

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

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**QUEEN'S BENCH ( JUDICIAL REVIEW)**

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**BETWEEN:**

**RUAIRI FALLON-McGUIGAN (A MINOR) BY HIS FATHER AND NEXT  
FRIEND MICHAEL McGUIGAN**

**-AND-**

**MICHAEL McGUIGAN**

**Applicants;**

**-AND-**

**THE BELFAST AND EDUCATION LIBRARY BOARD**

**AND**

**THE DEPARTMENT OF EDUCATION FOR NORTHER IRELAND**

**Respondents.**

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**MORGAN J**

[1] The minor applicant was born on 11 May 1993. In May 2000 he was assessed by an educational psychologist who found his full scale IQ was 127 placing him in the top 5% of the population. His reading, comprehension and spelling, however, was found to be in the lowest quartile and he was diagnosed as suffering from dyslexia. As a result of his condition it takes him longer to recognise, spell and understand words. He received peripatetic support at school thereafter to assist in addressing his condition.

[2] In the autumn of 2003 he sat the transfer procedure tests which provide the mechanism governing transfer of children from primary to secondary education. He was notified on 6 February 2004 that he had obtained a B1 grade. An A grade is awarded to the top 25% of the transfer age group in Northern Ireland and a B1 grade is awarded to the next 5% of the group.

[3] It was his desire to transfer to Aquinas Grammar School. His elder brother already attended the school. Like all grammar schools in Northern Ireland the school is obliged to admit pupils strictly in the order of the Transfer Grade which they obtain subject to special circumstances.

[4] By virtue of the Secondary Schools (Admission Criteria) Regulations (Northern Ireland) 1997 Boards of Governors of schools have responsibility for drawing up and applying admissions criteria including special circumstances criteria. The Belfast Education and Library Board published a booklet for the assistance of parents whose children were transferring in which it set out its "model criteria for special circumstances" which were adopted inter alia by the school.

#### "Special Circumstances"

Grammar schools must admit pupils strictly in the order of the Transfer Grade which they obtain, subject only to the consideration of medical or other problems which may have affected performance in the Transfer Test(s) and which are supported by documentary evidence of a medical or other appropriate nature. These "medical or other problems" are commonly referred to as "special circumstances".

Parents who wish to claim such "special circumstances" should read carefully the requirements set out in the criteria for the grammar schools concerned. Each school considers claims and decides on the validity of each case. It is essential that medical evidence, educational evidence etc are provided at the time and in the manner specified.

The Grammar Schools listed below have agreed that in order to consider such "special circumstances" parents should ensure that the following information is provided along with the Transfer Form.

The "Model Criteria for Special Circumstances" and "Special Provisions" will be applied to applications received by the following Grammar Schools:

Aquinas Grammar  
Belfast Royal Academy  
Bloomfield Collegiate  
Campbell College  
Dominican College

Rathmore Grammar  
Strathearn School  
St Dominic's High School  
St Malachy's College  
St Mary's Christian Brothers

### Details of medical or other problems

Where it is claimed that a pupil's performance in the Transfer Test has been affected by a medical or other problem, independent evidence of its existence must be provided to the school. Where the problem is a medical one of short term duration, which affected the pupil only at the time of the Transfer Tests, the school will require the production of evidence that the pupil was examined by a medical practitioner in relation to the illness.

Where the problem is of a non-medical nature, the parents should set out in the Transfer Form precise details of the problem and append any appropriate evidence to corroborate its existence.

### Educational Evidence

Sufficient objective comparative documentary evidence must be provided by the parents and the Primary School and accompany the Transfer Form to enable the school to reach a decision.

The following information must be provided:-

1. The number of pupils in his/her P7 class and the number taking the tests.
2. All the pupil's school internal test results in English, Mathematics, Science and Technology (eg standardised practice tests in exam conditions) from the beginning of the P6 school year (or the second year prior to the onset of the problem if earlier), compared to the results for the same tests of ALL the other members of his/her P7 class sitting the tests and the transfer grades of all the other members of his/her P7 class. In the case of small schools, or school where very few pupils who have taken the Transfer Tests in the previous year(s). Such information must be provided on Form SC1, a sample of which is set out at page 14/14. Only the pupil claiming Special Circumstances should be identified. All other pupils in the comparative picture should be anonymous.

The Primary School Principal's comments on the pupil's academic achievements in comparison with the other members of his/her P7 class who received the same or a higher grade in the Transfer Tests are also requested.

It is emphasised that the onus is on the parents to ensure that the above information is provided by the primary school. Failure to provide such information may result in the school being unable to consider the application for Special Circumstances."

[5] On 25 February 2004 the applicant's parents lodged a special circumstances claim along with the Transfer Form. The information provided included the following:

- (a) The number of pupils in his P7 class taking the tests.
- (b) The results of standardised practice tests taken at school from the beginning of his P6 year.
- (c) The comments of his Primary School Principal who stated that as a result of his specific learning difficulties it would be expected that his performance in timed test situations would be affected and that the B1 Grade obtained was not a true reflection of his ability.
- (d) The psychologist's report prepared in May 2000.
- (e) An IQ test (the Non-Readers Intelligence Test) conducted by his primary school less than 2 years previously indicating an IQ of 120 placing him in the top 10% of the population.
- (f) A variety of standardised test scores called the Richmond Tests which demonstrated that the applicant was performing at an average level in tests of literacy.
- (g) A mathematics test referred to as M1 administered in P6 in which he scored 121 which is within the top 10% range for children of his age. This test focuses on computational skills.
- (h) A mathematics test referred to as M2 in which his performance was average. That test requires the pupil to read and solve problems and may be more difficult for a dyslexic child.

[6] The special circumstances claim was considered by the Principal of the school by way of delegation from the Board of Governors. He noted that it was emphasised in the model criteria for special circumstances that it is for those arguing for re-grading to produce the materials on which the claim is to be based. He concluded that the educational psychologist's report of May 2000 provided no objective evidence of the applicant's mathematical abilities and asserted that he would have expected to receive an updated educational psychologist's report in respect of the applicant's literacy and numeracy abilities in P6 or P7 or other current objective material to support the claim. He did not consider it appropriate to place weight on the subjective judgment of the Primary School Principal. He recognised that timed tests did not give a true reflection of ability for pupils with dyslexia and accordingly did not give them any weight. There is no indication that he considered the other materials before him. He concluded that he should not adjust the Grade because the educational evidence was inconclusive. The school was oversubscribed with Grade A candidates that year and as a result the applicant did not succeed in getting a place at the school.

[7] On 27 August 2004 the Court of Appeal granted the applicant leave to apply for judicial review of the model criteria promulgated by the Board on

the basis that the requirement imposed on the applicant to produce evidence to support his application for special circumstances arguably constituted unequal treatment contrary to article 14 of the European Convention on Human Rights in respect of the applicant's right to education.

[8] On 27 October 2004 a replying affidavit on behalf of the Department of Education was made by John Leonard. In that affidavit he made the following points:

(a) Admissions criteria, including special circumstances criteria, are determined under the 1997 Regulations by Boards of Governors. It is, therefore, Boards of Governors of grammar schools that place the onus on parents to provide evidence in support of claims for special circumstances.

(b) He referred to Departmental guidance to parents advising them that they should ensure that all relevant information is included in the Transfer Form.

(c) He emphasised that the model criteria set out above were determined by the grammar schools listed in the booklet. He asserted that the BELB had no role in determining admissions criteria but merely publish these on behalf of each school and that the criteria are not those of the Department or BELB.

(d) He referred to general guidance to education authorities and grammar schools issued on 7 March 1996 which was reissued in April 2003. That guidance advised schools to consider whether to ask Education and Library Boards to make a formal assessment of children they were considering under the special circumstances arrangements.

(e) He noted that the Principal of the school had decided that the information available was inconclusive and that he could have asked the BELB for a further educational psychologist's report but chose not to do so.

(f) He pointed out that the provision to the school of the results of practice tests in examination conditions from Years 6 and 7 in accordance with the model criteria was contrary to guidance issued by the Department in October 2000 where it was asserted that a pupil's school results in Year 5 should be compared with other candidates in that year.

[9] In light of the criticism of the school that it failed to request a formal assessment by the BELB leave was granted on 14 December 2004 to proceed against the school on that ground. On 24 February 2005 the Principal of the school lodged an affidavit making the following points:

(a) There is a substantial volume of advice and guidance issued to schools by the Department and Education and Library Boards but no single cohesive document providing clear concise advice to secondary schools.

(b) He understood that the "model criteria for special circumstances" were devised by the Education and Library Boards in consultation with the

Department. Although the BELB filed a further affidavit they did not take issue with that assertion.

(c) He stated that he had never been made aware in briefing sessions provided by BELB that he could request an educational psychologist's assessment in connection with a special circumstances application.

(d) He concluded that a request for such an assessment in connection with the Transfer Form would not be practically capable of being dealt with within the timescale necessary to accommodate the Transfer process.

(e) He pointed out that the model criteria asserted that the onus was on parents to bring forward material in support of the special circumstances claim. In those circumstances he contended that the school would have been departing from its own criteria if it had requested such an assessment.

(f) He noted that the model criteria required evidence of practice tests in timed conditions in Year 6 to be provided and rejected the assertion by Mr Leonard that such material was contrary to Departmental guidance since the Department was well aware of the content of the model criteria.

(g) He pointed out that grammar schools did not have the resources to commission private assessments of applicants for places who claimed special circumstances.

[10] In the course of preparation for the hearing an assessment of the applicant by an educational psychologist was arranged by Martin Clarke, the Principal Educational Psychologist for BELB. He filed an affidavit on 1 March 2005 in which he stated as follows:

(a) He indicated that in the opinion of the Educational Psychology Service the applicant's academic potential is probably on a par with pupils who have gained a Grade A.

(b) The decision as to whether to make a special circumstances claim is for the parents. Neither the Board nor the primary school can provide the information relevant to such a claim without the authority of the parents.

(c) Many children with dyslexia are relatively slow to complete tasks which involve reading and writing and are less likely to demonstrate their true academic ability on time limited tests.

(d) The assessment conducted on 11 February 2005 by BELB placed the applicant's IQ at 119 which put him in the top 10% of the population.

(e) He relied upon the IQ test in May 2000 and the Non-Readers Intelligence Test conducted by the primary school thereafter to conclude that there was no doubt that the applicant's level of intelligence was well within the 25% range.

(f) He examined the Richmond tests which were included in the transfer material to demonstrate that the applicant's literacy levels had reached a level which should be good enough to allow him to express his high intelligence in a variety of academic subjects.

(g) He reviewed the M1 and M2 tests to support the same proposition.

(h) He concluded that there was sufficient evidence provided at the transfer stage by the primary school for the applicant to be assessed as a Grade A candidate.

(i) In considering why that conclusion had not been reached in this case he suggested that there was too much non-relevant information attached to the Transfer Report making it difficult to focus on the relatively small number of tests which are most valid as a measure of academic potential.

(j) He explained that in the time scale available it would not be possible for the Educational Psychology Service to provide transfer assessments on request for dyslexic pupils.

[11] For the applicant Mr MacDonald QC, who appeared with Mr Potter BL, submitted that the imposition on the applicant of the burden of establishing special circumstances in connection with his disability was discriminatory contrary to article 14 of the Convention when read in conjunction with article 2 of Protocol 1 dealing with the right to education. He contended that the transfer test procedure had as its objective the identification of those who could demonstrate academic potential but that the form of the test made no allowance for those who because of their disability were unable to properly display their potential in the examination. It was clear that the model criteria for special circumstances imposed an onus on the applicant to discharge the presumption created by his Grade B1 in the examination. He relied on the decision of Girvan J in *Re Lindsay's Application* [2004] NIQB to establish that a broad view should be taken of the approach to the engagement of article 14. He relied on *Thlimmenos v Greece* (2000) 31 EHRR 411 to establish that article 14 of the Convention applied to indirect discrimination and developed his submissions by utilising the approach of Brooke LJ in *Wandsworth BC v Michalak* [2002] EWCA Civ 271.

[12] Mr Larkin QC appeared for the school. Shortly after the opening of the case the applicant indicated that it did not intend to pursue its application in respect of the school and in the circumstances I did not need to hear from him on the substantive issue.

[13] Mr McCloskey QC appeared with Ms Gibson BL for the Board and Department. He relied on the limited scope of Article 2 of Protocol 1 as discussed in *A v Head Teacher and Governors of Lord Gray School* [2004] EWCA Civ 382. In this case the applicant had been successful in achieving entry into another grammar school and accordingly his right to education was unimpaired. In any event he contended that the facts of the present case did not fall within the ambit of the substantive convention right and that no disadvantage in respect of an appropriate comparator could be established.

[14] I consider that the starting point is to look at the issue of the ambit of the right to education contained in article 2 protocol 1 insofar as it applies to the circumstances of this case. The obligation to draw up criteria for

admission to schools is imposed upon Boards of Governors by article 16 of the Education (Northern Ireland) Order 1997:

“16. –

(1) Subject to the following provisions of this Article the Board of Governors of each grant-aided school shall draw up, and may from time to time amend, the criteria to be applied in selecting children for admission to the school under Article 13 or (in the case of a grammar school) Article 14.

(2) When drawing up or amending criteria under this Article –

(a) the Board of Governors of a controlled school shall consider any representations made to it by the board responsible for the management of the school;

(b) the Board of Governors of a Catholic maintained school shall consider any representations made to it by the Council for Catholic Maintained Schools.

(3) Where the criteria to be applied in respect of any school year have been published under Article 17(2), the Board of Governors shall not amend those criteria in respect of that school year without the approval of the Department.

(4) The criteria drawn up by the Board of Governors of a school under paragraph (1) shall provide for all children resident in Northern Ireland at the time of their proposed admission to the school to be selected for admission to the school before any child not so resident may be selected for admission.

(5) The criteria drawn up under paragraph (1) shall be such as to ensure that the Board of Governors by applying those criteria can comply with Article 13 or (in the case of a grammar school) Article 14 before the criteria are exhausted.

(6) The criteria drawn up under paragraph (1) and to be applied in selecting –

(a) children for admission to a secondary school, other than a grammar school; or

(b) children in the relevant age group for admission to a grammar school,

shall not include the performance of the children in any test or examination held by, or on behalf of, the Board of Governors of a secondary school.

(7) Paragraph (6) does not apply to a test or examination –

(a) of an individual child of a description determined by the Department which is held by a board at the request of the Board of Governors of a grammar school; or

(b) which is held by, or on behalf of, the Board of Governors of a secondary school specified by the Department for the purposes of this sub-paragraph.

(8) The criteria drawn up under paragraph (1) by the Board of Governors of a school shall not include the fact that the school was the first preference expressed by the parent of the child or was a higher preference than any other school or schools.

(9) Regulations may provide, in relation to any school or description of school –

(a) that the criteria drawn up under paragraph (1) shall include such matters or matters of such description as are specified in the regulations;

(b) that those criteria shall not include such matters or matters of such description as may be so specified. “

[15] The content of the said criteria is further provided for in the Secondary Schools (Admissions Criteria) Regulations (Northern Ireland) 1997. Matters to be included in the criteria are found in Regulation 4:

“4. The criteria to be applied in selecting children for admission to a school shall include the following matters –

(a) the order of priority in which children in the relevant age group shall be admitted to the school at the beginning of the school year, where the number of applications for admission exceeds the school's admissions number for that school year;

(b) the order of priority in which children in the relevant age group shall be admitted to the school at any later time in the school year, where the number of applications for admission exceeds the number of vacant places;

(c) the order of priority in which children not in the relevant age group shall be admitted to the school, where the number of applications for admission exceeds the number of vacant places;

(d) where a grammar school includes in its criteria the transfer procedure test grade achieved by children, a provision that, subject to regulation 6 and to the consideration by the Board of Governors of medical or other problems which may have affected a child's performance in a transfer procedure test and which are supported by documentary evidence of a medical or other appropriate nature, —

a child who achieved the transfer procedure test Grade A shall be admitted in preference to a child with any other grade; a child who achieved the transfer procedure test Grade B1 shall be admitted in preference to a child who achieved a transfer procedure test Grade B2, C1, C2 or D; a child who achieved the transfer procedure test Grade B2 shall be admitted in preference to a child who achieved a transfer procedure test Grade C1, C2 or D; a child who achieved the transfer procedure test Grade C1 shall be admitted in preference to a child who achieved a transfer procedure test Grade C2 or D; a child who achieved the transfer procedure test Grade C2 shall be admitted in preference to a child who achieved a transfer procedure test Grade D.”

[16] I have carefully considered the proper approach to the interpretation of Regulation 4(d). It is clear that the statutory purpose of the provision is to ensure that places are offered to students broadly in accordance with the potential demonstrated in the examinations. It is also clear that the reference to medical or other problems is intended to allow for those candidates whose performance in the examinations may not have properly reflected their potential to be considered prior to the application of the academic criterion at the end of the Regulation. I consider that the effect of Regulation 4 (d) is to impose on Boards of Governors an obligation to consider such problems where they are supported by evidence of a medical or other nature in order to ensure that the statutory purpose is fulfilled.

[17] Having examined the statutory background I now turn to the facts of this particular case as disclosed in the affidavits. At a very late stage in these proceedings affidavits were filed on behalf of the school and the BELB. I now have to consider the relevant facts as disclosed from consideration of those and the earlier affidavits:

(a) The applicant was not upgraded because the medical and other evidence submitted on his behalf was judged inconclusive.

(b) In addition to the IQ test undertaken by the applicant in May 2000 the papers submitted with the Transfer Form also contained a Non-Readers Intelligence Test undertaken less than 2 years before the consideration of special circumstances. Paragraph 16 of Martin Clarke's affidavit on behalf of BELB demonstrates how important these results were in concluding that the applicant's level of intelligence was well within the top 25%. It is clear from his affidavit that the Principal of the school did not appreciate the importance of the first IQ test and does not appear to have taken into account the second IQ test.

(c) The papers submitted included a variety of standardised test scores called the Richmond tests which showed that the applicant was performing at an average level of literacy. The importance of that information is identified in paragraph 17 of Mr Clarke's affidavit in that it should allow the applicant to express his high intelligence in a variety of academic subjects. The Principal does not appear to have understood the significance of that information or taken it into account.

(d) The M1 test administered in P6 showed a score within the top 10% for children of his age. The M2 test produced an average score but is one in which dyslexic children are at a disadvantage. That information was neither appreciated nor taken into account by the Principal.

(e) In contrast to the conclusion reached by the Principal Mr Clarke makes it plain that there was sufficient evidence submitted on the applicant's behalf to ensure that he should have been upgraded by virtue of his special circumstances application.

(f) The reasons for the Principal's failure to conclude that the applicant should have been upgraded were firstly his incapacity to properly analyse the available information, secondly as suggested by Mr Clarke that too much non relevant information made it difficult for him to focus, thirdly the absence of clear concise advice as to how he was to proceed as he himself says at paragraph 4 of his latest affidavit and fourthly the emphasis which he placed on the obligation of the parents to produce all relevant information which Mr Clarke makes clear in paragraph 4 of his affidavit is not justified.

[18] I find, therefore, that my search of the statutory background and the facts in order to identify whether this claim falls within the ambit of article 2 of protocol 1 has led me to the clear conclusion that the statutory obligation on the Board of Governors of the school to consider all medical and other appropriate evidence in the applicant's special circumstances claim was not discharged in the circumstances and for the reasons set out above.

[19] I have considered whether I should proceed to deal with the discrimination aspect of the claim in light of the breach of the statutory obligation which I have found. I consider that if I were to do so I would be entering the realm of the theoretical and academic. In particular the question of justification would be entirely theoretical as it is clear that the actual circumstances of this case could not justify the burden placed on the parents to produce additional contemporaneous information. I do not consider that it is appropriate for me to speculate as to what the position might have been if the statutory obligation had been complied with. I do, however, wish to express my gratitude to all counsel for their helpful written and oral submissions on the point.

[20] In the circumstances I will make a declaration that the applicant was not upgraded to a Grade A in his transfer test because of the unlawful determination of his special circumstances application. I consider that this declaration is particularly appropriate because the transfer test is now the only public examination in which a student's academic potential is judged competitively against other students in his age group.

[21] Finally the cohort of people with which this case is concerned are disabled children. As a matter of statutory policy they are to have their academic potential recognised in the transfer procedure. This case suggests that the process for doing so needs to be urgently examined to ensure that this vulnerable group are not further disadvantaged.