



**Hilary Term
[2017] UKSC 28**

On appeal from: [2016] EWHC 1283 (Admin)

JUDGMENT

Isle of Wight Council (Appellant) v Platt (Respondent)

before

**Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Reed
Lord Hughes**

JUDGMENT GIVEN ON

6 April 2017

Heard on 31 January 2017

Appellant

Martin Chamberlain QC
Ms Emily MacKenzie
(Instructed by Sharpe
Pritchard LLP, as agent
for Isle of Wight Council
Legal Services)

Respondent

Clive Sheldon QC
Paul Greatorex
(Instructed by Roach
Pittis)

*Intervener (Secretary of
State for Education)*

James Eadie QC
Louis Mably
(Instructed by The
Government Legal
Department)

LADY HALE: (with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hughes agree)

1. This case is all about the meaning of the word “regularly” when describing the attendance of a child at school. Under section 444(1) of the Education Act 1996, if a child of compulsory school age “fails to attend regularly” at the school where he is a registered pupil, his parent is guilty of an offence. There are at least three possible meanings of “regularly” in that provision: (a) evenly spaced, as in “he attends Church regularly every Sunday”; (b) sufficiently often, as in “he attends Church regularly, almost every week”; or (c) in accordance with the rules, as in “he attends Church when he is required to do so”. When does a pupil fail to attend school regularly? Is it sufficient if she turns up regularly every Wednesday, or if she attends over 90% of the days when she is required to do so, or does she have to attend on every day when she is required to do so, unless she has permission to be absent or some other recognised excuse?

This case

2. The respondent is the father of a child whom I shall call Mary, who is now aged nearly eight and three quarters, but was aged nearly seven at the relevant time. Her parents are separated and she lives roughly half the time with each of them. She is a registered pupil at a primary school on the Isle of Wight. On 30 January 2015, her father sent her head teacher a form entitled “Request to remove a child from education during term time”, with a covering letter seeking permission to take Mary out of school for a holiday from 12 to 21 April 2015. On 9 February, the head teacher replied refusing the request and warning that a fixed penalty notice would be issued if Mary was taken on holiday.

3. Coincidentally, Mary’s mother had taken her on a holiday which had not been authorised by the school for the week beginning the 9 February (five days, amounting to ten attendances). Neither, as it happens, had she sought the father’s permission to take the holiday (although we do not know whether she was required by law to do so). Mary’s mother was issued with a penalty notice by the school which she had paid.

4. Despite the head teacher’s refusal of permission, Mary’s father took her out of school from 13 to 21 April (for seven school days, amounting to 14 attendances). On 29 April, the head teacher sent a Fixed Penalty Notice Referral Form to the Council’s Education Welfare Officer (EWO). The reason given for believing that a penalty notice was appropriate was “unauthorised family holiday during term time”.

The EWO checked that the Council's Code of Conduct had been complied with and authorised the issue of the notice, which was done on 14 May. This required the father to pay £60 by 4 June 2015. He did not do so. Accordingly, that day he was sent a further invoice requiring him to pay £120 by 10 June 2015. He did not do so.

5. On 1 July, he was sent a letter before action, advising him that the EWO was preparing to prosecute him. He responded by email and telephone call to explain the reason for the absence. The EWO replied that the penalty notice had been correctly issued and the matter would now proceed to prosecution. Proceedings were duly brought in the Isle of Wight Magistrates' Court, alleging that Mary had failed to attend school regularly between 13 and 21 April and that as her parent he was guilty of an offence under section 444(1) of the Education Act 1996. He pleaded not guilty.

6. The trial took place on 12 October 2015. At the close of the prosecution's case, the magistrates ruled that there was no case to answer. As they explained, "the question we have to ask ourselves is whether [M] was a regular attender. Before the holiday with Dad, her attendance was 95%. Afterwards it was 90.3%. ... The document supplied on refusal of leave stated that satisfactory attendance is 90-95%". The Council appealed by way of case stated. In their case stated, the Magistrates certified the following question for consideration by the High Court:

"Did we err in law in taking into account attendance outside of the offence dates (13th April to 21st April 2015) as particularised in the summons when determining the percentage attendance of the child?"

7. On 13 May 2016, a Divisional Court of the Queen's Bench Division answered that question in the negative: the magistrates had not erred in taking into account the child's attendance outside the absent dates in determining the percentage attendance of the child. On 30 June 2016, the Divisional Court certified a slightly different point of law of general public importance, pursuant to section 1 of the Administration of Justice Act 1960:

"Whether, on an information alleging a failure by a parent over a specified period to secure that his child attends school regularly contrary to section 444(1) of the 1996 Act, the child's attendance outside the specified period is relevant to the question whether the offence has been committed."

Thus the magistrates had assumed that they were required to determine the percentage attendance of the child. The question certified by the Divisional Court

makes no such assumption. The essential question for this court is the meaning of “fails to attend regularly” in section 444(1) of the Education Act 1996.

The law from 1870 to 1944

8. We have been given an account of the history of the law leading up to section 444(1) of the 1996 Act which is interesting as well as instructive. During the early 19th century, the Church of England, the Methodist Church and other Churches set up many elementary schools, but attendance was not compulsory and the state had no obligation to provide universal elementary education. The Elementary Education Act 1870 (Vict 33 & 34, c 75) by section 5 required there to be provided in every school district “sufficient amount of accommodation in public elementary schools” for all the children resident in the district “for whose elementary education efficient and suitable provision is not otherwise made”.

9. However, the 1870 Act did not insist that attendance be made compulsory everywhere. This was politically controversial. There was concern about the practicality of compelling the attendance of children whose parents moved frequently in search of work and even more concern about the justice of depriving parents of the earnings of their children while imposing the costs of school attendance upon them. Instead, therefore, section 74 of the 1870 Act empowered each school board, with the approval of the Secretary of State, to make bye-laws (1) requiring parents of children of specified ages (between five and 12 inclusive) to cause them to attend school, unless there was some reasonable excuse, (2) fixing the times when children were required to attend school, with two exceptions, one of which was for “any day exclusively set apart for religious observance by the religious body to which his parent belongs”, and (4) imposing penalties for breach. There was a list of reasonable excuses (held to be non-exclusive in *London County Council v Maher* [1929] 2 KB 97): (1) that the child is under efficient instruction in some other manner; (2) that the child has been prevented from attending school by sickness or any unavoidable cause; and (3) that there was no public elementary school within what was thought to be a reasonable walking distance of the child’s home, with a maximum of three miles.

10. Only a minority of school boards made such bye-laws. However, the climate of opinion soon changed. The Elementary Education Act 1876 (39 & 40 Vict, c 79) prohibited the employment of children under ten, and of children between ten and 13 who had not attained an appropriate standard of education (section 5), and for the first time imposed upon parents a duty to cause their children “to receive efficient elementary instruction in reading, writing and arithmetic” (section 4). If a parent habitually and without reasonable excuse neglected to do this, the local authority was under a duty to apply to court for an order requiring the child’s attendance at a specified school. Thus such a parent might not only be prosecuted for a breach of

the bye-laws but also have the education of his child taken out of his hands. This was followed up by section 2 of the Elementary Education Act 1880 (43 & 44 Vict, 23), which required all school boards to introduce bye-laws to compel attendance, although they could still set the times at which attendance was required.

11. We have been shown a sample of these local byelaws. They made it a criminal offence for a parent to fail to cause his child of school age to attend school, unless there was a reasonable excuse. Many fixed the time when attendance was required at “the whole time for which the school selected shall be open for the instruction of children of a similar age”. Some fixed the number of days for which older children were required to attend, varying with the seasons, presumably in order to allow them to take time off for seasonal agricultural work.

12. The school leaving age was raised to 14 by the Education Act 1918 (8 & 9 Geo 5, c 39). The Education Act 1921 consolidated the earlier legislation, with its three basic features: the parental duty to cause their children to be efficiently educated in reading, writing and arithmetic; the duty of the local education authority (as school boards had become) to apply for a school attendance order where a parent habitually and without reasonable excuse neglected to do this; and the duty to make bye-laws requiring the parents to cause their children to attend school at the times required by the bye-laws unless there was a reasonable excuse.

13. The 1921 Act was passed in the knowledge of the case law under the earlier legislation. In *Ex p the School Board of London, In re Murphy* (1877) LR 2 QBD 397, at 400, Cockburn CJ had said that “an occasional omission might suffice” to constitute the offence under the bye-laws, contrasting it with the graver sanction of a school attendance order which might result from an habitual failure. In other cases, convictions on informations alleging a single day’s absence had been upheld, the argument being about whether there was a reasonable excuse: examples are *Hares v Curtin* [1913] 2 KB 328; and *Bunt v Kent* [1914] 1 KB 207. And in *Marshall v Graham* [1907] 2 KB 112, parents were prosecuted for failing to send their children to school on Ascension Day; the argument was about whether Ascension Day was a day “exclusively set aside for religious observance” by the Church of England. No-one suggested that the offence could not be committed by a single day’s absence if the child’s attendance were otherwise satisfactory.

14. The principle that the parent had to cause the child to attend school at all times when required to do so by the bye-laws was affirmed in *Osborne v Martin* (1927) 91 JP 197, where the Divisional Court held that a parent who withdrew his child from school every week for piano lessons should have been convicted. Lord Hewart CJ observed, at p 197:

“It was never intended that a child attending the school might be withdrawn for this or that hour to attend a lesson thought by the parent to be more useful or possibly in the long run more remunerative. The time-table and discipline of a school could be reduced to chaos if that were permissible.”

Salter J pointed out, at p 198, that parents were not obliged to take advantage of the free education provided by the state, but if they did, they had to take it as a whole.

The law since 1944

15. The modern law of school attendance dates back to the Education Act 1944, generally known as Rab Butler’s Act. This was the Act which provided, not only for compulsory elementary, or primary, education, but also for compulsory secondary education of a sort thought suitable for the particular child. The general shape of the school attendance regime remained the same, but there were some changes.

16. First, the parents’ duty was no longer limited to causing the child be efficiently educated in the “three Rs”. Instead, the duty was “to cause him to receive efficient full-time education suitable to his age, ability and aptitude, either by regular attendance at school or otherwise” (section 36). Second, if a parent failed to satisfy the local education authority of this, the authority could issue a school attendance order requiring him to register the child at a particular school; failure to comply was an offence (section 37). Third, the duty of LEAs to make byelaws was replaced by a statutory offence: if a child of compulsory school age who is a registered pupil at a school “fails to attend regularly thereat”, the parent was guilty of an offence (section 39(1)). The child was not to be deemed to have failed to attend regularly: if he was absent with leave, or when prevented by sickness or any unavoidable cause, or on any day exclusively set aside for religious observance, or if the school was not within walking distance and no suitable transport arrangements had been made (section 39(2)). These were all derived from the earlier legislation.

17. Thus the concept of reasonable excuse was replaced by a closed list of circumstances in which absence was permitted: see *Spiers v Warrington Corpn* [1954] 1 QB 61, holding that Parliament had decided to depart from *London County Council v Maher*, above. “Unavoidable cause” had to be something affecting the child rather than the parents: see *Jenkins v Howells* [1949] 2 KB 218. But the circumstances now included absence with leave. And the requirement that parents cause their children to attend school was replaced by an offence committed if the child failed to attend school “regularly”.

18. These provisions were replaced by provisions in materially identical terms in the Education Act 1993. These were then consolidated in the Education Act 1996. Section 7 reproduces the parents' duty in section 36 of the 1944 Act, with the addition that the education has also to be suitable to "any special educational needs he may have". Sections 437 to 443 deal with school attendance orders, which may be made where a parent, having been notified, fails to satisfy the local authority that the child is receiving suitable education and the authority are of the opinion that it is expedient that the child attend school (section 437(3)).

19. The school attendance requirement is now contained in section 444, which (as amended) now provides:

"(1) If a child of compulsory school age who is a registered pupil at a school fails to attend regularly at the school, his parent is guilty of an offence.

(1A) If in the circumstances mentioned in subsection (1) the parent knows that his child is failing to attend regularly at the school and fails to cause him to do so, he is guilty of an offence.

(1B) It is a defence for a person charged with an offence under subsection (1A) to prove that he had a reasonable justification for his failure to cause the child to attend regularly at the school.

(2) Subsections (2A) to (6) below apply in proceedings for an offence under this section in respect of a child who is not a boarder at the school at which he is a registered pupil.

(2A) The child shall not be taken to have failed to attend regularly at the school by reason of his absence from the school at any time if the parent proves that at that time the child was prevented from attending by reason of sickness or any unavoidable cause.

(3) The child shall not be taken to have failed to attend regularly at the school by reason of his absence from the school

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(a) with leave, or

(b) [repealed]

(c) on any day exclusively set apart for religious observance by the religious body to which his parent belongs.

[Subsections (3A) to (5) deal with the circumstances in which a child is not to be taken to have failed to attend regularly because of a failure to make the required travel arrangements for him.]

(6) If it is proved that the child has no fixed abode subsections (3B), (3D) and (4) shall not apply, but it is a defence for the parent to prove -

(a) that he is engaged in a trade or business of such a nature as to require him to travel from place to place,

(b) that the child has attended at a school as a registered pupil as regularly as the nature of that trade or business permits, and

(c) if the child has attained the age of six, that he has made at least 200 attendances during the period of 12 months ending with the date on which the proceedings were instituted.

(7) In proceedings for an offence under this section in respect of a child who is a boarder at the school at which he is a registered pupil, the child shall be taken to have failed to attend regularly at the school if he is absent from it without leave during any part of the school term unless the parent proves that at that time the child was prevented from being present by reason of sickness or any unavoidable cause.

(7A) Where -

(a) a child of compulsory school age has been excluded for a fixed period on disciplinary grounds from a school in England which is -

(i) a maintained school,

(ii) a pupil referral unit,

(iii) an Academy school,

(iiia) an alternative provision Academy,

(iv) a city technology college, or

(v) a city college for the technology of the arts,

(b) he remains for the time being a registered pupil at the school,

(c) the appropriate authority make arrangements for the provision of full-time education for him at the school during the period of exclusion, and

(d) notice in writing of the arrangements has been given to the child's parent,

the exclusion does not affect the application of subsections (1) to (7) to the child's attendance at the school on any day to which the arrangements relate.

(7B) In subsection (7A)(c) 'the appropriate authority' means -

(a) in relation to a maintained school, the governing body of the school,

(b) in relation to a pupil referral unit, the local authority, and

(c) in relation to any school mentioned in subsection (7A)(a)(iii) to (v), the proprietor of the school.

(8) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(8A) A person guilty of an offence under subsection (1A) is liable on summary conviction -

(a) to a fine not exceeding level 4 on the standard scale, or

(b) to imprisonment for a term not exceeding three months, or both.

(8B) If, on the trial of an offence under subsection (1A), the court finds the defendant not guilty of that offence but is satisfied that he is guilty of an offence under subsection (1), the court may find him guilty of that offence.

(9) In this section ‘leave’, in relation to a school, means leave granted by any person authorised to do so by the governing body or proprietor of the school.”

20. It will be seen that this now distinguishes between the less serious offence in section 444(1), where the local authority do not have to prove that the parent was at fault, and the more serious (but still summary) offence in section 444(1A), where the parent knows that his child is failing to attend regularly and has no reasonable justification for his own failure to cause the child to do so. It will also be seen that, as before, the circumstances in which a child’s absence is not to be treated as a failure to attend regularly are limited to sickness or other unavoidable cause, where the burden lies on the parent (section 444(2A)); when he has leave or the day is set aside for religious observance; and when there is a failure to make appropriate travel arrangements. Unavoidable cause has been strictly construed: it did not cover the decision of a 15-year-old child to leave home to live with her boyfriend (in *Bath and North East Somerset District Council v Warman* [1999] ELR 81) or where a 15-

year-old girl did not go to school because she was bullied there and her mother kept her away (in *R (R) v Leeds Magistrates' Court* [2005] ELR 589).

21. The penalty notice regime, as an alternative to immediate prosecution, is contained in sections 444A and 444B, introduced by section 23 of the Anti-social Behaviour Act 2003. The details need not concern us, but the broad shape is that an “authorised officer” may issue such a notice where he has reason to believe that a person has committed an offence under section 444. The notice offers that person the opportunity of escaping liability to conviction for the offence by paying the prescribed penalty. If he does so within the prescribed time he cannot be prosecuted for the offence. The current penalty prescribed by the Education (Penalty Notices) (England) Regulations 2007 (SI 2007/1867) (as amended by SI 2012/1046 and SI 2013/757) is £60 if paid within 21 days or £120 if paid within seven days after that. If the person does not pay, he can of course be prosecuted for the original offence, as happened here.

22. The Regulations also require each local authority to publish a Code of Conduct for issuing penalty notices, after consultation with governing bodies, head teachers and the police. Guidance from the Secretary of State states that this “should set out the criteria that will be used to trigger the use of a penalty notice”. Among the examples given where this might be done was “one-off instances of irregular attendance, such as holidays taken during term time without the school’s permission”. Regulation 7(1A) of the Education (Pupil Registration) (England) Regulations (SI 2006/1751) (as amended by SI 2013/756) provides that leave of absence for any purpose may only be given where there are “exceptional circumstances”. The Isle of Wight’s Code of Conduct stated, among other things, that

“It is for Headteachers to determine whether or not such a request is exceptional; and to state the number of days granted. Each request can only be judged on a case-by-case basis but it is usual that Headteachers will be sparing in their use of this discretion.”

Only if they feel obliged to categorise as unauthorised any holiday absence should a warning letter be issued and the penalty notice procedure invoked.

“Regularly”

23. There is no doubt that, before the 1944 Act, a parent was liable to conviction if his child failed to attend for a single day or half day when required to do so. Most

of the case law, both before and after that Act, was concerned with the scope of the statutory exceptions or excuses. But the introduction, in 1944, of the phrase “fails to attend regularly” raised the possibility that this was no longer the law.

24. The question arose, but was not fully explored, in *London Borough of Bromley v C* [2006] EWHC 1110 (Admin), [2006] ELR 358. A mother was prosecuted for failing to secure the regular attendance of her three daughters at their school between specified dates. The magistrates appear not to have decided exactly how many attendances, out of the possible 114 (that is, 57 days) between those dates, had been missed. They found that there were “good and cogent” reasons for some of the absences; the Divisional Court generously regarded this as the magistrates’ way of saying that there had been an “unavoidable cause” for each of them. That left the 18 attendances or nine days during which each girl had been absent from school on holidays for which the school had not given leave. The magistrates found that the mother “ought to have exercised more care regarding absences for holidays during school term but the absences were, in our view, justified”. Overall, they found that the mother had not failed to secure regular attendance. On the local authority’s appeal by way of case stated, one of the questions asked was “does the taking of an unauthorised holiday of itself amount to failing to secure regular school attendance?”.

25. In an extempore judgment, Sullivan LJ held that this was the wrong question:

“The real question is whether any reasonable bench of magistrates could have concluded that there was regular attendance by these three children if 18 out of a possible 114 attendances had been missed because of two unauthorised holidays. There could be no suggestion that the holidays were with leave or that they fell within the description of an unavoidable cause ...” (para 15)

He went on to say this:

“I would readily accept the submission that it does not automatically follow that there will not have been regular attendance merely because there has been an unauthorised holiday. The question will be very much one of fact and degree in each case, but in the present case the holidays amounted to ... some 16% of possible attendances.” (para 19)

The magistrates had to have regard to all the circumstances, including the extent to which the children had attended school. Against the background of their attending for 40 days (out of a possible 57), their absence for nine days on unauthorised holidays could lead to only one conclusion. There had not been regular attendance. He repeated that “the question was one of fact and degree for the magistrates” but there was only one answer on these facts (para 21). Auld LJ agreed that “on the facts found, the magistrates did exceed the generous ambit of judgment available to them in determining whether there was regular school attendance” (para 28).

26. No authorities were cited to the court in the *Bromley* case and it would appear that no argument was addressed to the court on the meaning of “regularly”. It seems to have been assumed that “regularly” meant “sufficiently frequently”. Some support from that view might have been gleaned from the case of *Crump v Gilmore* (1969) 68 LGR 56, where the magistrates had acquitted the parents because they had not known that their daughter was “bunking off” secondary school and took immediate steps to ensure her 100% attendance when they did know. The Divisional Court sent the case back with a direction to convict, because this is an absolute offence. But in the course of doing so, Lord Parker of Waddington CJ said, at p 59:

“The real and only question here is whether the 12 occasions out of a possible 114 when this little [sic] girl was not attending school and had no reasonable excuse for not attending, amount to a failure to attend regularly.”

But he went on to hold that they did and that the magistrates must have been of the same opinion. The assumption may have been that “regularly” meant “sufficiently frequently” but the matter was not addressed.

27. *Bromley* was cited to the Divisional Court in this case. In another extempore judgment, the Court adopted the same approach, which it considered correct. The question of regular attendance was one of fact and degree and the magistrates were entitled to take the attendance record over the whole school year into account. The local authority could not pre-empt that enquiry by limiting the period charged to the period of absence on holiday. Taken to its logical conclusion, this would mean that the offence could be committed by a single day’s absence (para 16). The question whether attendance had been regular could not be ascertained solely by reference to the period of absence. It was necessary to have regard to the period of absence in the wider context of attendance (para 20). Hence the answer to the question posed was “yes”.

28. The assumption that “regularly” means “sufficiently frequently” seems also to have been made in this case, because counsel for the father argued that, without a

definition, “regular” was far too vague to be the basis of a criminal offence (see para 21); but the Divisional Court found it unnecessary to reach a view. The answer to that problem could, of course, have been that “regularly” does not mean what everyone seems to have assumed that it means.

29. I turn, therefore, to the three possible meanings of “regularly” mentioned in para 1 above and ask which was the meaning intended by Parliament when enacting section 444(1).

(a) *At regular intervals*

30. We speak of a person going “regularly” to church or to Sunday school when he goes every Sunday or almost every Sunday. But this cannot have been the intended meaning in the case of school attendance. It would enable attendance every Monday to count as “regular” even though attendance every day of the week is required. It would enable a child’s attendance to be regular even if he was regularly late, yet in *Hinchley v Rankin* [1961] 1 WLR 421, the Divisional Court held that a father had been rightly convicted when his son had been recorded as absent because he had not been at school when the register was closed, for “it must be regular attendance for the period prescribed by the person upon whom the duty to provide the education is laid” (at p 425).

(b) *Sufficiently frequently*

31. This might well be the meaning assumed by many people at first reading, as it was by the Divisional Court in *Bromley* and in this case. This is what we mean when we talk about a person being a “regular” at the pub or a “regular” at church services. But there are many reasons to think that this was not what Parliament intended, either in 1944 or in 1996.

32. First, attendance at the pub or at church is not compulsory. There are no rules about when a customer should attend the pub. Such rules as there are about church attendance are not rules of law. School attendance is compulsory and there are rules about when it is required.

33. Second, the purpose of the Education Act 1944 was to increase the scope and character of compulsory state education. Parents were required to cause their children to receive efficient “full-time” education suitable to their age, ability and aptitude, no longer just efficient education in the three Rs. The compulsory school age was to be raised and a wider range of educational opportunities provided free of charge. It is implausible to suggest that Parliament intended to relax the previous

obligations placed on parents to secure their children's attendance to take advantage of those opportunities.

34. Third, other features of the 1944 Act indicated an intention to tighten rather than to relax the parental liability. The open-ended defence of "reasonable excuse" was replaced in such a way as to make it clear that only the statutory excuses were acceptable. Allowing parents the flexibility inherent in this interpretation would mean that their excuses did not even have to be reasonable. Taking a child to football or failing to get up in time to get the child to school would do, provided that it did not happen too often.

35. Fourth, section 444(3), in providing that a child is not to be taken to have failed to attend regularly by reason of his absence "on any day exclusively set apart for religious observance" suggests that otherwise his absence on a single day would be a failure to attend regularly.

36. Fifth, in section 444(6), dealing with children of no fixed abode, the parent has a defence if he can show that he has an itinerant trade or business, that his child had attended "as regularly as the nature of that trade or business permits", and in any event for the minimum number of attendances prescribed during the previous school year. "Regularly" in this provision does not suggest a matter of fact and degree; rather that the child has attended as often as he can. The provision also illustrates that when Parliament wishes to indicate what, in its view, is sufficiently frequent, it can and does do so.

37. Sixth, by section 444(7) of the 1996 Act, a boarder is taken to have failed to attend regularly at the school if he is absent from it without leave during *any* part of the school term, unless the parent proves that he was prevented by sickness or any unavoidable cause. If 100% attendance is expected of boarders, why should it not also be expected of day pupils? Both the school and the parents are *in loco parentis*.

38. Seventh, although subsequent amendments should not be used to assist in interpreting what was already there, it is not without interest that section 444(7A), dealing with excluded children for whom alternative provision has been made, proceeds on the basis that absences are to be counted by the day.

39. Eighth, and above all, this interpretation is far too uncertain to found a criminal offence. Over what period is the sufficiency of attendance to be judged? How much is sufficient? Does one take into account how good or bad the reasons for any previous absences were? If attendance over the whole school year, or over the period before the information is laid, is taken into account, how can the parent

know whether taking the child out of school on any particular day will be an offence? How is a parent like Mrs C, contemplating taking her children on holiday, to know whether the local authority and the magistrates will consider that it was (a) acceptable because there were no other absences, (b) acceptable because the other absences were for good cause, or (c) unacceptable because of the length of the holiday, or (d) unacceptable because, given the number of days the child had already missed for good reasons, he should not have been taken on holiday too? (No doubt other permutations are available.) The point is that, on this interpretation, the parent will not know on any given day whether taking his child out of school is a criminal offence.

40. Ninth, and this is the reason why the local authority have appealed and the Secretary of State has intervened in support, there are very good policy reasons why this interpretation simply will not do. It is not just that there is a clear statistical link between school attendance and educational achievement. It is more the disruptive effect of unauthorised absences. These disrupt the education of the individual child. Work missed has to be made up, requiring extra work by the teacher who has already covered and marked this subject matter with the other pupils. Having to make up for one pupil's absence may also disrupt the work of other pupils. Group learning will be diminished by the absence of individual members of the group. Most of all, if one pupil can be taken out whenever it suits the parent, then so can others. Different pupils may be taken out at different times, thus increasing the disruptive effect exponentially.

41. Finally, given the strictness of the previous law, Parliament is unlikely to have found it acceptable that parents could take their children out of school in blatant disregard of the school rules, either without having asked for permission at all or, having asked for it, been refused. This is not an approach to rule-keeping which any educational system can be expected to find acceptable. It is a slap in the face to those obedient parents who do keep the rules, whatever the cost or inconvenience to themselves.

In accordance with the rules

42. All the reasons why "sufficiently frequently" cannot be right also point towards this being the correct interpretation. The Divisional Court was clearly worried about the consequence that a single missed attendance without leave or unavoidable cause could lead to criminal liability. However, there are several answers to this concern.

43. First, there are many examples where a very minor or trivial breach of the law can lead to criminal liability. It is an offence to steal a milk bottle, to drive at 31

miles per hour where the limit is 30, or to fail to declare imported goods which are just over the permitted limit. The answer in such cases is a sensible prosecution policy. In some cases, of which this is one, this can involve the use of fixed penalty notices, which recognise that a person should not have behaved in this way but spare him a criminal conviction. If such cases are prosecuted, the court can deal with them by an absolute or conditional discharge if appropriate.

44. Second, this had not been thought an objection under the pre-1944 law. It was recognised that this sometimes produced harsh results, but the aim was to bring home to parents how important it was that they ensured that their children went to school. The offence in section 444(1) is an offence of strict liability, whereas the offence in section 444(1A) is not.

45. Third, while the general rule is that statutes imposing criminal liability should be construed strictly, so as not to impose it in cases of doubt, it is an even more important rule that statutes imposing criminal liability should do so in a way which enables everyone to know where they stand, to know what is and is not an offence. The alternative interpretations discussed above do not do this, whereas this interpretation does.

46. This interpretation is also consistent with the provision in section 444(3)(a) and (9) that a child is not to be taken to have failed to attend regularly if he is absent with the leave of a person authorised by the governing body or proprietor of the school to give it. Unlike sickness or unavoidable cause, leave is not a defence. It is part of the definition of the offence. Your child is required to attend in accordance with the normal rules laid down by the school authorities for attendance but the school can make an exception in your case. As noted above, it is also consistent with section 444(3)(b).

47. There is another pointer in the link between the parent's obligation in section 7, to cause the child to receive "full-time" education, and the offence committed under section 444(1), if the child fails to attend school regularly. "Full-time" indicates for the whole of the time when education is being offered to children like the child in question.

Conclusion

48. I conclude, therefore, that in section 444(1) of the Education Act 1996, "regularly" means "in accordance with the rules prescribed by the school". I would therefore make a declaration to that effect. To the extent that earlier cases, in

particular *Crump v Gilmore* and *London Borough of Bromley v C*, adopted a different interpretation, they should not be followed.

49. The question remains what should be done with this case. The father asks us to content ourselves with making such a declaration and the local authority take a neutral position. They and the Secretary of State are interested in the point of principle and not in the outcome of this particular prosecution. Nevertheless, the father did have a case to answer. On the agreed facts, the penalty notice was properly issued and, having failed to pay it, he should have been convicted of the offence with which he was charged unless he can establish one of the statutory exceptions. The case will be returned to the magistrates with a direction to proceed as if his submission of no case to answer had been rejected. I am particularly mindful of the fact that the mother did exactly the same thing, was issued with a penalty notice and paid it. She might well feel a sense of injustice if, it now having been held that the penalty notice to the father was properly issued, the case did not proceed.