

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Board of Governors of Loreto Grammar School's Application [2011] NIQB 36

**IN THE MATTER of an Application by the Board of Governors
of Loreto Grammar School for Judicial Review**

JUDGMENT: REMEDIES

McCLOSKEY J

[1] The Applicant in these proceedings, the Board of Governors of Loreto Grammar School, has succeeded in its application for judicial review. The question of remedies must now be determined by the court. I make clear, at the outset, that this is not one of those comparatively rare cases where the court, exercising its discretion, declines to grant any remedy at all, leaving the judgment to speak for itself. Nor is this course suggested by the Respondent Department.

[2] Clearly, there must be a direct correlation between the outcome of the proceedings and the selection of appropriate remedies. The court must also have an eye to the future. This means that the court must be alert to the consequences of any remedy which it may grant. This reference to the future is instructive, as it points up the nature of judicial review.

[3] In judicial review, the High Court is not a court of appeal. It does not hear and determine appeals on the merits against decisions of public authorities. Rather, the High Court exercises a supervisory jurisdiction. Stated succinctly, the function of the High Court is to ensure that public authorities observe all relevant legal rules, standards and requirements and act within the limits of their powers. In essence, the High Court conducts an audit of legality. Where, in judicial review proceedings, any material failing is demonstrated, the court is empowered to grant an appropriate remedy. In a very small minority of cases, the High Court can order the defaulting public authority to actively perform its legal duties. However, this occurs very rarely and is a reflection of the truism that, in judicial review litigation, the High

Court is not the final decision maker. Rather, the power of final decision making remains with the public authority concerned.

[4] The present case is a paradigm illustration of these reflections. One of the key facts in the matrix of the present case is Minister Gardiner's pledge in April 2004 that an estimated amount of £14.6 million would be invested in constructing a new Loreto Grammar School. The court has concluded, based on all the evidence, that the Governors and those whom they represent acquired a legitimate expectation which the law will protect that this pledge would be duly honoured by the construction of a new school on the existing site by 2010 at latest and, further, that this expectation has been unjustifiably frustrated by the Minister and the Department. However, the court is not proposing to order that this, or any, sum of public money, be paid by the Department to the Governors. Nor is the court proposing to order that the Minister take the steps necessary to ensure that a new school is constructed on the existing site by a particular date. Neither order of this kind would be a suitable remedy at the conclusion of these judicial review proceedings.

[5] In short, the power of further and final decision making continues to repose in the Minister and the Department, rather than the court. The new legal duties to which they will be subjected arise out of the judgment of this court and the remedies which it proposes to grant. One of the purposes of the judgment of the High Court in judicial review proceedings is to provide guidance, instruction and education to the public authority concerned, with a view to ensuring that it act henceforth in accordance with all relevant legal requirements and within the boundaries of its powers.

[6] In these proceedings ,the twin focus of the Governors' challenge is :

- (a) The frustration of the aforementioned legitimate expectation.
- (b) The further and freestanding decision that their reconstruction project is non-compliant with the relevant Departmental policy.

As regards (a), as appears from the court's substantive judgment, this may be viewed in either, or both, of two ways. Firstly, the Department's letters of February and March 2010 can properly be considered decisions, having legal effects and consequences. Secondly, and in any event, frustration of the Governors' legitimate expectation has occurred, irrespective of the letters. As recorded in the judgment, such frustration does not, as a matter of law, necessarily require a definitive, final decision. To give effect to the court's findings and conclusions, the court will order as follows:

- (i) There will be an order quashing the decision conveyed to the Governors in the Department's successive letters of February and March 2010.

- (ii) The court hereby declares that the first decision of the Minister/Department of Education challenged by the Applicants is unlawful on the following grounds:
- (a) The Governors of the Loreto Grammar School, Omagh and those whom they represent had a substantive legitimate expectation which the law will protect that a new school, financed by public funding, would be constructed on the existing site by 2010 at latest.
 - (b) This substantive legitimate expectation has been frustrated by the Minister/Department.
 - (c) The frustration of this substantive legitimate expectation is unjustified and gives rise to conspicuous unfairness, amounting to an abuse of power.
 - (d) Further, in making the impugned decision, the Minister/Department failed to properly take into account the said substantive legitimate expectation.
- (iii) The court quashes the second of the impugned decisions, which was that the school's reconstruction project is non-compliant with the relevant Departmental policy.

The order of the court takes effect forthwith, subject to a stay of execution of 28 days, expiring on 3 May 2011, as requested by Mr McMillan, to facilitate advice on a possible appeal.

[7] The Applicants are clearly entitled to recover their costs and this too will be reflected in the court's order, subject to the same stay.

[8] Finally, it is appropriate to add that phrases such as "*abuse of power*" and "*conspicuous unfairness*" are not the product of capricious or wanton judicial choice. They are, rather, the language of the decided cases, determining the relevant legal standards and obligations, the authorities to which this court must give effect. The language used in the decided cases and reproduced in the main judgment of the court is also a reflection of two of the over-arching values of the rule of law, namely the requirement that public authorities act within the law at all times and the avoidance of unjustifiable and unconscionable unfairness to the citizen. The doctrine of substantive legitimate expectations, on which the court's first main conclusion was based, protects and promotes each of these values.