school. Emphasis was no longer placed on the exclusion of A from a particular school or indeed from the state system. Rather, while acknowledging that the County Council had made conspicuous efforts to obtain a suitable place for A after the medical assessment was made, counsel for the appellant contended that the plain fact was that, from January 2002 until then, no effective education was provided for him. That, it was submitted, amounted to a denial of education in breach of Article 2 of the First Protocol.

The denial of education

146. Article 2 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms provides: -

> "Right to education
>
> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

147. Although expressed in negative terms, it is clear that this provision enshrines a right to have access to education – see *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 where the European Court of Human Rights (ECtHR) said at, p 280, para 3: -

> "By the terms of the first sentence of this Article, 'no person shall be denied the right to education'.
>
> In spite of its negative formulation, this provision uses the term 'right' and speaks of a 'right to education'. Likewise the preamble to the Protocol specifies that the object of the Protocol lies in the collective enforcement of 'rights and freedoms'. There is therefore no doubt that article 2 does enshrine a right."

148. The content of the right and the extent of the corresponding duty cast on the member state are discussed in the *Belgian Linguistic Case.* The court concluded that the scope of the obligation must be geared to the aim of the provision. That aim did not include the imposition of a duty to create an educational system; nor did it guarantee access to any particular type of education or at any specific level. What the provision was intended to achieve was the enshrining of a right to access to the education system that prevailed in the state at the material time.

149. It was recognised, however, that the Article 2 First Protocol right had a further dimension beyond the mere right to access to available educational institutions. The court dealt with this in the following passage from, p 281, para 4 of its judgment: -

> "4 The first sentence of article 2 of the Protocol consequently guarantees, in the first place, a right of access to educational institutions existing at a given time, but such access constitutes only a part of the right to education. For the 'right to education' to be effective, it is further necessary that, *inter alia*, the individual who is the beneficiary should have the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each State, and in one form or another, official recognition of the studies which he has completed."

150. Mr Bowen QC for the appellant argued that, in effect, the prevailing education system for children in respect of whom a statement of special educational needs had been made under section 324 of the Education Act 1996 was the educational provision specified in the statement since this was the only

form of education from which A could 'draw profit'. Moreover for special educational needs children a system of education was in place in this country. This consisted of a means of determining what such a child's needs were and then meeting them. This, therefore, was the system to which A was entitled to have access by virtue of Article 2 of the First Protocol. The riposte of Mr Faulks QC (for the County Council) was that the appellant's argument was tantamount to a claim to entitlement to a specific type of education which the *Belgian Linguistic Case* and later authority had expressly disavowed. Before commenting on these competing arguments, it is necessary to say something about the cases that came after the *Belgian Linguistic Case.*

151. A number of the later Strasbourg authorities dwell on the need for a system of regulation in the provision of education and the constraint that this places on the scope of the right under Article 2 of the First Protocol. In *SP v UK* (Application No 28915/95) [1997] EHRLR 287, the applicant suffered from dyslexia. He claimed that his rights under Article 2 of the first Protocol had been violated because the teaching staff of the schools that he had attended had failed to address his special educational needs and the local education authority had initially refused to make a statement of special educational needs in his case. The applicant's claim was declared inadmissible by the European Human Rights Commission. Citing the *Belgian Linguistic Case* 1 EHRR 252, 281, para 5 the Commission said that the right under Article 2 of the First Protocol "by its very nature call[ed] for regulation by the State" and that such regulation "may vary in time and place according to the needs and resources of the community and of individuals". It was recognised that there must be a wide measure of discretion left to the authorities as to how to make the best use possible of the resources available to them in the interest of disabled children generally.

152. And in *Şahin v Turkey* (2005) 44 EHRR 99 ECtHR said: -

> "154 In spite of its importance, this right is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State' (see the *Belgian Linguistic Case*, para 5; see also, mutatis mutandis, *Golder v United Kingdom* (1975) 1 EHRR 524, para 38; and *Fayed v United Kingdom* (1994) 18 EHRR 393, para 65). Admittedly, the regulation of educational institutions may vary in time and in place, inter alia, according to the needs and resources of the community and the distinctive features of different levels of education . ."

153. The constraint on the right under Article 2 of the First Protocol which arises from the recognition of the need for regulation leads inexorably, in my opinion, to

the conclusion that the system of education to which the article guarantees access must include the process for investigating what is required to meet an individual child's needs. Such inquiry is unquestionably a feature of the educational system in this country. It follows that the failure to supply education during the reasonable period that such investigation requires will not give rise to a violation of Article 2 of the First Protocol. I shall discuss the implications of this conclusion on A's case below.

154. The most important domestic decision in this area is *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363. Paras 12 and 13 of Lord Bingham's speech contain a valuable summary of the Strasbourg jurisprudence following the *Belgian Linguistic* case and it is convenient to reproduce them here: -

> "12 The court's judgment in the *Belgian Linguistic Case (No 2)* has been cited and relied on in a number of later decisions such as *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, *Şahin v Turkey* (Application No 44774/98) (unreported) 10 November 2005, Grand Chamber, and *Timishev v Russia* (Application Nos 55762/00 and 55974/00) (unreported) 13 December 2005. In later decisions the reasoning in that case has been followed but elaborated. It has been held that article 2 is dominated by its first sentence *(Kjeldsen*, para 52; *Campbell and Cosans*, para 40) but the article must be read as a whole (*Kjeldsen*, para 52), and given the indispensable and fundamental role of education in a democratic society a restrictive interpretation of the first sentence would not be consistent with the aim or purpose of that provision: *Şahin*, para 137; *Timishev*, para 64. But the right to education is not absolute (*Şahin*, para 154): it is subject to regulation by the state, but that regulation must not impair the essence of the right or deprive it of effectiveness: *Campbell and Cosans*, para 41; *Şahin*, para 154. It is not contrary to article 2 for pupils to be suspended or expelled, provided that national regulations do not prevent them enrolling in another establishment to pursue their studies (*Yanasik v Turkey* (1993) 74 DR 14), but even this qualification is not absolute: *Sulak v Turkey* (1996) 84-A DR 98. The imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils: *Şahin*, para 156.
>
> 13 In *Coster v United Kingdom* (2001) 33 EHRR 479, para 136, Her Majesty's Government submitted that article 2 did not confer a right

> to be educated at a particular school. The court did not expressly accept or reject this submission. Such an interpretation was, however, adopted by the Court of Appeal in *S, T and P v Brent London Borough Council* [2002] ELR 556, para 9."

155. In para 24 of his speech Lord Bingham identified the purpose of Article 2 of the First Protocol as the guarantee of fair and non-discriminatory access to the system of education prevailing within the jurisdiction of member states. He went on to characterise the right as "weak" compared to other rights guaranteed by the Convention. That it is weak in respect of its scope – in not guaranteeing access to a particular form of education, for instance – is undeniable. But I do not understand Lord Bingham to have been suggesting that it was weak in relation to the force and effectiveness of the guarantee that it embodies. That much is, I believe, clear from Lord Bingham's statement in the immediately preceding sentence of the same para: -

> "The fundamental importance of education in a modern democratic state was recognised to require no less [than fair and non-discriminatory access to the prevailing educational system]."

156. Later in the same paragraph Lord Bingham observed that the test as to whether there had been a denial of education was "a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?". It was on this passage that Mr Bowen particularly fastened in order to advance his claim that the special educational needs system (and indeed the special needs provision stipulated in the statement) was that to which A was entitled to have access in fulfilment of Article 2 First Protocol rights. But I do not consider that Lord Bingham here had in contemplation a particular group of pupils with particular educational requirements. Just a few sentences earlier he had said that there was no right to education of a particular kind or quality, other than that prevailing in the state and there was no Convention guarantee of education at or by a particular institution.

157. Sedley LJ in the Court of Appeal suggested that there was a possible tension between Lord Bingham's formulation of the scope of the right (*i.e.* effective access to such educational facilities as the state provides for such pupils) and Lord Hoffmann's statement in the same case (at para 57) that a breach must involve denial of "the basic minimum of education available under the domestic system". Taken as a whole, it seems to me that Lord Bingham's concept of the content of the right does not differ significantly from that of Lord Hoffmann. His emphasis on the fact that it did not guarantee any particular form of education and that it did not require to be provided at any particular institution chimes well with

the notion that all that need be provided is the basic minimum. I would not therefore be disposed to accept Mr Bowen's contention that A was entitled under Article 2 of the First Protocol to have access to the particular form of education specified in the statement of special needs. He was entitled, however, to the basic minimum education and what that basic minimum involves must be assessed, in my opinion, by reference (at least in part) to A's special needs. It would be utterly pointless to give A access to conventional education. To suggest that his right to an education extended only so far as the right to have access to the normal state system at its most basic level would be to rob the right of any meaning or effectiveness in his case.

158. My view that A was entitled to a basic minimum education geared to his particular condition is not influenced, therefore, by the observation in the *Belgian Linguistic* case that, for the right to education to be effective, it is necessary that the individual who is the beneficiary should have the possibility of drawing profit from the education received. That statement reflected the particular circumstances of the case and was directed to the need to ensure the availability of some form of certification as to the proficiency of the student who had undertaken the education. The underpinning of my conclusion that the basic minimum in A's case required that his condition be taken into account is the need for the right to be effective in his case. It would not be effective if that critical and central feature was ignored.

159. While supporting Lord Bingham's reasons for dismissing the pupil's claim in the *Lord Grey* case, Lord Hoffmann gave reasons of his own for agreeing with that result. At para 61 he said: -

> "In the present case, where the respondent was not excluded from school education, he would in my opinion have had no claim at Strasbourg. And if no claim can be made in Strasbourg, it follows that there cannot have been an infringement of a Convention right giving rise to a claim under section 6 of the Human Rights Act 1998: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529. It is in my view illegitimate to promote the public law duty of the school, not giving rise to a private right of action, to a duty under section 6 of the Human Rights Act 1998 remediable by a claim for damages, by saying that in domestic law the school bore the 'primary duty to educate the child'. The correct approach is first to ask whether there was a denial of a Convention right. In the case of article 2 of the First Protocol, that would have required a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education. As there was no such failure, that is the end of the matter."

160. The use of the words ‘systemic failure’ in this passage appears to have led the Court of Appeal in the present case to conclude that for a breach of Article 2 of the First Protocol to occur there must be “either a failure of the education system or a denial of access to it” – see para 12 of Sedley LJ’s judgment. So expressed, these alternatives seem to contemplate either a deliberate withholding of education from the pupil concerned or some fundamental failure of the educational system in general which leads to his being denied access to it.

161. As Mr Faulks was quick to accept, there can be a denial of education even if there has not been systemic default. I would therefore be slow to attach to Lord Hoffmann’s use of the words, ‘systemic failure’ quite the significance that the Court of Appeal appears to have associated with it. I consider that denial of education under the article can arise in a variety of ways. Obviously, a calculated refusal to allow a pupil access to any form of even basic education will be in violation of the right. But a failure to take steps to provide education when the state authority responsible for providing it is aware of the absence of the pupil from any form of education could in certain circumstances give rise to a breach of the right. If, for instance, a local education authority knows that a child has been asked by a school not to attend that school; and if the authority is responsible for the provision of education to the child; and if it takes no action to supply any alternative to what had been previously provided by the school, it is at least arguable that it is in breach of its duty under Article 2 of the First Protocol. I would go further. I believe it also to be at least arguable that an authority with the responsibility for providing education, if it knows that a pupil is not receiving it and engages in a completely ineffectual attempt to provide it, is in breach of the provision.

162. As I have said above, however, an education authority must have the opportunity to make reasonable inquires as to what a child’s educational needs are and how they can be met, without falling foul of the requirements of Article 2 of the First Protocol. What, therefore, is principally at stake in the present case is whether the entire period of A’s absence from any effective form of education can be accounted for on the basis that this period was reasonably required in order to investigate A’s particular needs and to identify a school at which they could be met. A subsidiary – but nonetheless important - issue is whether any less ideal option should have been considered in the meantime in order to mitigate the harm that A undoubtedly suffered during his absence from education.

163. In my opinion, these were triable issues. If it could be shown that the County Council had either failed to make inquiries during any period that it knew A was not receiving effective education or that such investigations as it conducted were wholly inadequate, there would be at least a reasonable prospect of success for A’s claim under Article 2 of the First Protocol. A trial might well have revealed that there was nothing more that the County Council could have done. In that case,

no breach of the article could arise. But I feel quite unable to say, in the absence of a trial, that this is bound to have been the outcome.

164. I am likewise unable to conclude, in the absence of evidence that would allow a confident judgment on the issue, that it could never be shown that the County Council ought to have put in place some short term basic educational provision which would have gone some way towards diminishing the adverse impact on A of the lack of education while the medical assessment was being arranged and subsequently while awaiting its implementation. I am in complete agreement with what Lady Hale has said on this issue. It is, of course, easy to speculate that there may have been nothing that the Council could reasonably do in this regard. But unless the matter was investigated, I cannot see how it can be said that A had no prospect of establishing that the County Council should have done something beyond such efforts as it made.

Extension of time

165. Because it upheld the judge's ruling that A's claim should be dismissed by way of summary judgment, the Court of Appeal did not deem it necessary to consider the issue of whether time should have been extended to permit the appellant's claim to proceed. Since I have reached a contrary view on the question of summary judgment, it is necessary for me to consider the extension of time point.

166. Section 7 (5) of the Human Rights Act 1998 provides: -

> "Proceedings under sub-section (1) (a) must be brought before the end of:
>
> > (a) the period of one year beginning with the date on which the act complained of took place; or
> >
> > (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

167. It has been held in *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB), [2007] 1 WLR 163, para 47 that the burden of establishing that it is equitable to extend time under s 7(5) is on the party seeking the extension. As Field J observed, at para 120, however, few cases of this type lend themselves to a ready resolution by the application of a burden of proof and I prefer to approach the question (as did the judge) by an open ended examination of the factors that weigh on either side of the argument that this is a case in which the discretion of the court should be exercised to extend the time under section 7 (5) (b).

168. Field J dealt with this issue in paragraph 129 of his judgment as follows:

> "In my judgment, it is not equitable to extend the limitation period in this case. My reasons are these. CLC [the Children's Legal Centre], who are very familiar with the law relating to education, were instructed on 14 April 2002 but no application for judicial review was made until 30 May 2003, an application that foundered on the LSC's refusal to grant funding because a school place was going to be made available from the end of July 2003. No such reason would have existed for refusing funding for a judicial review application made towards the end of 2002 but such an application was not made. Instead, proceedings have been issued a long time after the alleged infringements came to an end and at a stage when there is little point from A's personal point of view in seeking a declaration that his rights were infringed. As for his damages claim, it is far from certain that a court would conclude that an award of damages is necessary to afford him just satisfaction and any sum awarded is likely to be modest and therefore at a level that is disproportionate to the costs of the proceedings. It was this lack of proportionality that understandably led the LSC to refuse funding until March 2005. I do not think that the public interest identified by the Public Interest Advisory Panel tips the balance in favour of extending time. The question whether A2P1 confers a right to an education in accordance with the relevant SSEN, and if so, the appropriateness of an award of damages and the impact on the alleged shortcomings of judicial review in special educational needs cases, can be as easily (and more appropriately) determined in an upcoming application for judicial review made by another party as in these very late proceedings."

169. I can find nothing in this analysis with which to disagree. In particular, I consider that it is highly unlikely that any significant sum by way of damages would have been awarded if the action had been brought within time and had been successful. On the contrary, a court may well have concluded that no award of damages was necessary in order to provide just satisfaction to A. Accordingly, I

would dismiss the appeal on the ground that the judge was right not to have extended the time to allow the claim to be brought.