Neutral Citation [2013] NIQB 105

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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

HR (a minor)'s Application [2013] NIQB 105

IN THE MATTER OF AN APPLICATION BY HR (A MINOR) BY HER MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] This application is made on behalf of child H, a minor, by her mother and next friend. The applicant is a pupil at Girls Model School and she challenges a decision of Belfast Education and Library Board ("the Board") not to provide her with travel assistance for the journey to and from school.

Factual Background

[2] In or around September 2010 when the applicant first began attending Girls Model School, her mother completed an application form for travel assistance. If successful this application would have entitled the applicant to a free bus pass for her travel to and from school for the duration of the school year. This application was unsuccessful.

[3] Shortly after the application was declined, the mother wrote to Brian Chambers (Transport Officer at the Board) appealing that decision. The grounds of appeal at that time were the following:

(i) Her daughter lives outside the 3 mile statutory walking distance which is the threshold for the grant of a bus pass.

(ii) Her aunt's son lives in Twadell Avenue (which she alleges is closer to the school than her home), and he is in receipt of a bus pass.

(iii) If her daughter takes the Ballygomartin Bus she can reach school in one single bus trip. However, as this bus deposits boys at the Boys Model School first, it often happens that the girls on this bus will be late for their school, which is further along the bus route. For this reason her daughter takes a bus to Twadell Avenue first and then catches the Glencairn bus which does get her to school in time. However, this necessitates a total of four bus journeys per day.

In light of these circumstances the mother asked the Board to reconsider its refusal of a bus pass.

[4] On 18 October Mr Chambers responded to this appeal. He noted that:

> "Transport may not be granted to a pupil who resides less than 3 miles from the school attended. As per DENI guidelines this measurement is carried out by using the shortest available walking route. The distance from your home to Model Girls is 2.62 miles – the route used is Springmartin Road, Ballygomartin Road, Twadell Avenue, Brompton Park, Etna Drive, Alliance Avenue, Oldpark Road and Dunowen Gardens."

[5] Mr Chambers continued by noting the comments in relation to bus availability/the number of buses required to get the child to school in time and concluded:

> "[t]hese factors may not be taken into consideration when processing applications for travel assistance."

He continued:

> "Education boards may divert from D.E.N.I. policy if exceptional circumstances exist. If you wish for any exceptional circumstances to be taken into consideration please advise me in writing."

The appeal against the first refusal was therefore rejected. One of the implied grounds of rejection was that two bus journeys per morning to get a child into school on time was not an exceptional circumstance.

[6] On 16 November 2010, solicitors for the applicant wrote to Mr Chambers requesting that he consider the case as an exceptional one under para8 of DoE Circular 1996/41. That paragraph reads:

> "The Application of the eligibility rule relating to 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 paragraph."

[7] Solicitors for the applicant asserted that exceptional circumstances existed in her case on the basis of the perceived hostility of the residents of Ardoyne to persons perceived to be from the Protestant/Unionist community. They stated that if the applicant were to walk to school through Ardoyne in a Girls Model uniform she would be identified as a Protestant girl and this could give rise to risks for her. They argued that a refusal to provide the applicant with a bus pass in this case would be a breach of her Article 8 rights. The letter also outlined an alternative perceived 'safe route' to the school which measures 3.2 miles. For these reasons the solicitors for the applicant requested that the matter of travel assistance be reconsidered.

[8] Mr Chambers responded on 9th December 2010 reasserting that transport assistance may not be granted to a pupil living within the three mile statutory limit. He reiterated that the applicant lives 2.62 miles from the school, measured by the shortest walkable route. He explained that the 3 mile criterion is used to determine responsibility for travel expenses; it is not an injunction to the child to walk. He went on to note that requests for assistance based on the grounds that the nearest route passes through a hostile area have been made before and are assessed on an individual basis. He continued that in the applicant's case:

> "I am not aware that specific threats have been made to her or there is specific evidence demonstrating that she is particularly at risk. Please advise if such evidence exists."

He then concludes again that there are no exceptional circumstances in play which would require diversion from the Department's Home to School regulations.

[9] A further letter was written by solicitors for the applicant on 21 January 2011. This letter substantially repeats the contents of the letter of 16 November and seeks details in relation to the manner in which the child's application was assessed. Specifically it requests details of any risk assessment carried out and evidence of enquiries made by the Board relating to whether or not the child was particularly at risk.

[10] On 16 March 2011 Mr Chambers responded. His letter notes that the arrangements approved under Article 52 of the Education and Library (Northern Ireland) Order 1985 in relation to Home to School transport are contained in the Department of Education's circular 1996/41 (as updated). These current approved arrangements are based on only 2 criteria which are:

a. Distance (3 miles)

b. Suitable school.

He notes that distance is measured from the home of each pupil to the nearest school by the shortest walkable route. This calculation merely determines responsibility for any transport costs that may arise for children living more than three miles from school: it is not an injunction that any child should walk to school by the specified route or at all. He continues:

> "many requests for transport assistance on the grounds that the nearest available route passes through a perceived hostile area have been made to the Belfast Board over many years. Unfortunately, your client's case is by no means exceptional."

On the issue of risk assessment he asserts:

> "it is impossible for Education Boards to make enquiries into all applications"

and refers to his earlier request that he be made aware of any specific evidence indicating that the applicant was particularly at risk. He notes that:

> "This request still stands and any evidence provided by your client will be considered."

[11] The decision in this letter is the subject of the challenge in this application.

Grounds of Challenge

[12] The grounds of challenge set out in the applicant's amended Order 53 statement may be summarised as follows:

(a) The child feels unable to walk the designated route because of her sex, age and religion, and that to ignore these factors would be a breach of her rights under Article 8 and Article 14 ECHR.

(b) The impugned decision breaches the child's rights under Article 8 (bodily integrity) in that BELB have failed in their Article 8 obligation to secure the child from assault from third parties because no enquiries were made into the risk posed to the child. It would not be disproportionate to issue a bus pass in order to avoid such risks.

(c) It breaches the child's right to education under Protocol 1 Article 2 and Article 14 ECHR as her mother is on a low income and wishes her child to be educated in accordance with her religion. The Applicant is prevented from having the same access to school as an equivalent child from a higher income

group. This is because children whose parents can afford two bus fares per journey are not consistently late for school.

(d) No guidance was given as to what constitutes exceptionality.

(e) The board misdirected itself as to what would come within the remit of exceptionality. There is no onus on the Applicant parent to prove same and the application form does not cater for the outlining of exceptional circumstances.

(f) The Respondent misdirected itself by failing to consider the case in full, taking into account all relevant considerations raised by the Applicant. She asserts that sufficient issues were raised for it to be considered as a case which fell outside the provisions of the circular, and that being the case the onus was on the board to conduct a full investigation into 'relevant matters' including the child's health, behavioural issues, attendance, background, and the views of the PSNI on the issue of risk to the child.

(g) If the family lived in some other parts of the UK the child would automatically be entitled to travel assistance.

(h) The route identified is not strictly "'walkable' if the subject area is particularly hostile to her religion".

(i) No rational decision maker could have reached the decision taken in this case.

The Relevant Statutory Scheme

[13] The Education and Libraries (Northern Ireland) Order 1986 ("the 1986 Order") deals with supported home to school transport. It states:

> 'Provision of transport for, and payment of travelling expenses of, certain pupils
>
> 52. — (1) A board shall make such arrangements for the provision of transport ..... as it considers necessary or as the Department may direct for the purpose of facilitating—
>
> (a) The attendance of pupils at grant-aided schools; and
>
> (b) The attendance of relevant pupils at institutions of further education;

and any transport provided under such arrangements shall be provided free of charge.

(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 the approval of the Department.

(3) A board may, in accordance with arrangements approved by the Department, provide transport for, or pay the whole or part of the reasonable travelling expenses of—

(a) Pupils attending grant-aided schools; and

(b) Relevant pupils attending institutions of further education,

for whom the board is not required to make provision under arrangements made under paragraph (1).

(4) In paragraphs (1) and (3) "relevant pupils" means pupils of a class or description specified by the Department for the purposes of this Article.

(5) Any arrangements under paragraph (3) shall include provision—

(a) for the board to make charges (payable by the parents of the pupils concerned) in respect of transport provided under that paragraph; and

(b) as to the cases in which, and the extent to which, such charges are to be remitted by the board.

SCHEDULE 13

PART II

Duty of Parent of Registered Pupil to Secure his Regular Attendance at School

3.—(1) Subject to the following provisions of this paragraph, it shall be the duty of a parent of a registered pupil at a school to secure his regular attendance at that school.

(1A) For the purposes of sub-paragraph (1) and of any proceedings under paragraph 4, attendance by a pupil at a school ..... in pursuance of arrangements under Article 21 of the Education (Northern Ireland) Order 2006 shall be taken to be attendance at the school at which he is a registered pupil.

(2) For the purposes of sub-paragraph (1) and of any proceedings brought under paragraph 4 in respect of a child ..., the child shall not be deemed to have failed to attend regularly at the school only by reason of his absence therefrom—

(a) at any time when he was prevented from attending by reason of sickness or other unavoidable cause;

(b) if the parent proves—

(i) that the school at which the child is a registered pupil is not within walking distance of the child's home; and

(ii)that the child is one for whom the board is required to make provision under Article 52(1), but no suitable arrangements have been made by the board for his transport to and from school; ...

(6) In this paragraph "walking distance" means, in relation to a child who is a registered pupil at a primary school, two miles and, in the case of any other child, three miles measured by the nearest available route."

[14] Circular no 1996/41 provides, in so far as is relevant:

(i) Paragraph 2.2. Walking distance is defined by reference to Schedule 13 of the 1986 Order;

(ii) Paragraph 2.2(i). The term walking distance is not an injunction upon parents that their child must walk to school. It is applied to a route which it is established can be walked and thereafter used to determine whether the cost of transport should be paid by the Board or parent.

(iii) Paragraph 3.1. Transport should not normally be provided for any pupil who lives within statutory walking distance of the school.

(iv) Paragraph 8. "The application of the eligibility rule relating to distance may not always be appropriate and it is for the Board/ESA[1] to consider any case which is thought to be outside the provisions in the preceding paragraphs. Such cases considered by Boards/ESA should be, by their very nature, exceptional."

(v) Paragraph 10. "The Department should be consulted in any case where a proposal to assist with transport is not covered by this Circular."

(vi) Paragraph 11. "The Education (NI) Schools Information and Prospectuses) Regulations (NI) 2003 require boards/ESA to publish their arrangements for the provision of home to school transport…Boards/ESA should ensure that their published arrangements are revised to take account of the advice contained in this Circular…"

Parties' Arguments

[15] The applicant argues that**:**

(i) Her application for home to school transport should have been considered as an exceptional case by the board due to the low income status of the family and the perceived danger of walking through Ardoyne in a Girls Model uniform.

(ii) The identified route used to exclude her from the home to school transport policy is not 'strictly walkable.'

(iii) The 'exceptionality' provision is unfair in that no guidance is given as to what constitutes exceptionality.

(iv) The board has failed in its Article 8 obligation to protect the child by not considering the case at its fullest.

(v) Failing to provide the applicant with a bus pass breaches her Protocol 1, Article 2 right to Education.

(vi) The refusal of transport assistance discriminates against the applicant on the basis of her low income status.

[16] The respondent argues that:

(i) The applicant's application was refused because it fell outside the policy and was not an exceptional case.

(ii) It did not breach its Article 8 obligations to the applicant as there were two safe bus services in place to get the child to and from school and the child was in fact using these services to make the school journey.

(iii) There is no duty on the board to define exceptionality and further it is entirely proper for the respondent to expect the Applicant to provide the information which she asserts constitutes exceptionality.

(iv) The existence of other schemes for transport provision in other parts of the UK does not undermine the legality of the scheme in Northern Ireland.

(v) The Protocol 1 Article 2 right is only breached if she is denied the very essence of that right, but in this case the applicant is provided with access to Education in a same manner as other children in comparable circumstances.

Discussion

[17] The applicant argues that the 2.6 mile route identified by the Board was not 'strictly walkable' due to the perceived threat taking that route would pose to her daughter. She argued that the shortest 'perceived safe route' was 3.2 miles long and that as this exceeds the statutory walking distance, the Board ought to treat her as qualifying for financial support.

[18] In assessing this argument it is important to remember the purpose of the three mile statutory walking distance. The rule exists purely to determine which children qualify for financial support from the State and which do not. As such, the statutory distance operates as a 'bright line' demarcation between categories of children. Like all such 'bright lines', there is an unavoidable element of arbitrariness both in the selection of the cut–off point and in the consequences that may flow from having any such rule. In this case it may appear arbitrary and unfair that child H has been denied a bus pass when another child living only .4 of a mile further up her street might qualify for a pass. These outcomes are a reflection of the fact that the

State has limited resources and, in allocating what resources it does have, it must devise rules of general application to everyone.

[19] With any such rule some parties will fall on the right side of the dividing line while others in very similar circumstances will fall on the wrong side. It is inevitable and understandable that those who fall on the wrong side of bright line rules will feel disappointed by the outcome. However, such anomalies are unavoidable in any rule based system and society tolerates them because of the broader benefits we all derive from having clear, transparent and efficient administrative systems. Such anomalies are also accepted because administrative systems generally include 'exceptionality clauses' which allow exceptional cases to be reviewed separately and not to be treated as automatically governed by the bright line rule. I will come back to the 'exceptional cases' point later in this judgment.

[20] It follows from the above that some of the arguments advanced for the applicant have no real force within the factual context of this case. So, it is claimed that the Board had Article 8 duties to protect the physical integrity of the applicant and that by refusing the bus pass it was in breach of these duties. This argument has no force because the refusal of a bus pass did not require the applicant to walk the designated route. The applicant was free to use one of the two safe bus routes which would take her to school without any risk to her physical integrity. Indeed, she always went to school using one of these two safe busses. Therefore, there was never any actual risk to this child's person or to her physical safety and the issue of Article 8 protections simply does not arise on these facts.

[21] Similarly it is asserted that the Board has obligations under Article 2 of the first Protocol of the ECHR to provide the child with access to education, and this is indeed the case. However, as was stated in the case of Ali v Lord Grey School [2006] 2 AC 363 at p24 the Article 2 guarantee is 'a weak one, and deliberately so'. All that is guaranteed to any pupil is access to whatever educational facilities the State generally provides. In this case there is no doubt that the applicant had such access. She had the choice of two bus routes either of which was capable of getting her into her school safely. She also had access to the States system for allocating free bus passes to children and she did in fact access that system when she applied for a bus pass upon her transfer to the Girls Model School. The Applicant has therefore had access to the State education system on the same terms as other children.

[22] I now return to the issue of the exceptionality clause. The Department's Circular provides for exceptional cases in para 8 which states:

> "The application of the eligibility rule relating to 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. Such cases considered by Boards ..... should be, by their very nature, exceptional."

[23] This indicates that the Department did envisage departures from the general policy in exceptional cases where application of the normal eligibility rules 'may not ... be appropriate.' Looking at the Board's application form for transport assistance I did expect to see some reflection of the Departmental guidance on exceptional cases and was surprised to find no reference whatsoever to the *possibility* of exceptional departures from the general rules. The respondent asserts that there is no duty on it to define exceptionality while the applicant claims that the absence of guidance about exceptionality meant that this aspect of the policy was applied unfairly in her case.

[24] In my view this lack of guidance on the possibility of exceptional departures from policy does not appear to be best practice in the sense that it does not promote the clarity and transparency of administrative systems which all State bodies involved in applying statutory schemes should aspire to. Moreover, it may not be compliant with para 11 of the Department's Circular which states:

> "The Education (NI) Schools Information and Prospectuses) Regulations (NI) 2003 require board..... to publish their arrangements for the provision of home to school transport…Boards ..... should ensure that their published arrangements are revised to take account of the advice contained in this Circular…"

[25] As noted above the Circular does contemplate departure from its policy in exceptional cases, but the existence of this possibility is not referred to in this Board's application form for transport assistance. To the extent that it fails to refer to the possibility of exceptional departures, the application form does not reflect one aspect of the Circular it is derived from. To this extent the Board's published arrangements have not been 'revised to take account of the advice' in the Circular, or at any rate the published material is not a faithful representation of *all* the relevant Departmental advice. This is an omission it should address as soon as possible. There is no expectation that the Board should attempt an exhaustive definition of exceptionality which, I suspect, might well be counter-productive. However, in order to truly reflect the Circular it is derived from, the published material concerning home to school transport should at least refer to the possibility of departures from the general policy in 'exceptional circumstances'. It might then be most useful for all concerned if the Board were to provide a short summary of categories of cases which have been held NOT to be exceptional in the past as this will discourage applications which have little prospect of success and so avoid fruitless effort by parents and also reduce the number of cases which will require consideration by the Board.

[26] There remains the question whether, as the applicant asserts, the failure to issue any guidance on exceptionality has caused the decision making process in her case to become 'unfair' in judicial review terms.

[27] On the facts of this case, I do not consider that the applicant was prejudiced by the Board's omission of such guidance. This is because the applicant did *in fact* write several letters to the Board setting out what she claims are exceptional circumstances in her case and these claims were *in fact* considered and responded to by the responsible Board officer. For this reason I consider that the deficient wording of the Board's form did not have an unjust impact in this particular case.

[28] A question has also been raised in relation to where the burden of investigation into exceptionality claims should lie. The applicant asserts that once enough facts have been brought to a Board's attention to raise 'a thought' that a case *might* be exceptional, then an onus is created on the Board to undertake a thorough investigation into the possibility that exceptional circumstances may exist in the case. The alleged scope of this duty to investigate is very wide, requiring the Board to investigate 'all relevant matters .... such as the child's health, child's behavioural issues, the child's background, any issues raised by the school in respect of the child, the view of the PSNI as to the risk posed to the child, the child's attendance, any difficulties experienced by children from the girls model travelling through the Ardoyne on foot or by bus.'

[29] It is important to bear in mind the nature and purpose of the statutory scheme which is the context for the present dispute and also the context for the duty to enquire. This is an application for a free bus pass for a pupil living close to the boundary of general eligibility for free transport. Within this context I consider that the extensive duty to enquire contended for by the Applicant is simply disproportionate and that it would impose an unsustainable burden on the administrative system in question. The Board officer involved repeatedly invited the applicant to submit any evidence she chose of the existence of exceptional circumstances. It appears to me that this was sufficient enquiry in the circumstances and Board's approach is compliant with the dictum of Laws LJ in R (Khatun) v London Borough of Newham:

> "... it is for the decision maker and not the court, subject to Wednesbury review, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor ..."

[30] This brings me to the exceptionality arguments that were actually advanced by the applicant in this case and the question whether anything in the Board's response to her claim made its decision unlawful in judicial review terms.

[31] The applicant claims that:

> "her application for home to school transport should have been considered as an exceptional case by the board due to the low income status of the family and

> the perceived danger of walking through Ardoyne in a Girls Model uniform."

[32] She therefore relies on two essential elements: (1) the presumed danger of walking through a perceived hostile area; and (2) the low income status of the family involved. Both issues are dealt with in Mr Chamber's affidavit in this case. On the issue of transport through perceived hostile areas he says at para11:

> "Within the Belfast Board, the issue of travel through hostile areas has been raised on many previous occasions. It is a particularly problematic issue in North Belfast which includes many small communities adjacent to one another but with different perceived religious/political affiliations. Every year, several applications are made to the Board for home to school transport based upon perceived community hostility along an identified alternative walking route. The problem of pupils living in the Glencairn/Springmartin areas and travelling to the Boys and Girls Model schools has arisen before. Previous applications ... have been made on this ground and have been refused. Two dedicated bus routes are available ... for pupils living in these areas, thus providing .... an alternative to walking through the Ardoyne area. This is considered to be an acceptable solution to avoid any risk to pupils' safety."

[33] The affidavit points out that the issue of perceived risk in walking to school is one that afflicts families from many communities in Belfast and gives several examples of other such difficulties. These include pupils from Short Strand travelling through the Ravenhill Road to access St Joseph's College; pupils from Ligoniel and the Cliftonville Road travelling through the Westland area to access St Patrick's School on the Antrim Road; pupils from several areas passing through the Ballysillan area to access Our Lady of Mercy school and pupils from Ardoyne travelling through perceived hostile areas to access Holy Cross Primary school. In all these cases the Board's solution has been to provide dedicated safe bus routes to the relevant schools.

[34] This is not to say that hostility on a school route can *never* be a ground for an exceptional diversion form Board policy. As Mr Chambers asserts in his various letters to the applicant, the Board remains prepared to consider evidence of actual and specific risks in any case. So in his letter of 9 December to the applicant's solicitors he states:

> "I am not aware that specific threats have been made to her or there is specific evidence demonstrating that she is particularly at risk. Please advise if such evidence exists."

[35] No evidence of any such actual risk is referred to anywhere in the case papers for this judicial review.

[36] In his final letter to the applicant's solicitors on 16 March 2011 the Board officer again reiterates the view that cases of this kind simply are not exceptional in Northern Ireland:

> "many requests for transport assistance on the grounds that the nearest available route passes through a perceived hostile area have been made to the Belfast Board over many years. Unfortunately, your client's case is by no means exceptional."

[37] I can find nothing in the facts of this application which suggests that this decision was unlawful.

[38] On the issue of the financial status of the family the Board officer's letter of 9 December re-states the 'bright line ' policy operated by his Board:

> "Education and Library Boards are responsible for an eligible pupil's travel expenses to a post primary school which is over three miles from his/her home. Travel expenses for a pupil who resides within three miles of the attended school are a matter for parental responsibility."

[39] The question raised by the applicant is whether this bright line policy discriminates against her, on the basis of her family income, in relation to her access to education?

[40] Para 18 of Mr Chambers affidavit recounts the enquiries the Board made into this issue. It states:

> "At the start of the 2011/2012 academic year, *no pupils* attending the Girls' Model School received a bus pass. This means that no pupils attending that school qualified for free school transport... All pupils using the dedicated buses on the Glencairn and Ballygomartin Roads therefore fund this transport from personal resources.'.... (emphasis added).

[41] Para 19 continues:

> "there are a total of 899 pupils at the Girls' Model School for the 2011/2012 academic year. Of these pupils 366 (40.7%) are eligible for free school meals. On the basis of this information, it is not accepted by the Board that the Applicant has been discriminated against in any way when compared to other pupils at the school living within the same district or other pupils who are eligible for free school meals."

[42] On the basis of the evidence presented by the Board it appears to me that there are no reasonable grounds on which this applicant could show that she has been discriminated on by comparison to other pupils from low income families in her district. There are also no viable grounds for sustaining a complaint of discrimination based on a comparison with children from higher income families because any such case would amount to a complaint about where the 'bright line' has been drawn within the legislative scheme. There is no doubt that the legislation upon which the whole scheme for supported transport to schools might have been framed in many different ways, but this is not a matter which can be challenged in a judicial review court. What is challengeable is the manner in which an actual scheme was applied in practice and on the evidence presented by the Board I am satisfied that this was done in a non-discriminatory way in the applicant's case.

[43] On the basis of all the above I am satisfied that this applicant's case was considered both fairly and exhaustively by the respondent Board. Whilst I have every sympathy for the applicant's feeling that she is forced to bear an additional financial burden in securing her child's education because of the religiously divided nature of our housing and schooling arrangements, it appears very clear from all the facts rehearsed in this case that this is not an exceptional burden in Northern Ireland. It appears that many families from different communities labour under the same burden and it is not one that can be remedied by a court imposing an unnatural interpretation on well established home to school transport policies.

[44] For all these reasons this court is unable to uphold the applicant's complaints in this case.