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Judgment: approved by the Court for handing down | *Delivered:* **16/05/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY J S
FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of a decision of the Special Educational Needs Tribunal in relation to the applicant's Statement of special educational needs. The decision dated 21st December 2005 was notified to the applicant on 4th January 2006 and on review the decision remained unchanged on 23rd February 2006.

[2] The applicant was born on 23rd August 1997. He has been diagnosed as autistic and has special educational needs with severe learning difficulties, autistic spectrum difficulties, significantly delayed communication skills, mobility difficulties, severe hearing difficulties, problems with eye contact and hand to eye co-ordination. He has displayed self-injurious behaviour and as a result has lost the sight of his right eye, has had surgery on his left eye and he sometimes has to wear a helmet to prevent him from injuring himself. He attends Parkview School, a special school. He was first statemented on 8th March 2001 and on 9th February 2005 the Board issued an amended Statement. An appeal was lodged on 11th April 2005 and the Tribunal heard that appeal on 25th November 2005. The resulting Tribunal decision is the subject of this application for judicial review.

[3] The applicant's grounds for judicial review essentially concern two aspects of the Tribunal's decision. The first aspect concerns self-injurious harm where the applicant contends that there has been a failure to make adequate provision in the Statement. The second aspect concerns the ABA programme and the applicant contends that the Statement fails to make adequate provision for any programme of ABA for the applicant. The affidavit filed on behalf of the applicant's father records that since June 2003 the applicant has participated in a home based education

programme using the ABA principles and that a Doctor Gallagher has been overseeing this programme. The father believes that there has been a significant improvement in the applicant's condition since he commenced the ABA programme. However, the father is paying approximately £140.00 per week for the programme and this has caused financial hardship. The applicant's mother has had to give up full-time employment in order to care for the applicant and the applicant's father had asked for the Statement to make provision for a home based programme and a school based programme, and in particular the father believes that the programme needs to continue to address the issue of self-injurious behaviour.

[4] The Tribunal heard evidence from Doctor Gallagher, and on behalf of the Board from Diane McKee, a Senior Administration Officer with the Board, Doctor Cath Valentine, a Speech and Language Therapist and Ms Martin the Principal of Parkview School. The conclusion at page 8 of the decision states -

> "The tribunal notes that Parkview School incorporates principles of the ABA programme and was impressed by the evidence of the school principal Miss Martin, in relation to the eclectic approach adopted in teaching JS. She confirmed that JS's teacher has experience in teaching children who are described as autistic. Therefore the tribunal does not consider JS's statement should provide for the provision of a specialist home and school based ABA programme. JS's behaviour should identify and take into account his self-injurious behaviour. His individual education plan should deal specifically with his behaviour and the procedures to be implemented to ensure his safety. These procedures should be agreed with [his parents] with in-put from the multi-disciplinary team working with JS. We consider a consistent approach is required here to ensure similar provision at school and home."

[5] On the issue of self-injurious behaviour the father's affidavit indicates that he is dissatisfied with the Tribunal's conclusion that there should be an agreed education plan that takes account of this issue. He believes that this approach does not make proper provision for JS's self-injurious behaviour but simply allows for measures to deal with JS's self-injurious behaviour as it happens, and does not address the cause of his self-injurious behaviour or help JS to stop injuring himself. The father believes that the Tribunal should have ordered that the Statement itself should include provision for JS's self-injurious behaviour and that this provision should be by way of an ABA programme. Further he states that he believes that in all the circumstances the Tribunal should have followed the advice of Doctor Gallagher and ordered that ABA therapy be provided for JS. He also believes it is

important for JS to receive an ABA programme at school as JS responds well to ABA and because there needs to be consistency in the approach to JS's educational needs so that he does not become confused.

[6] The respondent on the other hand has raised two preliminary issues. First, that the applicant is a child and is not the appropriate applicant in this application. The appropriate applicant, contends the respondent, should be the parent. Secondly, the respondent contends that there is an alternative remedy available, namely a statutory right of appeal.

[7] First, in relation to the position of the child as applicant, Order 53 rule 3(5) of the Rules of the Supreme Court provides that on the grant of leave the party concerned should have "sufficient interest." The issue has arisen in other cases involving parents and children as to whether the child is the appropriate applicant, particularly in cases where the child is chosen as the applicant in order to avail of legal aid while, had the parent been the applicant, the parent would not have been entitled to legal aid. In cases relating to parental preference for a child's school it has been stated that the appropriate applicant is the parent. In Re J C [2001]LGR Kennedy LJ stated in relation to school preference that it is the parent and not the child who should mount the challenge. It was accepted that the child may have a sufficient interest to mount a challenge, and that in some exceptional cases it may be appropriate for the child to make the application for permission to apply for Judicial Review, but normally the only reason why the application was made in the name of the child was to obtain legal aid and to enable the parents to protect themselves in relation to costs. That Kennedy LJ regarded as an abuse (paragraph [35]).

[8] That approach was followed by our Court of Appeal in Anderson(a minor)'s Application [2001] NI 454, which also concerned parental preference for a school for the child applicant. Carswell LCJ stated that while the Court did not propose to dismiss the appeal in that particular case on the grounds of standing, he proposed to lay down some guidelines for future cases and at page 468e he stated –

> "Unless sufficient ground has been established for such an exception to operate we consider the judges ought to refuse leave for applications for judicial review of governors' or tribunals' decisions in relation to school admission to be brought in the name of the pupils."

[9] Of the above cases I note first of all that they concern parental preference as to the identity of the school to which the child is to be admitted for the purposes of the provision of education. Secondly, it was stated that in such cases a child may have a sufficient interest to mount a challenge, and it was recognised that, exceptionally, it may be appropriate for the child to make the application. Thirdly, unless it was an

exceptional case it was regarded as an abuse of the legal aid system and the costs system for the child to make the application.

[10] In the arena of special education needs, Byrne's Application [2003 Unreported], concerned a five year old child applicant who applied for leave for judicial review of a decision of the Board not to allow a psychologist access to the special school in order to carry out an assessment of the teaching for special needs. Carswell LCJ noted that the application had been brought in the name of the child and not the parent, notwithstanding the terms of Article 18 of the Education (Northern Ireland) Order 1996, which provides that the parent of a child for whom the Board maintains a Statement under Article 16 may appeal to the Tribunal. It was said to be apparent that there is a statutory right of appeal to a Tribunal and that it is the right of the parent to make that appeal. Having referred to the decisions in Re I C and Anderson (a minor)'s Application Carswell LCJ stated:

> "I consider that the same considerations apply just as strongly in the present case. Under Article 18 the parents of the persons who are to apply to the Special Educational Needs Tribunal and the parents in the present case are the people who ask for the inspection. There is no sufficient reason to bring the application in the child's name and on that ground alone I refuse leave."

It might be noted that the issue in Byrne's Application related to a decision by the Board not to allow a psychologist access to a school in order to assess teaching methods. The challenge was not directly concerned with the Statement.

[11] There may be cases where the parent and the child both have a sufficient interest in the proceedings and the child may secure legal aid and apply for judicial review. In Murphy's Application [2004] NIQB 85 a child applicant was objecting to planning permission for telecommunication masts outside her home. The issues raised by the judicial review applied to all the members of the family who were residents in the house so that the adults and children each had sufficient interest to make the application. The applicant child was chosen in order to secure legal aid. I was satisfied that that was an appropriate approach and that it was not an abuse. When there are a number of adults with sufficient interest in a particular matter, an applicant may be chosen as representative of those persons, but on the basis of an entitlement to legal aid. Whether legal aid is granted in such cases is a matter for the legal aid authorities. It should not work to the disadvantage of a group who happen to be a family that they choose one of the children as an applicant. Again it is a matter for the legal aid authorities as to whether legal aid should be granted.

[12] In R(Edwards) v Environment Agency [2004] 3 All ER 21 Keith J considered the issue of standing in relation to the grant of permission by the Environment Agency in England for a certain commercial enterprise to use tyre chips for fuel

where the applicant was a child resident in the locality. It was held not to be an abuse for the proceedings to be undertaken in the name of the applicant child, selected on the basis of entitlement to legal aid, as the applicant had sufficient interest to make the application.

[13] In the education field this issue was addressed in Nolan's Application [2005] NIQB 46. The applicant was an autistic child raising issues about the Statement of special educational needs and the application of an ABA programme. Morgan J referred to the approach in Murphy's Application and Byrne's Application, and while recognising that the scheme of the 1996 Order makes clear that parents have a right of representation in respect of the assessment of the child and a right of appeal in respect of the Statement, he considered that the issue before him was not the place at which the education provision was to be delivered but the nature of that provision. An issue about the nature of education provision was considered to be capable of giving rise to a breach to the right of education in Article 2 of the First Protocol, thus engaging a right of the child. It was held that the child applicant had a sufficient interest to make the application.

[14] The distinction that emerges in the education cases is between on the one hand those cases where the issue concerns parental rights, such as the place of education, as in Re J C and Anderson (a minor)'s Application, where there exists a statutory right of parental preference for a child's school, and where the right to education under Article 2 of the First protocol does not include any entitlement to education at a particular school. On the other hand there are education cases where the issue does concern an aspect of the right to education under Article 2 of the First Protocol, such as Nolan's Application and the present case, where the issue engages directly the rights of the child. The issue in the present case is whether or not the required minimum standards are being provided for this applicant's educational needs. The issue engages Article 2 of the First protocol and it is an issue in respect of which the applicant child has sufficient interest and it is appropriate that the child should be the applicant. Byrne's Application concerned a specific parental request for an assessment of the school by a psychologist, and the issue concerned the entitlement of parents to engage independent experts to monitor effective educational provision. Such an issue is collateral to the right to education under Article 2 of the First Protocol and the nature of educational provision.

[15] The applicant accepts that this application has been made in the name of the child in order to secure legal aid. This acceptance also bears on the second preliminary point raised by the respondent, namely the alternative remedy by way of statutory appeal. It is proposed to consider that second point before expressing an overall conclusion in relation to both preliminary points. Article 24 of the 1996 Order provides for an application to the High Court in respect of Tribunal decisions, which application must be made within twenty-eight days. The decision in this case was reviewed on 23rd February 2006, which is the date from which the twenty-eight days would run, and therefore the time limit has expired. The statutory appeal to the High Court has not been exercised. First of all, this statutory appeal is the

parents right of appeal, as is apparent from the text of Article 24. In S v Special Educational Needs Tribunal [1996] ELR 102 the equivalent English legislation was considered to involve a right of appeal for the parent. Morgan J in Nolan's Application also met the alternative remedy point by indicating that he considered that the right of appeal resides with the parent rather than the child. The applicant contends that the effect of the appeal being the right of the parent is that the child has no participatory right in the appeal, so it should not be considered an alternative remedy for the child. In general, where a number of people qualify as having rights of appeal on a particular issue, some affected parties may have no participatory rights in the appeal proceedings and where that is the case those affected parties would have no effective alternative remedy. Although in the present case it is the parents right of appeal, the parents are in effect making their appeal on behalf of the child and the child's interests and rights are being represented by the parent when the parent undertakes the appeal. Accordingly I do not accept that the applicant can rely on the absence of participatory rights of the child in the appeal just because it is the parents right of appeal.

[16] However the right of appeal, even when regarded as in effect an appeal by and on behalf of the child, must be an effective remedy. The applicant contends bluntly that the parents cannot afford the statutory appeal under Article 24 and therefore have no effective remedy. The evidential basis for the parents inability to afford the costs of an appeal is not directly established in the papers, although it is stated on affidavit that the cost of the ABA programme is £140.00 per week, which has caused financial hardship to the family. In addition the mother has had to give up full-time employment and works a few hours a week as a lunchtime supervisor in her local school, and they also have a 12 year old daughter to support and they have obtained assistance and funding from family members. While there is no indication as to the family finances it is stated on affidavit that there is financial hardship and while the father might have an income that does not qualify for legal aid, it is apparent that he is unlikely to be able to fund High Court proceedings. Further evidence could be filed in relation to his financial position, if that becomes necessary. An alternative remedy that a party could not afford to undertake would not an effective remedy.

[17] On the preliminary issue of sufficient interest I am satisfied, first of all, that the applicant child has a sufficient interest to make this application. Secondly, I would distinguish the cases of Re J C and Anderson (a minor)'s Application as being cases concerned with parental preference where the issue is not the child's right to education but the parent's right to select a venue for that education. That may in some cases also touch the child's right to education but there is a distinction between parental preference and the right to education. Thirdly, I would distinguish Byrne's Application as it concerned a parent's request for inspection of special needs provision by an independent expert, not directly involving the child's right to education. Fourthly, I would follow Nolan's Application in finding that the issue about the nature of the special educational needs in the Statement will engage Article 2 of the First protocol. Fifthly I would follow Murphy's Application and R

(Edwards) v Environment Agency in finding that the selection of an applicant for judicial review from the ranks of a number of potential applicants with sufficient interest, based on that applicant's entitlement to secure legal aid for the application, is not an abuse. Accordingly, I am satisfied that the applicant has sufficient interest and there is no basis for refusing leave to apply for judicial review because the applicant has been chosen in order to secure legal aid to mount the application.

[18] On the preliminary issue of alternative remedy, I am satisfied first of all, that the existence of an alternative remedy is a matter to be taken into account in the exercise of discretion on an application for leave. The statutory scheme for the right of appeal to the High Court does not have the effect of excluding the jurisdiction of the Judicial Review Court. Secondly, an alternative remedy must be an effective remedy. Thirdly, the applicant child does not have the right to apply to the High Court but as appears from S v Special Educational Needs Tribunal it is a parental right to apply to the High Court. Fourthly, the right of appeal resting in the parents is not sufficient to dispose of the matter because the right of the parent to apply to the High Court permits of all of the rights and interests of the child being addressed at the appeal, and this is a matter to be taken into account in exercising the discretion. Fifthly, the inability of the parents to exercise the statutory right of appeal because of financial problems must also be taken into account in determining if the alternative remedy is effective. While the financial position of the parents is not addressed directly I accept such evidence as appears in paragraph 7 of the father's affidavit in relation to financial difficulties. I accept that financial difficulties prevented the application to the High Court and consider that for that reason there is no effective alternative remedy. I do not accept the respondent's preliminary points either on sufficient interest or on alternative remedy.

[19] The substance of the application for leave requires the applicant to identify an arguable case. The first matter that is raised concerns the issue of self-injurious harm. The approach taken by the Tribunal was to indicate that it is a matter that can be dealt with by way of an education plan and that should be prepared by the school and by the parents. The applicant's objection is that this approach is only dealing with the instant response to self-harm rather than the cause or the means of helping the child to overcome this problem. I do not accept that it is so restrictive. There is no basis on which it is limited to that extent. A programme is to be drawn up and the programme may deal with instant response and with matters that cause concern and the help that is required for the applicant. I accept that the Tribunal's approach is capable of addressing the wider issues about which the applicant's father is concerned. But there is another objection which is that this is not a suitable means of addressing this problem. The applicant contends that the problem should not be left to an education plan but rather should be set out in the Statement itself. Statements must be specific but they need not set out every detail. They must specify the extent of provision that is to be made but this is an issue of a different character. I am satisfied that the education plan can set out what may be required in relation to dealing with the issue of self-injury. Accordingly, on the issue as to whether or not the details should appear in the education plan or in the Statement I would refuse

leave. The substance of the problem of self harm is to be addressed. Judicial review is not the appropriate forum to argue about whether or not that substance should be set out in one form or another. I refuse leave on the ground concerned with self-injury.

[20] The other issue concerns ABA treatment at home and at school. The Tribunal has heard the debate on this issue and reached a conclusion. Evidence was given on behalf of the applicant and on behalf of the Board. The Tribunal did not accept the evidence presented on behalf of the applicant and were satisfied with the evidence presented on behalf of the Board. This is a specialist Tribunal and these are the kinds of judgment that the Tribunal would be expected to make. The applicant contends that the evidence of the expert, Dr Gallagher who was called on behalf of the applicant, should have been accepted. The applicant contends that if the Board wished to dispute the expert they should have presented a competing expert to the Tribunal or the Tribunal should have sought other expert evidence if they were not minded to accept the evidence of Dr Gallagher. I do not accept that it is necessary that when one expert presents a view to a Tribunal that in effect the Tribunal is obliged to accept that view unless it obtains a contrary expert view. The Tribunal was entitled not to accept the views and recommendations of the expert. It reached a decision and has given reasons why it reached that decision. It preferred the respondent's position and has said so in its conclusion. The Tribunal was satisfied that the applicant's special education needs would be met in the manner specified, which did involve amendment of the existing Statement. The Tribunal heard and took into account the applicant's different view. The Tribunal was entitled to reach the conclusion that it did. There is no arguable case on judicial review grounds to interfere with the Tribunal decision. Accordingly I refuse leave to apply for judicial review of the Tribunal decision.