

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY X (A MINOR) BY Y HER MOTHER
AND NEXT FRIEND FOR JUDICIAL REVIEW

GILLEN J

Application

[1] The Applicant in this matter is a minor and currently a sixth form student at Cambridge House Grammar School, Ballymena ("CHG") having commenced her post-primary education at that school in September 2002.

[2] At that time she unsuccessfully applied to the North Eastern Education and Library Board ("the Board"/"Respondent") for transport assistance from her home in Antrim ("the impugned decision").

[3] The Applicant claims that a child, identified in this judgment as "A", in identical circumstances was granted such assistance.

[4] It is the Board's case that this occurred through administrative error.

[5] The Applicant seeks an order of certiorari to quash the impugned decision and to compel the grant of such assistance.

[6] The grounds upon which leave has been granted and on which this relief is sought are that:

(a) The impugned decision was irrational in that it breaches the principle of equality and treatment given in the case of A.

(b) Alternatively that the Board failed to give any or adequate reasons for their decision given the similarities between the Applicant's circumstances and those of A.

Statutory and policy framework

[7] Where relevant, Article 52 of the Education and Libraries (NI) Order 1986 (“the 1986 Order”) provides:

“52(1). A Board shall make such arrangements for the provision of transport and otherwise as it considers necessary or as the Department may direct for the purpose of facilitating:

(a) the attendance of pupils at grant aided schools;

... any transport provided under such arrangements shall be provided free of charge.

(2) Arrangements made by a Board under Paragraph (1) (other than arrangements made in pursuance of a direction of the Department) shall be subject to the approval of the Department.

(3) A Board may, in accordance with arrangements approved by the Department, provide transport for, or pay the whole or part of the reasonable travelling expenses of:

(a) pupils attending grant aided schools; and

(b) relevant pupils attending institutes of further education for whom the Board is not required to make provision under arrangements made under Paragraph (1).”

[8] Departmental Circular 1996/41 contains the arrangement referred to in the 1986 Order. Where relevant it provides:

“3.3 Where there is a suitable school or schools within statutory walking distance from a pupil’s home and a pupil attends a school outside statutory walking distance, transport assistance will be provided only where the pupil has been unable to gain a place in any suitable school within statutory walking distance.

3.6 Each application will be treated individually for the purposes of assessing transport entitlement and a suitable school will be the category of school in which the pupil is finally placed. To be eligible for transport assistance to a school outside statutory walking distance, application must first of all be made to all schools in the same category that are within statutory walking distance before a preference is expressed for the more distant school. To qualify for assistance to the more distant school, applicants must be able to show that they were unable to gain a place in such schools in the same category within statutory walking distance of their home.

9. The application of the rule relating to statutory walking distance may not always be appropriate and it is for the Board to consider any case which is thought to be outside the provisions in the preceding paragraphs. An example of where a Board might wish to exercise discretion will be where there is an exceptional road safety hazard.”

[9] The Board has established a policy relating to the provision of transport assistance. Where relevant it provides:

“3.4 Where there is a suitable school(s) within the statutory walking distance from a pupil’s permanent home address and a pupil attends a school outside the statutory walking distance, transport assistance will be provided only where the pupil has been unable to gain a place in any/all suitable school(s) within statutory walking distance. The nearest suitable school(s) must be revealed in order of preference on the pupil’s transport application form.

3.5 The home to school transport policy makes no exceptions for those parents who disregard the requirement to apply to any/all suitable school(s) within walking distance of a pupil’s permanent home address on the basis of possible rejection by those school(s). This may mean parents will need to apply to some schools even where, on evidence of past patterns there would be little prospect of obtaining a place. To do so will not affect their application to other schools ...”

Legal principles

[10] Where two parties are in a materially similar position and there is unjustifiable or illogical inequality of treatment of them by a decision-maker, fairness requires that such a decision may be challenged on the grounds of *Wednesbury* unreasonableness. The cardinal principle of good administration is that all persons in similar positions should be treated similarly. See R v Hertfordshire CC ex parte Cheung, the Times 4 April 1986 and Colgan's case (1990) NI 24 per Girvan J at 44.

[11] The decision-maker is entitled to a margin of appreciation to treat comparators differently if he may tenably consider that there are points of distinction between them (see Croft's case 1997 NI 457 per Girvan J at page 491) or that the inequality of treatment is capable of rational explanation (see Morrison's case [1988] NI 68 per Kerr J at p. 76).

Comparing A and the Applicant

[12] The applicant and A are similar for a number of reasons. Both reside in Antrim within the statutory walking distance of Antrim Grammar School (AGS) ie less than 3 miles from that school.

[13] Both obtained Grade C2 in the transfer test.

[14] Neither pupil made a formal application to AGS for admission. Neither included AGS on their school transfer form.

[15] Neither would have been accepted to attend AGS even if it had been their first choice of school.

[16] Both were admitted to CHG which is within the same category of school as AGS.

[17] Neither pupil fell within the terms of the arrangements approved by the Department of Education for the grant of transport assistance by the Board. Both however did require transport to and from CHG.

[18] *Prima facie* therefore there was no duty on the Respondent to provide transport assistance to either child.

[19] Notwithstanding the similarities between A and the Applicant, A received the benefit of transport assistance from the date he commenced secondary school in August 2002 until he left that school in 2007. During the same period the applicant's parents have been refused assistance and have been paying for her transport to and from school. This situation continues.

[20] Whilst the Respondent's case is that transport assistance was given to A by way of administrative error, upon discovering the error and having decided to withdraw assistance, the Respondent did not contact Translink to cancel the travel pass or the school to return the pass albeit the Respondent did request A's mother to return the pass.

The Board's explanation for disparity of treatment

[21] It is the Board's explanation that the disparity of treatment between the Applicant and A was as a result of its poor administrative practices and was not as a result of any positive decision on the part of the Board to differentiate between the two pupils. The details of the explanation are contained in the affidavit of Samuel James McDowell, transport officer of the Respondent in an affidavit of 4 March 2008. The points he made are as follows.

[22] A had completed a transport application form which had been considered by the Board's Transport Section on 15 July 2002. Not only did this form contain a manuscript note referring to AGS being a distance of 1.9 miles but in shorthand letters it stated "Not nearest post-primary" as a clear reference to CHG. Mr McDowell records that this is a clear indication that the application was recommended for refusal on the ground that a school within the same category as that to which A was ultimately accepted was located within the statutory walking distance of his home.

[23] Mr McDowell goes on to relate that unfortunately the records retained by the Board do not reveal what happened next with regard to this application for transport assistance. He records at paragraph 12:

"In the ordinary course of events, the parents would be contacted and informed that the application had been refused. There is no record of this taking place either by way of telephone call or a formal letter of refusal."

[24] He observes however that -

"It is of note that on the transport application form A's parents have not listed the schools to which the application was made in his transfer report form. This section of the application was left blank. It is possible that this omission caused some hesitation or confusion in the mind of the Board officer dealing with the transport application. However, the officer

would normally have access to the transfer report form which should clarify the matter”.

[25] It is clear that some direct contact was made with AGS by the parents of A with a view to confirming whether a formal application had been made to AGS.

[26] By letter dated 5 August 2002, the principal of AGS wrote to the Board’s transport officer. Ms Doherty, who appeared on behalf of the applicant, contended that the terms of that letter were significant. They were as follows:-

“Dear Sir or Madam,

1. Z (*the name and address of another child*).

I am writing to confirm that Z has not been offered a place at Antrim Grammar School which was his first choice.

2. A

I am writing to confirm that A has not been offered a place at Antrim Grammar School. We did not accept any “C” grades this year.”

Ms Doherty contended that this letter should have put the Respondent on notice that A had not made AGS his first choice. The principal’s silence on this matter in respect of A sharply contrasts with the specific reference to that action on the part of Z. This ought to have alerted the attention of the Board according to Ms Doherty.

[27] As is clear from the final handwritten line of A’s transport application form for transport assistance was approved for A on 19 August 2002 with a recommendation for a Translink Ulsterbus pass. That approval was initialled by Norman Brian Crossett, District Transport Officer. Mr McLaughlin, who appeared on behalf of the Respondent, indicated to me that Mr Crossett did not have any recollection of and was unable to assist in this matter.

[28] It is the contention of Mr McDowell and the Respondent that “it is likely that the decision to grant assistance was influenced by the contents of the letter of 5 August 2002”. In saying this, however, the former concedes that the decision was not in accordance with the Board’s policy since A did not make a formal application to AGS.

[29] Mr McDowell at paragraph 13 of his affidavit states:-

“It is possible that the grant of transport assistance to A was as a result of the exercise of discretion by the Board following representations on the pupil’s behalf. However the Board has no record of any such events taking place or of any discretionary considerations being taken into account. It is therefore the view of the Board that the strong likelihood is that a mistake was made when granting transport assistance to A. The letter from Antrim Grammar School may have been the source of that mistake. However in light of the passage of time the Board is not now in a position to give a clear explanation as to why Mr Crossett reversed the recommendation of the Board official who recommended the application for refusal on 15 July 2002. Unfortunately the Board has no records other than those exhibited which might shed further light on the matter.”

[30] On the issue of the possible exercise of discretion by the Board, Ms Doherty drew attention to a letter written by the mother of A when, as I will shortly set out, the Board wrote to her requesting the return of A’s school pass. That letter contains the following account on her part as to how the transport pass came to be given to her son:-

“I have been asked to return my son’s bus pass as an audit has taken place and they say I was given it wrongly. When I applied for transport assistance I understood exactly the form but chose to leave out Antrim Grammar on purpose (being the closest school). This was because my eldest son was turned down from Antrim Grammar and he had a far higher grade than [A]. My eldest son had been refused all grammar schools on his school transfer form and I had to appeal all the schools. Cambridge House accepted my son.

When it came to my second son’s form I left out other schools on purpose after what I had been through. I believed I could explain the circumstances to transport and they would understand.

I was refused the bus pass at first. I priced how much it would cost and couldn’t afford it.

I went to Antrim Grammar and the headmistress said there was no way they would have or would accept my son with the grade he received. (I had already known this because of his brother being rejected). She said she would write to Transport explaining this, which she did.

I had won the appeal two years ago and I can't understand why they are putting me through this again.

I do understand that in black and white in theory my son wouldn't receive a pass but it was quite more complicated than on paper . . ."

[31] Ms Doherty submitted that the reference in this letter to Mrs A having "won the appeal two years ago" suggests that some form of appeal had taken place and the Board had exercised its discretion. I pause to observe that I do not consider this to be likely. In the context of the letter, I believe this reference to an appeal is purely a reference to the mother of A challenging the refusal to grant a bus pass by obtaining the letter of 5 August 2002 from AGS (referred to in paragraph 30 above). The full contents of the letter from the mother of A, in which a reference to winning "the appeal" is in immediate sequence to the reference to the letter from AGS, satisfy me that that is the probable substance and extent of the process that occurred. It lends weight to Mr McDowell's suggestion that the letter from AGS was the source of the mistake in granting transport assistance. Whilst it is impossible to be certain about this matter, the likelihood seems to me to be that the AGS letter led the Board officer down an error-laden avenue. Frankly it does not surprise me that such an official, giving the reference to Z a perfunctory glance, missed the significance of the reference in the earlier part of the letter to another pupil having put AGS as first choice whereas no such mention was made in the case of A.

[32] The next step in the sequence of events was that in September 2004 the Applicant's mother brought these facts to the attention of the Board. There followed correspondence between the mother of A and the Board in which it is explained to her that the travel pass had been issued to her son "in error" pointing out that the bus pass should be returned. Mr McDowell's affidavit goes on to record that "unfortunately" neither the option of asking Translink to cancel the pass or requesting the school to return the pass was followed up by the Board. Of this failure Mr McDowell says:-

"The investigation into the circumstances of A concluded in late October 2004 which was after the commencement of the academic year and after his annual bus pass had already been issued to him. It is

probable that the Board were reluctant to force the school to demand the surrender of the bus pass and were hopeful that it would be surrendered voluntarily. In any event the matter ought to have been addressed, at the very latest, by the end of 2004/05 academic year. I cannot provide any good reason why this matter was not done at that time. I can confirm there was no change in the decision by the Board, nor was there any further exercise of discretion on its part to allow transport assistance to continue to A. The matter simply appears to have been overlooked and transport assistance continued."

[33] Ms Doherty drew attention to a further letter, not referred to in Mr McDowell's affidavit of 14 November 2005 written in the course of exchanges between the Applicant's solicitor and the Board. In the course of that letter Mr McDowell explained the attitude of the Board to the refusal to grant transport assistance to the Applicant. Mr McDowell stated in the penultimate paragraph of that letter:-

"We are unable to comment on other individual cases but can assure you that where transport assistance has been approved this has been in line with the transport policy."

This letter is manifestly inaccurate because transport assistance had been provided to A when it was not in line with the transport policy. ("The letter of 14 November 2005").

Conclusion

[34] I have come to the conclusion that I must dismiss the Applicant's case in this instance. My reasoning for so concluding is as follows.

[35] First, I am satisfied that the likelihood is that the disparity in treatment between the Applicant and A occurred as a result of human error on the part of the Board. The Board's poor record keeping system mirrors the ineptitude of the relevant staff. The waste of public funds involved in this affair is a matter which merits a careful review by this Board of the transport assistance training being given to the relevant officers and indeed the system itself.

[36] I am satisfied, however, that there can be no other rational explanation for the provision of transport assistance to A other than administrative error. There is no evidence before me of bad faith, bias or deliberate unfairness on the part of the Board or any of its officers.

[37] I do not believe that there is any evidence to suggest that there was an appeal or a considered discretionary allowance made to A in this regard. As I have already indicated I consider that the reference to “an appeal” by the mother of A is probably a loose reference to the fact that she had encouraged and elicited a letter from the principal of AGS to the Board which in my view must have been instrumental in bringing about the change of attitude to the grant of a transport pass. On the probabilities, any process which would involve the consideration and exercise of a discretion or an appeal procedure will have either been recalled by some Board official or would have been the subject of a note or record despite the poor system that has been evidenced in this instance. Whilst I could not be certain on such a conclusion, on the balance of probabilities I consider simple error to be the most likely explanation.

[38] I have considered the comment of Mr McDowell referred to in paragraph [33] of this judgment. I have concluded that given the context of the overall events and of his affidavit, it was an ill informed careless remark illustrative of the all too casual approach which has permeated the approach of the Board and its officials in this matter.

[39] Notwithstanding the flaws in the Board system, however, I consider that the evidence before me does bear out the explanation of mistake. In the first place, as I have said, there is no plausible reason why the Board would not have adhered to the normal system short of human error. I see no basis for the exercise of a discretion in favour of A. It is clear that initially the decision had been to refuse assistance. I believe that the likelihood is that the picture became confused by virtue of the letter from AGS of 5 August 2002 which was hastily misread. The pattern of casual and error-laden approach is well illustrated by the failure to pick up in the letter of 5 August 2002 the distinction between A and the other child who had made AGS his first choice. Secondly, once the error became known to the Board, steps were taken, albeit once again in a flawed and all too casual manner, to redress the matter. This would not have been likely to have occurred if a considered discretion had been exercised in his favour or an appeal process instituted. The mother of A was written to and an attempt was made to retrieve the pass albeit in a fairly casual and haphazard manner. If there had been some other motivation for the pass being granted in the first place, I cannot understand why the Board would have belatedly informed the mother of A that the pass had been granted in error and an attempt made to retrieve it.

[40] In conclusion my view is that the approach of this Board is so strewn with error that it is transparently without guile or deceit in the approach that has been adopted. On the balance of probability the explanation given by the Board is the correct one namely that it was its own poor administrative practices and, I add, human error which has brought this position about. In my view this does constitute a rational and tenable explanation for the difference in

treatment between the applicant and A. Accordingly I am not satisfied that there was a breach of the principle of equality of treatment.

[41] If I am wrong in my conclusion that poor administrative practice constitutes a tenable or rational explanation for the disparity in treatment, I wish to make it clear that in any event I would have refused a remedy in this case in the exercise of my discretion. It is a first principle of judicial review that the remedies are discretionary. The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration and the effect on third parties. (See Hobhouse LJ in Credit Suisse v Allerdale Borough Council [1997] QB 306 at 355 D).

[42] The exercise of the discretion by the court can have regard to such matters as –

(1) the nature and importance of the flaw in the challenged decision,

(2) the conduct of the applicant,

(3) and the effect on administration of granting the remedy. (See Nicholl v. Gateshead Metropolitan Borough Council [1988] 87 LGR 435 at 460).

[43] I do not consider that it is in the interests of justice to penalise the Respondent, particularly in circumstances where public money is in issue, for what amounts to an administrative error. There was never any intention in my view to discriminate between A and the Applicant in this case.

[44] The fact of the matter is that the Board had no duty to make an award of transport assistance to the Applicant. The Applicant had no basis whatsoever for expecting that travel assistance would be granted given the statutory and policy confines which govern the grant of transport assistance. In my view it would be unjust for the Applicant to benefit from public funds in the absence of any duty on the part of the Board to provide them to her. It cannot be in the public interest that the Applicant should benefit from a windfall resulting from what I have determined is no more than poor administration. This was not an important or significant flaw in the overall system.

[45] Moreover I consider that there would be a damaging effect on administration to grant a remedy to the Applicant in such circumstances. Mistakes by public authorities in certain circumstances should not result in depletion of scarce public funding where for example, as in this instance, no duty was ever intended to be imposed on the Respondent to make provision for the Applicant. It could create a dangerous precedent for other similar errors.

[46] In all the circumstances therefore I dismiss the Applicant's case. I shall invite the parties to address me on the issue of costs.