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*(subject to editorial corrections)**

No 2017 52017/01

IN THE HIGH COURT OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY STUDENT A (A MINOR) BY HER MOTHER AND NEXT FRIEND G FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

COLTON J

Background

[1] The applicant in this case is aged 14 having been born in 2003. She is currently in Year 8 at Drumcree College in Portadown. The college is a Catholic Maintained School for pupils in Years 8-12. She has a Statement of Special Educational Needs which provides that she will attend the Learning Support Centre ("LSC") located within the school.

[2] LSC is a facility attached to the school which provides education for children with SENs such as the applicant in a small group setting.

[3] The applicant brings these proceedings by her mother and next friend G. The application is grounded on affidavits from G and from Ms Noella Murray, who is the Principal of the college, which I have considered carefully.

[4] The proposed respondents are the Education Authority ("EA") and the Council for Catholic Maintained Schools ("CCMS").

[5] The Department of Education ("the Department") is a Notice Party to the application.

[6] A related case (P – A Minor) was mentioned for case management/review purposes on 18 May 2017. This potential challenge was mentioned to the court at that date and Lord Justice Weatherup directed inter alia –

(a) The applicant was to issue any proceedings by 30 May (proceedings issued on 31 May).

(b) Both cases were to be listed for a preliminary point to be determined, that is whether the applications were academic.

(c) The matter was to proceed as a "rolled up" hearing on 26 June 2017.

[7] The matter came before me on 1 June when the respondents argued that they were not the correct respondents; that the application was academic and potentially premature.

[8] As the arguments developed the respondents argued that the application should be dismissed at this stage as it was fundamentally flawed.

The Hearing

[9] At the outset I want to express my thanks to all the counsel who appeared in this matter. Mr Steven McQuitty appeared for the applicant and provided a helpful written submission which was amplified ably in oral submissions. Mr Paul McLaughlin provided a written submission on behalf of the EA and advanced his case by way of oral submissions. I received oral submissions from Ms Maura Herron on behalf of CCMS and from Mr Philip McAteer on behalf of the Notice Party, the Department.

[10] Before I examine the Order 53 Statement and the relief sought I need to set out more of the background to this application.

[11] In September 2015, the EA received two requests from the CCMS pursuant to Article 14 of the Education & Libraries (Northern Ireland) Order 1986 to publish development proposals relating to Drumcree College;

(a) A proposal to close Drumcruee College beginning 1 September 2016 or as soon thereafter as possible (DP 428).

(b) A proposal to open a new Key Stage 3 school on the site of Drumcree College beginning 1 September 2016 or as soon thereafter as possible (DP 429).

[12] Following statutory consultations, the EA published the proposals for a 2 month public consultation on 19 November 2015. On 4 April 2016 the Minister approved both development proposals. It was also decided that the implementation date for the proposals would be 1 September 2017. It has now been decided that the new school will be called St John the Baptist's College.

[13] The effect of the Minister's decision is that when the new Key Stage 3 school, St John the Baptist College, opens on 1 September 2017 it will not have a LSC.

[14] This is at the heart of the applicant's complaint. She and others in a similar position want a LSC to be established or as they see it, "retained" at the new school.

[15] It is trite to say that the closure or reorganisation of schools is a vexed and emotional topic for pupils, parents and staff affected. This is reflected in other public law challenges to closures/amalgamations and reorganisations of highly valued schools and this case is no exception.

[16] The wishes of the applicant's mother and the school Principal of the new and old school are perfectly understandable, but what the court has to consider is the legal validity of what is being challenged and what, if any, steps it can lawfully take if illegality in the public law sense is established.

[17] In response to the concerns arising in this case the EA has adopted a particular approach to those children with SEN Statements provided for attendance at Drumcree College who wish to attend the new school.

[18] In accordance with the requirements of Article 16(7) and Schedule 2 (paragraphs 3, 5-9) Education (NI) Order 1996, the closure of Drumcree College triggers a requirement to amend the Statement of any existing pupil. The process allows parents the opportunity to express a preference for a new school. Following a consultation process, the EA is required to name the chosen school unless it decides not to do so on grounds set out in Schedule 2, Paragraph 5(3) of the 1996 Order.

[19] The EA has issued an Amendment Notice to the applicant's family. In the event (as assumed) the applicant's parents will nominate St John the Baptist College the EA has made it clear that its intention is to respect that preference and to allow all existing pupils within the existing LSC to continue to be educated at the new school in accordance with the requirements of their Statement. This will enable children to continue to be educated in a small group setting in the new school for up to 2 more years.

[20] A similar undertaking to the family in the related Lavery case has resulted in the withdrawal of that application, as the relevant child will be able to complete his education at the new school in accordance with his SEN, and so, for him, this matter is academic.

[21] This applicant argues that because the new school is KS3 she will have to transfer to a new school for her Year 11 and 12 post primary education which means the matter is not academic for her and that she is directly affected by the issues raised in the application.

[22] In this regard the respondents stress that the transitional arrangements they had made mean that the applicant's needs will be met at the new school if she chooses to name it although she is not obliged to do so.

[23] This brings me to the question of what are the legal issues raised in this application.

[24] In truth the Order 53 application is extremely wide-ranging with a diffuse and prolix litany of grounds. It was only in the course of oral submissions that the court was able to identify the legal issues with a degree of precision.

What are the impugned decisions?

[25] The first is stated to be the decision "to close/relocate" the LSC.

[26] Whilst I will return to this issue later, it is important to understand that in January 2017 the CCMS requested the EA to publish two development proposals to establish two LSCs at Lismore Comprehensive School, Craigavon. These development proposals have not been published by the EA, no public consultation has taken place and no decisions have been taken by the Department in accordance with the Article 14 procedure.

[27] There is no proposal to establish a LSC at the new school – subject to the transitional arrangements which I have described.

[28] There is no doubt that it is this issue which is at the heart of the applicant's grievance, as is clear from paragraph 14 of G's affidavit where she avers –

> "I cannot understand why these authorities have made this decision as the existing provision could and should continue in the new St John the Baptist College. It does not make sense at all and I would have thought that a decision involving children with SEN would have involved in depth evaluations, consultations and assessments of the options for provision but this is totally lacking in this case. I am very concerned about the impact a move at the end of Year 11 or Year 12 (see further below) would have on my child. I believe she would not be able to cope with another traumatic upheaval given all that she has had to deal with hitherto in her life including her battle with cancer and ongoing medical issues, the loss of her father and most recently the transition between schools. She is now settled and doing well and I know that she would continue to be so if she was able to continue all her remaining post primary education (to Year 12) in this familiar and nurturing environment."

[29] G's views are entirely understandable.

[30] The starting point for me is to identify what are the decision/s which has led to the consequences complained of by the applicant? The answer is straightforward. The absence of a LSC and the requirement for the applicant to complete part of her remaining post primary education at a school other than the new school are the direct legal consequences of DP 428 and DP 429 – decisions which were taken on 4 April 2016.

What is the legal status of a LSC?

[31] A LSC does not have separate legal existence from the school to which it is attached. A LSC is an amalgam of facilities/resources within a school in which children with special educational needs may be educated in a small group setting, where such provision is contained within a statement. The only statutory recognition of a LSC is contained in the Education (School Information Prospectuses) Regulations (NI) 2003. It contains the following definition:

> "'*Special Education Unit' means a unit approved by the Department for the purpose of making educational provision for pupils with special educational needs;*"

[32] Pursuant to a combination of Article 17 Education (NI) Order 1997 and the 2003 Regulations, both the EA and Boards of Governors are required to publish information about schools. In the case of EA, it includes information about provision made within an area for pupils enrolled in special education units (Schedule 2 para 8(d), 2003 Regulations). In the case of Boards of Governors, the school prospectus must contain details of whether it is a school with a Special Education Unit (Schedule 3, para 3(e), 2003 Regulations) and also details of any special provision and facilities for children with special education needs (Schedule 3, para 29, 2003 Regulations)."

[33] The legal effect of all of these provisions is that a LSC is not a separate form of educational establishment. It is a unit which is attached to and forms part of a school. All the pupils are registered at the relevant school and are under the management of the Board of Governors. Accordingly when the Minister decided to close Drumcree College, the LSC will close with it. The Department has not given approval for a new LSC to be opened at the new school.

[34] It seems to me this has two implications for the applicant.

[35] Firstly, the EA is not the appropriate respondent – the real decision about which the applicant complains was made by the Department in April 2016.

[36] Secondly, there is no basis for challenging that decision now, 14 months later, particularly when the implementation of DP 429 is the very basis for the new school which the applicant hopes to attend.

[37] Mr McQuitty quite properly concedes that he would not be in a position to successfully mount a legal challenge to the decisions to implement DP 428 and DP 429.

[38] On its own this point defeats the challenge to the first decision identified in the Order 53 statement.

[39] The applicant has tried to salvage an argument by reference to correspondence from the former Minister of Education, Mr John O'Dowd MLA, in whose constituency the school is situated, who when referring to the LSC at the new school says:

> "It would be my view (that) it is not open to CCMS and EA to agree to keep it open. I signed a DP which kept it open. The only way it can be closed in my view is by a DP and I am not aware of one being published."

[40] It is not clear what material was available to the former Minister when he expressed this opinion but the contemporaneous documents are clear. Counsel for the Department, Mr McAteer, points out that the Minister was made fully aware of the consequences of the DPs and that there was no ambiguity about the LSC closing as a result of his approval of the DPs. Interestingly, the EA advised against the approval of DP 429 but the Minister, as he was perfectly entitled to do, decided to approve the proposal, so he clearly took a personal interest in the issue.

[41] The briefing document prepared to the Minister before he made his decision contains the following:

> "The Learning Support Centre currently at Drumcree College will close with the closure of the school. The EA had confirmed that it will agree with CCMS where alternate LSC provision will be located and a DP will be brought forward for the new provision."

[42] This could not be clearer. In any event even if the Minister was under a wrong impression about this there can be no doubt about the legal consequence of the DPs which were approved and the decision made in April 2016. The LSC closes with the closure of Drumcree College.

[43] The briefing document also makes it clear that in due course a DP would be brought forward for the new provision of LSC and this is underway by reason of the CCMS proposal to the EA in January 2017.

[44] The effect of the approval of DP 248 and DP 429 not only results in closure of the LSC at Drumcree College but means that the new school only provides education

for up to Key Stage 3, that is Years 8-10. The applicant's complaints about having to complete her post-primary education at a different school again arises from the decision made back in April 2016.

[45] It is important to recognise, as I have pointed out already, that the EA has put in place transitional arrangements recognising the particular circumstances of the applicant and indeed other children in a similar position.

[46] The EA has indicated its willingness to allow pupils within the LSC at Drumcree College to transfer to the new school if their parents express that preference. For those pupils, the EA will make resources available to allow them to continue to be educated in the new school in accordance with their statements. If this requires education within a small group setting, the EA will ensure that this is provided, albeit that the new school will not be one which has LSC approved by the Department.

[47] Thus the EA is willing to name the new school to allow the applicant to complete two more years in the same environment since that is the period of time during which education will continue to be available in a small group setting. The applicant has requested the EA to commit to allowing her to continue to be educated in a small group setting in St John the Baptist for the remainder of her post-primary education. The EA is not willing to do so since the new school caters only for Years 8-10 and the decisions in relation to the nature of the new school have been taken by the Minister. The applicant is not obliged to express a preference for the new school if she wishes to have continuity for a longer period of time.

[48] Mr McQuitty drew my attention to the fact that another school within this area namely Clounagh Junior High School (KS3 controlled school) has a LSC which caters for pupils beyond the ordinary KS3 limit. Mr McLaughlin responds that this is one solution that has been approved in relation to LSC provision. It is one model that has been adopted. However it does not mean that every KS3 school must have a similar model and there is absolutely no power on the court to compel such provision for a particular school. I shall return to the issue of the provision of an alternate or new LSC later.

[49] It is important to understand that there is no legal right for a LSC to be established at a particular school.

[50] Ultimately it is for the Department to give approval for a new LSC to be opened either at this school or any new school under the relevant statutory procedure. In fact what has happened is that the CCMS has requested the EA to publish two development proposals to establish two LSCs at Lismore Comprehensive School, Craigavon.

[51] This brings me to the second impugned decision namely the decision to propose and publish DP 508. In the grounds relied upon to challenge this decision

the applicant says that this is unlawful as it is contrary to the intention of the Minister who had made the earlier related linked decisions under DP 428 and DP 429. I have already dealt with the legal consequences of DP 428 and DP 429 above. I also refer to the briefing documentation provided in respect of that decision which made clear the consequences in terms of LSC at Drumcree College and also provided that in due course the EA would agree with CCMS where alternate LSC provision would be located and that a DP would be brought forward. This process has now commenced. The applicant further complains that there has been inadequate time for public consultation on DP 508, that is one month as opposed to the two months required under the relevant Departmental Policy Guidance.

[52] At present the two DPs regarding Lismore have not been published by the EA and they remain CCMS proposals only. There has been no public consultation on those proposals and no decisions have been made by the Minister. These proposals may or may not be taken forward by the CCMS or the EA or indeed some other proposals may emerge during the transitional period. This could include a proposal to develop a LSC at the new school.

[53] At present, it is simply premature to predict what proposals may be made. Insofar as the applicant has contended there should be a LSC attached to St John the Baptist College this is a matter for the Department to approve following a proposal by an interested body.

Conclusion

[54] In relation to the first impugned decision I have come to the conclusion that this is in effect a challenge to DPs 428 and 429 which is simply untenable at this stage. The decisions were made in April 2016. Any challenge to them at this stage is simply too late. In any event the effect of the decisions was to provide for the new school which the applicant proposes to attend. Indeed Mr McQuitty quite properly did not seriously attempt to say that the court could set aside these decisions. The legal effect of this decision is clear.

[55] I would add that neither the EA or the CCMS actually made the decision in any event.

[56] I have come to the conclusion that the challenge to the first decision identified in the Order 53 statement is fundamentally flawed. It is misconceived, unarguable and should be dismissed at this stage.

[57] In relation to the second decision I conclude that a public law challenge at this stage is premature and should therefore also be dismissed.