

**Response of legal adviser to ESF to the Note for Bills Committee  
on the English Schools Foundation (Amendment) Bill 2007 - Proposed Objects of the  
English Schools Foundation**

1. We refer to the Note prepared by the Senior Assistant Legal Adviser - 2 (LC Paper No.LS10/07-08) for the assistance of the Bills Committee on the English Schools Foundation (Amendment) Bill 2007 (the "**Note**").
2. We agree with the conclusion set out in paragraph 4 of the Note that a decision of ESF which relates to the implementation of its objects would be reviewable by the court.

**"Target duties"**

3. We do not, however, agree that the restriction on the ESF having regard to "race or religion or disability or special educational need" as proposed to be included in the objects could amount to a "target duty" as suggested in paragraphs 5 to 9 of the Note.
4. The Note refers to the *Ali* case as an example of a "target duty". In this case it was alleged that the relevant Education Authority had failed in its duty to provide "sufficient schools" for their area. In deciding that the relevant duty was a "target duty" (and therefore an individual could not bring an action against the Education Authority for breach) Woolf LJ identified the following key issues :-
  - (a) the duty was drafted "in very broad and general terms", and
  - (b) the Secretary of State had the power to override the Education Authority at any time and, therefore, the duty could not be absolute.

The *Beck* case concerned a similar duty and involved a similar analysis by Owen J.

5. Neither of the key issues identified by Woolf LJ apply to the situation being considered in respect of ESF. There is nothing "aspirational" or "general" (to use the wording quoted in the Note) about a statement that in providing the specified services (namely owning, managing and administering certain schools) ESF must not have "regard to race or religion or disability or special educational need". To the contrary, such restriction on ESF's power is very clear and very specific. In addition, there is no power in the ESF Ordinance which would enable some other statutory body to override ESF in exercising its objects.
6. Unfortunately the Note fails to analyse how the proposed objects of ESF could be construed as a "target duty". There are, as mentioned above, fundamental differences in nature between the powers in the *Ali* and *Beck* cases and those in the objects for ESF. Not least of these differences is that the powers in the *Ali* and *Beck*

cases were permissive provisions, whilst those in the case before the Committee are restrictive provisions.

7. The Note itself is equivocal as to whether the proposed objects of ESF would amount to a "target duty". In this respect see:-

- paragraph 9 of the Note "*any proposed amendment to the objects of ESF ... may be interpreted as a target duty of ESF*", and
- paragraph 11 of the Note "*The proposed objects of ESF in so far that they may be interpreted as target duty*"

(emphasis added in both instances).

8. In short therefore, whilst we agree that the courts have, on occasion, determined that certain statutory obligations can be construed as "target duties" this is only in specific circumstances which, we suggest, clearly do not apply to the case in question.

### **"Ultra vires"**

9. It is established law that where in exercising a statutory power a public body takes account of a matter beyond those specified in statute then such act is ultra vires<sup>1</sup>. The act of the statutory body can then be declared a nullity by a court.

10. The leading case on this point is *R v Sunderland City ex p Redezeus Ltd (1995) 27 HLR 477*. In this case the aptly named Judge J determined that where the wording of a statutory power set out certain factors which should be considered and the statutory body considers additional factors then the decision reached by the statutory body is ultra vires.

11. It is suggested that the *Sunderland* situation is directly analogous with that faced by ESF. (Indeed it is suggested that the situation of ESF is even clearer than that in *Sunderland* as ESF is facing express exclusions, rather than implied exclusions as was the case in *Sunderland*.)

### **Conclusion**

12. The proposed changes to the objects of ESF are not "target duties" as suggested in the Note. They are clear and unequivocal fetters on the powers of ESF. There is no "degree of elasticity" in the wording or scope for ESF to place its own interpretation on such wording.

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<sup>1</sup> Fordham, "Judicial Review Handbook", 4th Edition page 821

13. Hartmann J in *R v The English Schools Foundation* (already cited in the Note) determined that ESF in considering whether to admit or expel a student is exercising a public power. Were section 4 to be amended in the manner set out and were ESF to have regard to an applicant's "disability or special educational need" in considering whether to accept or reject him or her as a student this would, following the clear authority of the English courts, be considering matters "beyond those set out in statute" and, therefore, be ultra vires.
14. It would appear that the best comfort the SALA can provide to members of the Committee is that the proposed objects "may" amount to target duties. Clearly the SALA has considerable doubt as to whether or not they do amount to "target duties". We are confident that they do not amount to "target duties".
15. Finally the introduction of the proposed objects must be considered in light of the already existing provisions of the Disability Discrimination Ordinance ("**DDO**"). The DDO imposes stringent obligations upon ESF (which are directly relevant to persons with disabilities or special educational needs) with which ESF has complied and will continue to comply.

Johnson Stokes & Master  
1st November, 2007