

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Cunningham's (Maighread) (A Minor) Application [2015] NIQB 25

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

TREACY J

Introduction

[1] The applicant is a pupil at Clintyclay Primary School, 81 Clonmore Road, Dungannon, BT71 6HX ("the school"). The applicant is in P4 at the said school. The applicant is a minor and therefore brings these proceedings by her mother and next friend, Breda Cunningham. The applicant is directly affected by the impugned decisions as they will result in the closure of her school in August 2015 and will require her to relocate to a different school against her wishes.

[2] The applicant seeks judicial review relief arising from decisions of the Department of Education ("the respondent") dated 15 October 2014 wherein the respondent refused to permit the school to transform from a Catholic Maintained school into an Integrated school and further approved the closure of the school. The decision on transformation was made under Development Proposal 315 ("DP315") and the decision to close the school was made under Development Proposal 312 ("DP312"). These are the impugned decisions under challenge.

Order 53 Statement

[3] The applicant raised numerous grounds of challenge which are summarised in the proposed amended Order 53 Statement. Objection was taken to the late proposed amendments - in particular to the ground alleging apparent bias based on

the Minister's approval, contrary to the advice of his officials, for an Irish Medium secondary school west of the Bann. I do not propose to rule on the application to amend or the objections raised. This is principally because the court is able to arrive at a clear decision based on some of the original grounds pleaded.

[4] There is some urgency about the present application since it appears the latest point at which a parent can choose a primary school for their child is 8 April 2015. On that account the Court has been requested to give judgment prior to that date to avoid the risk of prejudice to admissions to Clintyclay Primary School for the 2015/2016 year, in the event that judicial review were to be granted.

[5] Over the course of the two day hearing this week the parties helpfully opened a substantial body of material from the extensive exhibits. For reasons of expedition and economy and because of the basis upon which the court has reached its conclusion it is unnecessary to rehearse in any detail the materials to which I was taken.

[6] One of the criticisms of the impugned decisions is that it is said that the Minister erroneously took into account and proceeded on the basis that the school was in financial difficulties. It was common case before me that the school was *not* in such difficulties. However, the response to the pre-action correspondence makes it clear that the Minister did proceed on the basis and expressly took account of "...the financial difficulties of the school" (see page 806). It seems that this erroneous approach to the schools finances may have originated from the CCMS in their parish review - a review which has been and is vigorously challenged by the school and its parents.

[7] A similar error appears in the response of the ETI which refers to budgetary difficulties. It is frankly acknowledged by the respondent that the school was not in financial or budgetary difficulties. However the error crept into the decision making process the error is manifest in the submission that was made to the Minister as the pre-action correspondence explicitly acknowledges that the Minister took into account and proceeded on the basis that the school was in financial difficulties. This was erroneous. In fact not only was the school not in financial difficulties, it had a budget surplus. In one of the appendices to the ministerial submission the budget surplus, echoing the position of the CCMS, also appears to be portrayed in a negative light.

[8] The Minister was faced with two DP's one of which was a proposal from a Catholic maintained primary school to transform into an Integrated school. This was the very first time a Catholic school had ever made such a proposal. Had the proposal been accepted its galvanising effect could have had potentially very significant positive implications for the IE sector. This is apparent from the affidavit sworn by NICIE in support of the applicant's judicial review. On the other hand viewed from the CCMS standpoint acceptance of the DP to transform could have had dangerous implications for the Catholic maintained sector. Indeed, the

applicant alleged in this case that the CCMS had accelerated its separate DP to close the school in order to effectively undermine the schools chances of gaining IE status. The alleged animus of the CCMS towards the proposal to transform was evidenced the applicant said by the commissioning of a deeply flawed Parish Review in support of closure which it was argued was replete with inaccuracies. One such inaccuracy was the accusation that the school was in financial difficulties, an inaccuracy which managed to find its way into the impugned decision making process even though it is accepted by counsel for the respondent that the school has no such difficulties and in fact has a budgetary surplus. Further, the court was referred to various documents which made it clear that the school was not suffering from financial stress and that the only stressor identified faced by this small but very successful rural school, in common with other rural schools, was the number of pupils. It is concerning that such a material inaccuracy managed to infect the decision making process to the point where it appears in the submission to the Minister and is, unsurprisingly, then taken into account by him.

[9] The Minister had two proposals before him to determine – the schools DP to transform to IE status and the CCMS DP to close the school. In each case the ministerial submission was infected by erroneous reference to financial and budgetary difficulties which may well have originated from the CCMS Parish Review. Whether it so originated or not the error was material and was taken into account. That this is so seems clear from the Ministers acknowledgement to that effect in the response to the pre-action correspondence.

[10] The Minister was faced with the possibility of saving an educationally successful and obviously much loved school at the epicentre of its community whilst simultaneously giving a potentially ground-breaking development boost to IE since this was the very first time a catholic maintained school attempted to convert. And this possibility was taking place in the context of, the GFA inspired, statutory duty under Art 64(1) of the Education Reform (NI) Order 1989:

“General functions of Department and boards in relation to integrated education

64.—(1) It shall be the duty of the Department to encourage and facilitate the *development* of integrated education, that is to say the education together at school of Protestant and Roman Catholic pupils.

(2) The Department may, subject to such conditions as it thinks fit, pay grants to any body appearing to the Department to have as an objective the encouragement or promotion of integrated education.

(3) It shall be the duty of a board to provide free of charge to any person seeking it advice and information about –

- (a) the procedures for acquisition by a school of controlled integrated status;
- (b) the implications for a school of the acquisition of that status."

[11] At the very least it was argued if the Minister was not minded then to approve the school's DP he should have considered deferring his decisions. Deferring that is until the picture had become clearer and he was fully informed following the outcome of the very inquiry he had directed in the form of the strategic review of IE in the area as recommended by NICIE. Instead of, at the very least waiting for the outcome of the review, he rejected the IE proposal, never considered exercising his discretion to defer and accepted the CCMS proposal to close the school. And in determining both DP's he had before him submissions from his officials which contained the same serious erroneous contention that had been first advanced in the CCMS Parish review that the school had financial difficulties.

[12] The Respondent's counsel suggested that the financial difficulties referenced in the Minister's advices relate only to the observations at para 15 of DP315 (page 6) which relates to an enhanced per capita allocation and the provision of Small School Support funds. I reject that contention. As the applicant submitted the Minister clearly and mistakenly made both impugned decisions on the basis that the school was under financial stress - and not because they were receiving what they were entitled as a small rural school.

[13] The respondent deals with the finance point at para 66 and 67 of their substantive replying affidavit. I agree with the applicant that it is significant that they do not say that when the advices (or Minister) reference "*financial difficulties*" what they meant was restricted to the observations made at para 15 of DP315 which is the case now advanced by Senior Crown Counsel on behalf of the Minister.

[14] Further at para 66 it is asserted that "*no reference was made to the statements within the Parish Review of December 2012*". This is incorrect as the advices, followed by the Minister, referred to that document and gave a basic summary. Although it is averred the Minister personally, did not have sight of the CCMS Parish review when he made his decisions it is not said that his officials did not have this document when preparing their recommendations (see para 66 of Ms Durkin's second affidavit).

[15] Further, DP315 makes reference to an ETI report of March 2010 at §19 and 20. The March 2010 report makes no reference to budget difficulties (only to the very good educational provision). The comments from the ETI recorded at para 20 of DP315 have come as a result of additional comments by them. They are recorded as saying that "*low enrolment (circa 30) and the budget difficulties have been highlighted as areas of stress*". The ETI refer to budget difficulties as being a source of "stress" in the

same category as low enrolment. I accept the applicant's submission that this is wrong. As the applicant points out there has only ever been one officially identified stress factor, related to enrolment [see pages 974 and 980 of the Bundle].

[16] I agree with the applicant that it is clear from the sequencing of DP315, at paras 37 and 38, that there is a distinction made between the per capita allocation and Small School Support funding issues (para 37) and the CCMS report and the "inevitable" further "financial difficulties" alleged in that report - (para 38 of DP315). It is thus clear that the advice given to the Minister was infected by the erroneous CCMS report and certainly by this material factual inaccuracy.

[17] In my view it is clear the Minister has misdirected himself on the question of the school's finances by his reliance on the advices given to him which directly or indirectly reference financial matters raised by CCMS (in the Parish Review) or by comments made by the ETI. As the applicant pithily observed the problem for the respondent is that there never was any financial or budget difficulties.

[18] For the above reasons the impugned decisions must be quashed.