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Judgment: approved by the Court for handing down | *Delivered:* **06/06/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between

BM

Appellant

and

THE SPECIAL EDUCATIONAL NEEDS AND DISABILITY TRIBUNAL

and

WESTERN EDUCATION AND LIBRARY BOARD

Respondents

O'HARA J

Introduction

[1] This is an appeal by case stated from a decision of a Special Educational Needs and Disability Tribunal ("the Tribunal") about the educational needs of the appellant's son D. The central issue is whether the Tribunal was correct in upholding the decision of the Western Education and Library Board ("the Board") that these interests could be appropriately met at a Special School (hereafter referred to as "X") in light of his needs.

[2] The appellant was represented by Mr Eoghan Devlin, the Board by Ms Roisin McCartan and the Tribunal by Ms Neasa Murnaghan. I am grateful to all counsel for their valuable written and oral submissions.

The Parties

[3] The primary statutory provisions about children with special educational needs are found in the Education (NI) Order 1996. This Order provides for education and library boards to make and maintain statements of special educational

needs and allows for parents to appeal against the contents of those statements to specialist tribunals. In the present case the Board's statement in respect of D was challenged by the appellant. The Tribunal heard the appeal on 15 May 2013 but dismissed it in a written decision dated 10 June 2013.

[4] Article 24 of the 1996 Order allows an appeal by a disappointed parent by way of case stated to the High Court. This option was taken up by the appellant on 15 July 2013. The Tribunal stated the case on 27 August 2013. Following various exchanges the case stated was revised and finalised by the Tribunal on 18 October 2013. In the meantime, in September 2013, at a review of the appeal in the High Court, the court heard from the appellant, the Board and the Tribunal and concluded that the appropriate respondent to this appeal was the Tribunal rather than the Board. However, that decision was reached without attention having been drawn to the decision of the Northern Ireland Court of Appeal in Re: Darley's Application [1997] NI 384. The context was a challenge to a decision of an industrial tribunal. Giving the judgment of the court, Carswell LCJ stated this at page 387:

> "In our opinion the proper party to contest an appeal from a decision of an industrial tribunal or an application for judicial review is normally the opposing party in the proceedings before the tribunal whose decision is challenged. There may be circumstances when it is appropriate for a tribunal to be separately represented, for example if there was an allegation of personal misconduct on the part of the members of the tribunal, but such cases will be very rare. In the ordinary way we consider that the opposing party is the correct person to undertake the task of upholding the tribunal's decision and putting forward any necessary defence of its procedures. If in any case the opposing party does not appear to contest the appeal, it will be for the appellate court to determine whether it wishes to ask for other representation in some form so that the contrary case can be properly argued."

[5] It is logical that that approach should apply equally to appeals from decisions of other tribunals such as the Tribunal in the present case. Accordingly, I directed on 10 February 2014 that the Board be made a respondent to the appeal in this case. I did not dismiss the Tribunal as a respondent because I had already received skeleton arguments from it on the substantive issues. In future appeals however, once it has stated the case, the tribunal itself will have no role to play other than in one of the rare situations envisaged in Re: Darley.

Factual Background

[6] Turning to the present case, this is an appeal against the Tribunal's dismissal of an appeal against the statutory assessment made by the Board of D's special needs

and how they are to be provided for. In short his parents believe strongly and passionately that those needs cannot be met appropriately at X and that he needs to stay in the independent school (hereafter referred to as "Y") where he has been for some time. D's parents believe that it is the only appropriate place for him to be educated. The five questions upon which the Tribunal ultimately stated a case on 18 October 2013 can be summarised as follows:

(i) Whether or not the Tribunal erred in law in its application of Article 16 of the Education (NI) Order 1996.

(ii) Whether or not the Tribunal erred in law in its consideration of parental choice in the context of Article 10 of the 1996 Order.

(iii) Whether or not in light of the decision of the House of Lords in Edwards v Bairstow [1956] AC 14 the Tribunal erred in law in arriving at its decision.

(iv) Did the Tribunal err in law in its exercise of its powers when it permitted two additional witnesses to give evidence at the hearing?

(v) Whether or not the Tribunal erred in law in failing to provide adequate reasons for its decision.

[7] D is a profoundly physically and mentally disabled child who was born on 6 May 2008. He has Angelman's Syndrome, a neuro-genetic disorder characterised by intellectual and developmental delay, sleep disturbance and jerky movements. While he has a happy demeanour he has limited gross motor skills and remains dependent on others for all activities of daily living. Having initially chosen a special school as their desired school placement for D in September 2011, his parents subsequently enrolled D at Y. This is an independent school registered with the Department of Education under the management of a charitable company established to promote conductive education. The school provides full-time education for 3 children aged 4-8 years and for 11 children who attend every two weeks for a one hour session.

[8] The Board issued an amended statement of special educational needs in respect of D on 23 October 2012. In that statement it named X as the appropriate school to meet D's needs. D's parents did not agree with the naming of X in the statement. They wished the Board to name Y instead as the appropriate school for him. They therefore appealed the statement to the Tribunal. That appeal was unsuccessful.

[9] The concerns expressed by these parents include the following:

- The statement which the Tribunal upheld was dictated or at least influenced by resources.

- D has made significant progress at Y, the extent of which may not have been fully recognised by the Board or the Tribunal.

- The plan for his placement in X was far less developed and coherent than the equivalent plan proposed at Y.

- Removing D from Y and sending him instead to X would be disastrous for him.

[10] The Board's position is that on the available evidence D's disabilities can be provided for appropriately in X in conjunction with input from occupational therapists and physiotherapists. It also asserts that the detail of the support which he would receive at X would necessarily be fleshed out on his arrival at the school and that Y is not better or appropriate because it has a regime and programme in place for D already.

[11] In this appeal Mr Devlin, for the appellant, has focussed his attack on what he suggests is an inadequate and legally confused written decision of the Tribunal dated 10 June 2013. There has also been a secondary attack on the fairness of the hearing before the Tribunal but I do not accept that contention. It is recorded at page 2 of the Tribunal's decision that the only objection raised by D's parents was to two witnesses being called on behalf of the Board. However, that objection was on the grounds that any evidence they could give was already covered in the papers. The Tribunal decided to allow the witnesses to give evidence as they believed it was clearly in D's interest that they do so. The Tribunal stated that it was:

> "mindful that the two witnesses could provide invaluable evidence relating to D's non-educational needs".

I do not accept that the acceptance of oral evidence from these witnesses was improper or unfair.

[12] There is however more scope for debate and challenge to the Tribunal's reasoning and its expression of its findings. Article 16 of the 1996 Order provides for the contents of a statement of special educational needs. Paragraph 4 is in the following terms:

> "(4) The statement shall –
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> (a) specify the type of school or other institution which the Board considers would be appropriate for the child;
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> (b) if the board is not required under Schedule 2 to specify the name of any grant aided school in the statement, specify the name of

any school or institution (whether in Northern Ireland or elsewhere) which it considers would be appropriate for the child and should be specified in the statement; and

(c) indicate any provision for the child for which it makes arrangements under Article 10(1)(b) otherwise than in a school or institution and which it considers should be indicated in the statement."

[13] The primary contention advanced on behalf of the appellant is that the Tribunal did not state clearly or at all that X was appropriate to meet D's needs within Article 16(4)(b). Instead it carried out a ranking exercise between the two schools, an exercise which is not provided for in the statute and is wrong in law. Furthermore, it was contended that the Tribunal was not nearly clear enough about its rationale for concluding, if it did in fact conclude at all, that these needs could be met at X. Mr Devlin further submitted that even allowing for some leeway being given to Tribunals in presenting their decisions, this decision just does not meet the minimum core requirements in order for it to be allowed to stand.

[14] There is no doubt that in order to determine whether X was appropriate for D, an assessment had to be made by the Tribunal of what X offered and of what D needs. Unless there is a sufficient match between those two, X would not be appropriate for D for the purposes of Article 16(4)(b). That requirement is clear from the statute and from the decision of the Court of Appeal in England and Wales in C v Buckinghamshire County Council and the Special Educational Needs Tribunal [1999] ELR 179.

[15] The appellant's case went further by contending that the Tribunal had erred in law in its consideration of parental choice in the context of Article 10 of the 1996 Order. Article 10 provides as follows:

"(1) Subject to paragraphs (2) and (3) and to Articles 11 and 12, a board may arrange for the special educational provision (or any part of it) which any learning difficulty of a child in its area calls for to be made –

(a) in an institution outside Northern Ireland, or

(b) in Northern Ireland otherwise than in a grant aided school.

(2) A board shall not make any arrangement under paragraph (1) unless it is satisfied that –

(a) the interests of the child require such arrangements to be made; and

(b) those arrangements are compatible with the efficient use of resources.

[16] I do not accept the contention advanced for the appellant under Article 10. The English legislation is not identical to that in Northern Ireland. In my judgment education at a non-grant aided school in Northern Ireland (such as Y) does not fall to be considered unless and until a decision has been taken under Article 16 that there is no grant aided school which is appropriate for that particular child. If there is such a school (eg X) then it is highly unlikely that provision of education at a non-grant aided school is required by the statute. This brings the question back to the adequacy of the Tribunal's reasoning, analysis and conclusion in its decision of 10 June 2013.

[17] Ms McCartan for the Board and Ms Murnaghan for the Tribunal emphasised in their submissions the repeated decisions of appellate courts about what is expected from tribunals when setting out their conclusions in cases such as the present. A recent example of the approach to be taken is found In the Matter of an Application by TCM (a minor) for Judicial Review [2013] NICA in which Morgan LCJ stated the following:

> "We can deal briefly with the argument that the Tribunal erred in comparing the appropriateness of the two schools rather than concentrating on the statutory question of whether St Joseph's College was unsuitable. That submission was largely based on a sentence in the Tribunal's decision that the needs of the child would be best met in St Columbanus' College. The courts have often made it clear that a Tribunal decision ought not to be subject to an unduly critical analysis. A more recent statement of the general principal in the context of employment Tribunals can be found at paragraph 26 of the opinion of Lord Hope in Hewage v Grampian Health Board [2012] UKSC 37:
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> > "It is well established and has been said many times that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."

[18] Turning then to the eighth page of the written decision of the tribunal, the following points are relevant:

(i) The parents were represented at the hearing by a barrister.

(ii) The Tribunal had considered the papers carefully in advance of the hearing to the extent that they had reduced to writing eight issues which they wished the parties to consider before the substantive hearing began. It was also indicated to the parties that if they wanted to raise additional issues they should feel free to do so and the list of issues could be amended accordingly. The barrister representing the parents took some time to review those issues and returned only to indicate that the final issue of the eight was no longer in play. No additional issues were advanced. Accordingly, the hearing proceeded on the basis of the seven issues which had been identified by the Tribunal with no further issues being put before it.

(iii) The Tribunal then set out over 3½ pages the evidence which it received.

(iv) On the final page it set out the conclusions which it had reached.

[19] While the conclusions are set out in six sub-paragraphs, it is sufficient to set out the first three:

> "(i) The Tribunal is not satisfied that the interests of (D) require him to remain at [Y] rather than be placed at [X]. In this regard the Tribunal is mindful that (D's) progress in recent years is also partly due to the amount of occupational therapy and physiotherapy which he has received.
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> (ii) The Tribunal is satisfied that the interests of (D) can be best met at [X]. In this regard the Tribunal notes that (D) will have access to a clinical OT specialist at [X] and that he will experience a greater level of social interaction with other children. The Tribunal also notes that (D) will be have access to a high adult:pupil ratio and an individualised teaching approach.
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> (iii) Accordingly, the Tribunal is not persuaded that [Y] should be named in Part 4 of the Amended Statement as the appropriate school for (D)."

[20] Of course Tribunals can, and do, make mistakes as do courts at all levels. Even when care is taken, errors creep in and important points are missed. But in reading this Tribunal's decision I am struck by the way in which it set out the issues

which were adopted by the parties, it then set out the evidence in some detail and finally its conclusions. I am far from satisfied that it did not, admittedly in an imperfect way, conclude that X was an appropriate school for D with his special needs. It is impossible to read the recorded evidence, especially at page 7 of the decision without appreciating that the focus of the hearing was on how X could meet these needs eg the number of teachers, the number of assistants, the availability of group activities, the fact that a child with a similar profile to D was already in the school, the principal's own experience of a child with Angelman's Syndrome and the benefits which would flow from a greater level of social interaction.

[21] Nor do I believe it to be significant that in introducing its conclusions the Tribunal referred specifically to Article 10 but not to Article 16. The introductory statement to the conclusions is as follows:

> "Having carefully considered both the written evidence and the oral evidence and having regard to:
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> (a) the provisions of Article 10(1) and (2) of the Education (NI) Order 1996; and
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> (b) the relevant provisions of the Code of Practice on the Identification and Assessment of Special Educational Needs …"

It does not follow from this that the Tribunal did not have Article 16 in mind, particularly when the written evidence which it received from the parents specifically referred to Article 16, for example at paragraphs 10 and 76.

[22] I accept the submission that the clarity of the reasoning of the Tribunal could be improved upon but that falls a long way short of establishing that the Tribunal's decision was wrong in law, defective or appealable in any of the ways or on any of the bases raised in the amended questions. Accordingly, I dismiss the appeal.

[23] I would however add one suggestion. There is nothing wrong with tribunals giving their reasons for reaching their decisions in concise terms – in fact that is to be encouraged. It is however even more helpful if they do so in terms which are clear and which minimise the risk of arguments about whether some point which might be expected to be explicit is instead implicit.