

Judicial review – school transport assistance – whether departmental directions lawful  
– whether discriminatory under Northern Ireland Act 1998, ss 75 and 76.

**Neutral Citation no. [2004] NIQB 64**

*Ref:* **GIRC5088**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

*Delivered:* **1/10/04**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN’S BENCH DIVISION (CROWN SIDE)**  
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**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR  
JUDICIAL REVIEW BY E ON BEHALF OF S (A MINOR) OF DECISIONS  
OF THE NORTH EASTERN EDUCATION AND LIBRARY BOARD  
MADE ON 17 OCTOBER 2000 AND 10 JANUARY 2001**  
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**GIRVAN J**

[1] E, the father of S who was born on 4 November 1988, brings these proceedings purporting to act on behalf of his daughter. The application seeks a declaration that the decisions of the North Eastern Education and Library Board (“the Board”) made on 17 October 2000 and 10 January 2001 and the circular known as the Department of Education (NI) Circular 1996-41 Home to School Transport (“the Circular”) are unlawful. He seeks an order directing the Board and the Department to have due regard to the need to promote equality of opportunity between the applicant and his daughter and other children from Antrim attending denominational Catholic schools and to reassess and review the interpretation and implementation of the Board’s transport from home to school policy. He seeks an order in the nature of an injunction pursuant to section 76(B) of the Northern Ireland Act 1998 (“the 1998 Act) restraining the Board from refusing to provide free transport to the applicant. In addition he seeks damages representing the cost of transport at the rate of £2.50 per day in the cost incurred in providing a bus pass at the cost of £290.00 per year. This application, in essence, challenges the legality of the Circular which sets out the policy of the Department in relation to the provision of transport cost to school children.

[2] There was some confusion in the course of the hearing as to who the proper applicant for judicial review is. Mr Stephens QC in his argument presented the case on the basis that the applicant was S although the Order 53 Statement referred to the applicant as the father. The Board's argument proceeded on the same basis. The Department's argument however proceeded on the basis that the applicant was the father. Although the father purported to act "on behalf of" S he described himself in the Order 53 Statement as the applicant. He does not appear to have followed any of the procedural steps provided for in Order 80 to sue as next friend of S who is a minor. As a parent he was immediately affected by the impugned decisions and the Circular and accordingly, he has locus standi to bring the proceedings. No substantial point was taken on the issue of the precise identify of the applicant. I shall proceed on the basis that the applicant is S's father.

[3] The applicant has two children, S and a son R who was born on 11 March 1987. The family reside in Fountain Lane, Antrim. As S approached the age of transfer from primary to secondary education the applicant submitted a transfer form in which Belfast Royal Academy was indicated as the parents first choice of grammar school for S with Antrim Grammar School as the second choice followed by Ballymena Academy and Slemish College. At the time R was attending Antrim Grammar School.

[4] Following the 11-plus procedure S was awarded a place at Belfast Royal Academy. The applicant applied for transport assistance. The Board's transport officer wrote to the applicant informing him that under the relevant transport regulations pupils who reside within statutory walking distance (3 miles) of the nearest suitable school are not eligible for transport assistance to facilitate their attendance at a more distance school unless they have been refused a place at all of the nearest suitable schools within the statutory walking distance of their home. As the parents of S had not nominated the nearest post-primary school as a first preference when selecting the choice of school for S the Board was unable to provide transport. In subsequent correspondence the Board stated that the only situation in which S would qualify for transport assistance to Belfast Royal Academy was if she had applied unsuccessfully for admission to her nearest suitable school, Antrim Grammar School. The applicant then obtained a letter from the Headmaster of Antrim Grammar School which indicated that S would not now obtain an entry to Antrim Grammar School. In response to that the Board stated that enquiries had revealed that the first preference school on the transfer application form had been Belfast Royal Academy. The nearest school Antrim Grammar School had not been selected as the first choice and therefore S did not quality for travel assistance. The current inability to obtain a place at Antrim Grammar School did not affect the position.

[5] The applicant in his affidavit avers that in selecting schools for R and S the parents considered which school best suited them as individuals. He said in choosing the school for S he was not aware of the significance of the change in the transport assistance brought about by the 1996 Circular. The family were Episcopalians and the child who had moved recently to Northern Ireland has been raised in an multi-cultural, multi-ethnic society and he wanted the children to be exposed to as broad and diverse section of the Northern Ireland community as available. He did not want S to be educated at a denominational Catholic school. The parents' religious and philosophical convictions led them to select Belfast Royal Academy as the school S should attend. They had also considered performance tests and results.

[6] The applicant made the point that he is aware of Catholic pupils being provided with transport assistance to schools at least equidistant from Antrim namely, St. Malachy's College and Dominican College on the Somerton Road, Belfast whenever there were nearer denominational grammar schools available at St. Louis's Grammar School, Cullybackey Road, Ballymena.

[7] Mr Stephens QC introduced in evidence departmental statistics which, he said, unchallenged by the Department emanated from the DENI web-site. These statistics established that in the grammar school sector 28,355 pupils attend schools under Catholic management, 14,883 attend controlled grammar schools and 20,109 attend schools under other management. Those attending Catholic schools are attending schools which are designated "denominational" grammar schools under the DENI circular and Board policy. Of the 14,883 attending controlled grammar schools 889 are Catholic. 1,345 are not recorded as having a religion. Of these some may come from the Catholic community. Of the 28,355 attending Catholic schools, 181 are Protestant representing 0.6% of the total, 44 are designated as other Christian, 19 are described as non-Christian and 27 as having no religion. Thus 99% of pupils attending Catholic schools are Catholic. In other non-denominational voluntary schools 71% are Protestant. 1,771 are designated as Catholic (representing thus 9%) 3,224 have no religion or none recorded (some 16% of the total). Of these some may have come from the Catholic community. The statistics, Counsel argued, showed that Catholic schools are overwhelming Catholic. In non-denominational schools, on the other hand there are a significant number of Catholic pupils whose parents have accordingly elected to send their children to a non-Catholic grammar school.

### **The Relevant Statutory Provisions Relating to School Transport**

[8] Under Article 52 of the Education Libraries (Northern Ireland) Order 1986 substituted by Article 23 of the Education (Northern Ireland) Order 1997 it is provided that:

“(1) A board shall make such arrangements as it considers necessary or as the Department may direct for the purpose of facilitating shall

(a) the attendance of pupils at grant-aided schools.

(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 approval of the Department.”

### **The Department Circular**

[9] The Circular purported to give advice about the transport arrangement which came into operation from the beginning of 1997-1998 school year. The document purported to replace the current guidance contained in Circular 1992/25. Although paragraph 1 refers to the Circular as being advice paragraph 2.1 states that the Circular sets out the arrangements approved by the Department under Article 52. Read as a whole the Circular contained directions given by the Department to the Boards for the purposes of Article 52. The Circular cannot be construed as merely advisory or directory as Mr Stephens argued on behalf of the applicant.

[10] The Circular contains the following material provisions:

- (a) By Clause 2.2 it is provided that to determine those people who should be assisted with transport the Board should have regard to the walking distance as defined in paragraph 3(6) of Schedule 13 to the 1986 Order (ie. 2 miles in relation to a pupil under 11 years of age and 3 miles for older pupils measured by the nearest available route.)
- (b) By Clause 3.1 it is provided the transport assistance should not normally be provided for any pupil who lives within statutory walking distance of the school or institution or further education attended. Neither should assistance be provided for pupils before the beginning of the academic year in which they attain compulsory school age. The Board has no obligation to assist with travel for the whole of a journey provided that the remainder of the journey does not exceed the statutory walking distance and the Board is satisfied having regard to the length and time of the total journey that the remainder of the journey is not excessive.
- (c) By Clause 3.2 it is stated that the arrangements thereafter set forth “will apply to all pupils enrolling in schools or changing school from the 1997-98 year.”

- (d) Paragraph 3.3 and 3.4 provide “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 a suitable school within statutory walking distance.”
- “3.4 Where there is no suitable school within statutory walking distance from a pupil’s home Boards may provide transport assistance to any suitable school, provided that a suitable Board or public transport service to the vicinity of that school is already available. A Board will not be expected to introduce new bus routes for services for individuals or small groups of pupils where the cost of such transport would result in unreasonable public expenditure.”
- (e) Paragraph 3.5 sets out that a suitable school is a grant-aided school in any of the category therein set forth. Under the heading “grammar schools” categories of school are defined as “denominational” and “non-denominational”.
- (f) Clause 3.6 provides that applications may be made for a place in the school in more than one category in each school sector and for schools in both the secondary and grammar sectors. 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 categories 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.
- (g) Under Clause 6 transport assistance can be provided by a variety of means including the issue of sessional tickets for public transport, the operational of Board vehicles, the hire of buses or taxis and the payment of cycle or car allowances.
- (h) Under Clause 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 should be where there is an exceptional road safety hazard.

## **The Board Policy**

[11] Under the Board's Home to School Transport Policy paragraph 3.2 defines a suitable school as a grant-aided school in any of the categories there. Under the heading "Type of School" is a class known as grammar school. Under the heading "Category" appears the words "denominational or non-denominational." For the purposes of transport the term denominational grammar school encompasses all grammar schools under Catholic management. Paragraph 3.4 states that where there is a suitable school 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 at all suitable schools within statutory walking distance. The nearest suitable school must be revealed in order of preference on the pupil's transfer application form. Clause 3.6 where there is no suitable school within statutory walking distance from a pupil's permanent home address the Board may provide transport assistance to any suitable school provided that a suitable Board or public transport service too or in the vicinity of that school is already available.

## **The Applicant's case**

[12] Mr Stephens QC argued that in Antrim there was a non-denominational category of grammar type of school and St. Malachy's High School a Catholic maintained category of a secondary type of school. It is not a grammar school. The Board does not apply its policy to Catholic school children who are provided with transport assistance to St. Malachy's College, Antrim Road, Belfast or Dominican College, Somerton Road, Belfast. The Board's policy does not state that it is subject to the Department's Circular. The Department's Circular is only guidance. The difference between the Board's policy and Department's Circular is that the qualification to the entitlement to transport assistance is that application must first be made to all schools in the same category as opposed to all suitable schools within statutory walking distance. Denominational schools under Catholic management are based on a Catholic ethos with denominational religious instruction and denominational acts of worship. A preference is given to those who subscribe to the Catholic ethos in that within the terms of the transport policy they will always have a choice of two schools and still quality for transport assistance. In Antrim there where no Catholic maintained grammar schools but there is a non-denominational grammar school. Catholics have two choices selecting either Antrim Grammar School or any Catholic maintained grammar school outside Antrim. A pupil whose parents did not wish him or her to be educated in accordance with the Catholic ethos can only select Antrim Grammar School. A Catholic pupil when exercising the two choices is free to do so on grounds other than religious preference. A Catholic parent can select a better academic school for

his child and thereby increase the chances of achieving better examination results. There is a greater ability for a Catholic pupil to choose a school which can cater for the individual characteristics of that individual pupil. The Department's Circular and the Board's policy are in breach of section 75 of the Northern Ireland Act 1998.

### **The Board's Case**

[13] The Department's Circular sets out the over-riding policy being a direction by the Department given under Article 52. There is no conflict between the Board's policy and the Department Circular and the Board's policy must be read in the light of the Department's Circular. St. Malachy's High School not being a grammar school would have been no more suitable for Catholic pupils placed in the grammar sector than it was for the applicant. The Board had not departed from its own policy. The suggestion that Catholic secondary pupils invariably enjoying more choice was wrong. There is no evidential foundation for the assertion that a non-Catholic pupil attending a Catholic grammar school must perforce submit to a Catholic ethos education. Choice in transferring to a second level school would invariably depend on variables such as the transferring pupil's home address, the existence or otherwise of suitable second level schools within the statutory walking distance, the number of such schools, the success or failure of the pupil seeking admission to such schools and the religious and philosophical convictions of the transferring pupil's parents. Properly analysed these are matters of geographical accident and parental choice. In the case of Antrim it is a matter of geographical accident that there is no denominational grammar school within a distance of 3 miles of the homes of those Catholic pupils who attend denominational grammar schools further away with Board assistance. If those Catholic pupils had resided on, for example, the Antrim Road in Belfast where there are 2 denominational grammar schools the geographical variation would have obliged them to satisfy the 3 mile refusal requirement in order to qualify for transport assistance to a Catholic grammar school outside the radius of 3 miles from their home. The assertion that a Catholic always had a choice of 2 different types of grammar school is unfounded. The applicant's parents had a choice in this case which they duly exercised. Section 75 did not create a statutory duty to treat individuals or groups of individuals equally rather it enshrined a number of quality of opportunity goals and enjoined relevant authorities to have due regard to the need to promote such quality of opportunity. The duty is to have due regard to equality of opportunity and this differs from the suggestion that the goals must be achieved. Schedule 9 sets out the arrangements for enforcement pursuant to the policing duties and functions of the Equality Commission and they provide a suitable, alternative remedy. Moreover E was pursuing parallel proceedings in the County Court under Article 28 of the Fair Employment and Treatment (Northern Ireland) Order 1998 ("the 1998 Order"). Nothing the Board or the Department were doing

detracted from the principle that pupils should be educated in accordance with the wishes of the parents nor was there any infringement of Article 2 of the First Protocol.

### **The Department's Case**

[14] The applicant's parents opted in preference for four grammar schools all within the non-denominational category. It could not be maintained that a denominational school is an unsuitable school and therefore only capable of providing a preference for a Catholic parent. Denominational schools as much as non-denominational schools assist in the fulfilment of the duty of Boards to secure sufficient schools for providing secondary education (see *R v Cecil* (1989) (Unreported)). The arrangements for religious education and collective worship will not be such as to exclude any pupil (see Articles 21(4) and (5) of the 1986 Order as amended). The applicant had accordingly the same range and choice as his Catholic neighbours and could have opted for a denominational grammar school. If the applicant's Catholic neighbour had applied in preference order for four non-denominational grammar schools he would have been treated in exactly the same way as the applicant. The requirements apply equally to everyone. There was no breach of section 75 of the 1998 Act. The Department's Circular was the subject of PAFT audit at the time when it was introduced. It concluded that it was not anticipated that the proposals would disadvantage any section of the community on the grounds of religion. On an initial screening under the Equality Scheme the Department considered the school transport policy did not present a problem in respect of impact on persons identified by religion. It was the Department's intention to subject the policy in due course to an equality impact assessment in 2002-2003 but this had been delayed because of an ongoing review of the overall policy.

### **Decision**

[15] As stated in paragraph [9] I am satisfied that the Department's Circular constitutes not mere advice or guidance but actual directions to the Board for the purposes of Article 52 of the 1986 Order. The Board accordingly, is bound to implement the policies enunciated in the directions of the Department and the Board policy falls to be read together with the Circular. There is in fact no inconsistency between the Board's policy and the Circular when the two are read fairly and together.

[16] The central question that arises is whether in formulating and applying the policy the Department was acting lawfully. The applicant's case is that the Department's decision to implement the policy in the Circular was flawed because the Department failed to have proper regard to its duties under section 75 of the 1998 Act and is unlawfully discriminating by giving Catholic parents an advantage compared with non-Catholics and that the Board failed



to appreciate and have regard to the discriminatory effect of the policy. Furthermore the Department by proceeding on the basis that Protestants are as free to choose and attend a denominational Catholic school as Catholics are to choose to attend a non-denominational school was acting on a false and illogical premise.

[17] Since the case turns on the legality of the directions set out in the Circular and since the making of those directions does not fall within Article 28 of the 1998 Order as Mr Maguire's argument on behalf of the Department made it clear, the fact that the applicant is pursuing a claim in the County Court for discrimination contrary to Article 28 of the 1998 Order does not mean that this court should decline to entertain the judicial review application on the basis that there is an alternative remedy. The County Court proceedings were adjourned by consent, apparently on the basis that the matter was coming before this court in the judicial review application. The applicant's challenge to the legality of the Circular raises public law matters. It is not clear that the County Court could strike down the Department's directions under Article 28 and in the County Court the respondent is the Board.

[18] Under section 76 of the Northern Ireland Act 1998 it is unlawful for a public authority to discriminate against a person or a class of persons on the grounds of religious belief. The section does not apply in relation to any act or omission which is unlawful under the 1998 Order. The applicant argues that by implementing the Circular the Department is guilty of unlawful discrimination. A person discriminates against any person or class of persons if he treats that other person or persons less favourably in any circumstances than he treats or would have treated other persons in such circumstances. The statutory definition of discrimination in the 1998 Act differs from discrimination under the 1998 Order in that under the Order provision is made both for direct and indirect discrimination. Indirect discrimination is not dealt with in the 1998 Act. If the consequence of the Circular is in fact to directly discriminate (in the manner defined) then the making of the Circular would be an unlawful act under section 76.

[19] There is no evidence or suggestion that the Circular was implemented with the intention of discriminating against Protestants in favour of Catholics. The PAFT document put before the court reveals that the Department did address equality issues raised by the proposed policy. It was concluded that the proposals were not perceived as likely to cause systematic or disproportionate disadvantage to any group. It is unclear from the Department's affidavit when the PAFT assessment was carried out. It must have preceded the 1998 Act since it preceded the implementation of the Circular. Section 75 of the 1998 Act requires relevant bodies to have due regard to the need to promote equality of opportunity which may be a somewhat different thing from preventing a systematic and disproportionate

disadvantage although the two concepts have much in common. The PAFT assessment clearly negatives any deliberate policy of discrimination on the part of the Department although the test of discrimination is not dependent on intention but on effect (see *R v Birmingham City Council ex parte Equality Opportunities Commission* [1989] AC 1155 and *James v Eastleigh Borough Council* [1990] ) 2 AC 751 775.

[20] If the policy was not intentionally discriminatory the question arises as to whether the policy was causatively discriminatory. Carswell LJ (as he then was) stated in *Belfast Port Employers Association v Fair Employment Commission* [1994] NIJB 36 at 40:

“The construction of the words ‘on the ground’ in section 16(2) which was described by Lord Lowry in *James v Eastleigh Borough Council* [1990] 2 AC 751 775 as the “subjective construction” did not receive the support of the majority of the House, which adopted the construction term by Lord Lowry “the causative construction”. The intention or motive to discriminate is not a necessary condition of liability, and there is discrimination under the statute if there is less favourable treatment on the ground of religious belief, in other words if the complainants would have received the same treatment as those short-listed but for their religious belief whatever the intention or motive of the respondents...”

[21] A Catholic from Antrim in a position of the applicants sending his child to Belfast Royal Academy would not qualify for the transport subvention since the child would be going to a non-denominational school when there was a non-denominational school available in Antrim. A Catholic sending his child to a Catholic denominational grammar school in Belfast would be entitled to transport subsidy there being no denominational school available in Antrim. If the applicant had sent his child to a denominational school outside Antrim he likewise would have received a transport subsidy. Where the Catholic person secures the transport payment in respect of his child going to a Belfast Catholic grammar school he receives a benefit but that does not mean that the applicant is the victim of a detriment. In *Jeremiah v Ministry of Defence* [1979] IRLA 436 Brightman LJ put the matter thus:

“I do not say that the mere deprivation of choice for one sex, or some differentiation in their treatment, is necessarily unlawful discrimination. The deprivation of choice, or differentiation, must be associated with a detriment. It is possible to imagine a case where one sex has a choice but the other does not yet there is

nevertheless no detriment to the latter sex and therefore no unlawful discrimination.”

If one substitutes “religion” for “sex” in that citation the present case appears at the height of the applicant’s case to be a case where it has been argued that one religion has a choice but the other does not (the choice being a greater choice of school). The applicant’s freedom to choose a school for his child remains unimpaired and unaffected by the fact that a Catholic person may have a theoretical greater choice of schools. No detriment to the applicant has been demonstrated. The Circular does not have a directly discriminatory effect. Section 76 of the Northern Ireland Act 1998 prohibits direct discrimination but as noted does not contain provision for outlawing indirect discrimination which is forbidden under the 1998 Order. It is therefore unnecessary to consider whether the Department would be guilty of indirect discrimination. In any event there is presently no evidence before the court to lay the basis for a charge of indirect discrimination even if that were a relevant consideration.

[22] In relation to the case that the Department has failed to have “due regard” to the need to promote equality of opportunity between persons of different religious beliefs, the Department submitted their policy to a PAFT assessment concluded the policy did not cause inequality. The equality of opportunity goal enshrined in section 75(1) must be duly taken into account but the section does not mean that the policy adopted must achieve a particular goal. Schedule 9 makes provision for the enforcement of the duties under the scheme, section 75(4) and schedule 9 indicate the intention of Parliament that complaints should be determined in accordance with the statutory procedures. If there were evidence that the Department had simply failed to have a due regard to the need to promote equality of opportunity or had failed to have due regard to its own equality scheme then it would have failed to have taken into account relevant considerations. Here, the evidence indicates that the considerations were taken into account. The question of weight to be attached to the consideration was for the Department. A complainant aggrieved by the outcome or by the implementation of the policy is entitled to pursue the matter through the procedure set out in schedule 9 paragraph 10.

[23] In the result the applicant has failed to establish that the Department’s Circular is discriminatory for the purposes of section 76 or that the Department failed to have due regard to its duty under section 75. The Board’s policy falls to be applied in accordance with the Department’s Circular and the Board acted in accordance with this policy properly construed in the light of the Department’s policy which for the reasons indicated was not an unlawful one. In a result the application is dismissed.