Neutral Citation No. [2006] NIQB 27 | *Ref:* **DEEF5546**

Judgment: approved by the Court for handing down | *Delivered:* **09/05/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY DANIEL HUGHES (MINOR) BY HIS FATHER AND NEXT FRIEND SHANE HUGHES FOR RELIEF TO APPLY FOR JUDICIAL REVIEW

DEENY J

[1] This application was brought by Daniel Hughes, who was born on 20 January 2000, and who has been diagnosed as suffering from Autistic Spectrum Disorder with associated learning difficulties. The applicant, who was represented by Mr Brian Kennedy QC with Mr Brendan O'Hare, sought a number of reliefs by way of judicial review on foot of an Order 53 Statement dated 22 April 2005, particularly an order requiring the respondent Belfast Education and Library Board to make a final Statement of Special Educational Needs relating to Daniel. The Board were represented initially by Ms Heather Gibson who was subsequently led by Mr Bernard McCloskey QC.

[2] On 5 May 2005 the matter came before me at a contested leave hearing and I gave an ex tempore judgment on that occasion. I granted leave to pursue the proceedings to compel the Board to deliver a Statement of Education Needs, as they had already issued three proposed statements and were indeed planning at that time to issue a fourth amended proposed statement. I also granted leave to challenge their failure to obtain an occupational therapy report. This was subsequently obtained, as promised, and this aspect of the matter does not trouble the court further.

[3] I refused leave to proceed to judicial review on the applicant's ground 3D ie "The respondent is refusing to set out in a Statement, Speech and Language Provision which is specific, detailed and quantified. In particular it is refusing, apparently as a matter of policy, to specify the hours per week for speech and language provision." I need not repeat my reasons for so doing which were essentially that this was a matter for the Board to consider in its professional judgment, bearing in mind that the rate of progress of this child could not be forecast in a fixed way in advance and nor, I may add, could the rate of progress of other children who would be impacted if a fixed period of

time was allocated to a specific child well in advance of any particular week or day.

[4] In the events, prompted I am told by the grant of leave, and the remarks which I made, the Board did issue a final statutory Statement of Special Educational Needs. The parents of the little boy then proceeded, as they were entitled to do, to challenge that statement before the Special Educational Needs Tribunal.

[5] The applicant sought to raise my refusal of leave on the specificity point before the Court of Appeal which declined to hear the matter, in part, at least because the substantive judicial review application had not been determined. By notice dated 13 October 2005 the Belfast Education and Library Board sought an order pursuant to Order 32 Rule 8 or in the exercise of the inherent jurisdiction of the court, setting aside the grant of leave to the applicant to apply for judicial review or in the alternative staying the proceedings pending the completion of the appeal to the Special Educational Needs Tribunal. They did so on two principal grounds. Firstly that on foot of my leave a statutory Statement had been made thus obviating the need for a hearing on that point. Secondly they took a point not previously taken ie. that Daniel Hughes himself did not having standing to bring this application before the court.

[6] Mr Kennedy QC countered this Notice of Motion by seeking to amend his Order 53 Statement himself. These amendments can be found in a document dated 31 August 2005. While no objection was taken to the timing of this amendment it was contended that it did not advance matters. I feel I can deal with it shortly. It seeks to attack the final statement of special educational needs made on 7 June 2005 on the grounds that the statement does not set out sufficiently specific detailed and quantified occupational therapy provision. I am not persuaded in any way that this is a matter in which I should grant leave to bring judicial review proceedings. Firstly it seems to me very much a matter that can be considered by the Special Educational Needs Tribunal. It has the necessary expertise, information and opportunities for examination to reach a conclusion about that. It seems to me that it would be quite wrong of the court to intervene in that matter where an alternative remedy is available. See Regina (Pepushi) v Crown Prosecution Service 2004 EWHC 798 (Admin). See also Regina v Special Educational Needs Tribunal ex parte F 1996 ELR 213 where Popplewell J held that it was only in exceptional circumstances that judicial review would be granted where a statutory right of appeal existed. I respectfully agree with that view which finds repeated echoes in the decisions of the court. Like Popplewell J I agree it applies in this area. In any event it seems to me that, subject to any specialist views the Tribunal might arrive at, the statement and the supporting correspondence from the Board seems reasonable in declining to fix particular hours per week.

[7] However Mr Kennedy's response was not confined to this amendment point upon which I have ruled against him. While accepting that a final Statement had, of course, been issued he contended that the circumstances in which the Board had failed to make a final statement before the application for judicial review was still a matter of public interest which should be pursued before the court. He relied on the judgment of Kerr J (as he then was) in Re E's Application [2003] NIJB 288. Before addressing that however I remind myself that in seeking to set aside the grant of leave the respondent much show there is a very clear case for so doing. The power should be exercised very sparingly. See R v Secretary of State for the Home Department ex p Chinoy (1991) 4 Admin LR 457 at 462 per Bingham LJ. I respectfully agree with the colourful phrase used by Simon Brown J (as he then was) in R v Secretary of State for the Home Department ex p Sholola [1992] IMMAR 135 that it was necessary for a party in the position of the respondent "to deliver some clean knockout blow to justify invoking this procedure." Mr McCloskey QC contends that in the clearest possible way that is what has happened here. I gave leave to review the failure of the Board to make a final statutory Statement. Following that they then issued a final statutory Statement in July 2005. That puts an end to the matter. If there is something wrong with the final statutory Statement the body, with particular skill and training and opportunity, set up by Parliament to consider such statements should be allowed to do so. As already mentioned by me an alternative remedy should be pursued save in exceptional circumstances. See In re Ballyedmonds Application 2000 NI 174.

[8] I am obliged to both counsel for helpful and carefully researched skeleton arguments in relation to this and other matters. I also had the benefit of helpful oral argument from both senior counsel. I note that Mr Kennedy accepted that his amendments did not assist him in this regard. They dealt with how specific the provision should be in the statement. The matter which he was anxious for the court to consider was whether the delay by the Board in arriving at a final Statement of Special Educational Needs arose not through a proper exercise of their power, albeit slowly, nor, as Mr McCloskey suggested, due to the incessant correspondence of Mr and Mrs Hughes slowing down the process, nor through simple human frailty in dealing with the various factors in mind but through a deliberate policy on the part of the Board to delay such statements with the view to minimising the cost to the Board of implementing such statements. He urged upon me a consideration of the papers as showing there was a triable issue that such was the case and that therefore it should proceed to a full hearing. As indicated he relied heavily on the judgment of Kerr J (as he then was) in Re E's application. In that case the learned judge cited the leading authority in the House of Lords of the R v Secretary of State for the Home Department ex p Salem [1999] 2 All ER 42, [1999] 1 AC 450. Lord Slynn of Hedley said at page 47:

> "The discretion to hear disputes even in the area of public law [where there is no longer a lis to be decided], must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[9] I observe that there is no point of statutory construction arising here. I will turn to the point of public interest in a moment but in my opinion what Mr Kennedy seeks would involve detailed considerations of facts. I am not persuaded that there are a large number of similar cases whose resolution will be facilitated by this court seeking to ascertain and rule upon the thinking behind the Education Board's failure to make a final Statement earlier in this case.

[10] In E's Application Kerr J was concerned with what had been an acute public controversy ie. the denial of free access to primary school children at Holy Cross School, Belfast. The applicant therein was critical of the police handling of this prolonged dispute. It is indisputable that the courts play a vital role in supervising the exercise of powers by the police, which would support the view expressed by the learned judge that even though the dispute had been suspended, and he notes that it had been suspended rather than ended, he should proceed to a full hearing with regard to the issue. There was also of course the legal issue there as to whether the courts had a power to review the police handling of a particular operational matter. The facts there clearly differ from the facts in the instant case. Furthermore I note that in Re Nicholson's Application [2003] NIQB 30 Kerr J said:

> "Generally, it will be necessary to demonstrate that such a ruling (on an academic issue) would not require a detailed consideration of facts; it should also be shown that a large number of cases are likely to arise (or already exist) on which guidance can be given; that there is at least a substantial possibility that the decision-maker had acted unlawfully and that such guidance as the court can give is likely to prevent the decision-maker from acting in an unlawful manner."

I have already said that contrary to that helpful summary of key criteria detailed consideration of facts would be necessary here. It is not clear that a large number of cases would be guided by a decision on this point. I do consider that there is a substantial possibility that the decision-maker had acted unlawfully but I am being asked to find the motive for that and not merely the fact of unlawfulness. I do not consider that such guidance as the court could give here would be likely to prevent the decision-maker from acting in an unlawful manner in the future. The granting of leave here has apparently served to fire a warning shot across the Board's bows. What good would a declaration by the court in this regard be? Even if Mr Kennedy succeeded in persuading the court, which, on a preliminary reading of the papers, would be difficult, that there was deliberate delay on the part of the Board here, it could only relate to their conduct between May 2004 and May 2005. It does not mean that the same policy, if such ever existed, continues. It is of course the case that Mr McCloskey emphatically denies, on instructions, that there was such a policy. If there was such a policy, whose policy was it? Was it a lower or middle ranking official? If Mr Kennedy is to fix the Board with it am I to examine all the minutes of the Board for the period? Are we to have applications for discovery? If some letters bear ambiguous interpretations are we to have cross-examination of the authors of the letters?

[11] I am not satisfied there is a good reason in the public interest for proceeding to a full hearing here. The matters in issue are very fact specific and I consider, even if the applicant succeeded in this contention, which I consider unlikely, it would not be of assistance in affecting rights and obligations more broadly.

[12] I conclude in the exercise of my discretion that no useful purpose would be served for a full hearing of the reasons for delay by the Education Board in failing to provide a final Statement about Daniel Hughes until July 2005. I therefore find in favour of the respondent in their Notice of Motion to set aside the earlier grant of leave. In those circumstances it is not necessary for me to address the submissions of Mr McCloskey QC with regard to the issue of whether the minor is the appropriate applicant before the courts. I wish to make it clear that I have not ruled on that and there may well be substance in his submissions.