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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **05/04/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY NBE (a minor) FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY DK (a minor) FOR JUDICIAL REVIEW

WEATHERUP J

[1] NBE is now 11 years old. DK is now 13 years old. Each brings an application for judicial review of decisions of the relevant Education and Library Board in relation to Statements of special educational needs under the Education (Northern Ireland) Order 1996. The issue concerns the lack of consultation with, and the alleged failure to take account of reports prepared by, experts engaged on behalf of the applicants. The Statements are under appeal to the Tribunal but in each case the applicants contend that consultation between the applicants' experts and the Board psychologist should have taken place and in any event should be completed before the date of the Tribunal hearing. Mr Kennedy QC appeared with Mr B. O'Hare for NBE and with Mr Sands for DK and Ms Gibson appeared for the respondents.

[2] First the case of NBE. The applicant contends that there was a failure to take into account and to consult with the applicant's experts, namely Ms Douglas a Psychologist and Professor Fitzpatrick a Psychiatrist.

[3] There is a dispute about the diagnosis of the applicant's condition and hence about the resulting content of the Statement prepared by the Board. The Education (NI) Order 1996 at Article 15 provides for the assessment of educational needs and at Article 16 provides for a Statement of special educational needs. Article 15 provides that where a Board is of the opinion that a child for whom it is responsible falls, or probably falls, within the Article it shall serve a notice on the child's parents and the parents have a right to make representations within a certain time. Further, if the Board,

having heard those representations remains of the opinion that the child probably falls within the Article, the Board shall make an assessment of his educational needs and give notice to the child's parents of that decision. Article 16 provides that in the light of the assessment under Article 15, if it is considered necessary for the Board to determine the necessary educational provision, the Board shall make and maintain a Statement of his special educational needs, and Schedule 2 of the Order applies. There are rights of appeal to a Tribunal against decisions not to make a Statement and against the contents of a Statement and further there is provision for review of a Statement and a requirement that a Statement shall be reviewed by the Board each year. Schedule 2 of the Order provides for the making of a Statement, and before making a Statement a Board must serve a copy of a proposed Statement. The parent may express a preference for a particular school and the parent may make representations, and after the process is complete the Statement will be issued.

[4] There are two distinct stages. One is the assessment stage during which certain steps are required and the other is the Statement stage during which different steps are required involving a proposal and representations and a final Statement. The process set out in the Order is supplemented by the Special Educational Needs Tribunal Regulations 1997 and Part II deals with assessments. Mr Kennedy QC relied on various requirements in the Regulations. First the Board is required to seek advice from sources specified under Regulation 5(1), namely –

(a) parental advice;
(b) educational advice;
(c) medical advice;
(d) psychological advice;
(e) Social Services advice; and
(f) any other advice which the Board considers appropriate for the purpose of arriving at a satisfactory assessment.

[5] Secondly, there is a twofold provision under Regulation 5(3) in connection with advice and consultation. It provides that the person from whom advice is sought may in connection with the giving of advice consult such persons as it appears to him expedient to consult. Further that advisor shall consult such persons as may be specified by the Board who may have relevant knowledge or information relating to the child. In the first case the advisor to the Board may decide that it is appropriate to consult with another where expedient. In the second case the Board may specify another who may have relevant knowledge or information relating to the child and the advisor must consult.

[6] Thirdly, Regulation 8 deals in particular with psychological advice and where the Board has engaged an educational psychologist, as in the present

case, and that person has reason to believe that another psychologist has relevant knowledge or information, the Board appointed psychologist shall advise after consultation with the other psychologist.

[7] Fourthly, Regulation 9 provides that when making an assessment the Board shall take into account representations made by the parent and any written evidence submitted on behalf of the parent and also any advice obtained by the Board from any of the sources specified.

[8] The four obligations referred to above are supplemented by the Code of Practice for special educational needs. At para. 3.57 it is stated that the educational psychologist from whom the Board seeks advice must consult and record any advice received from any other psychologist who may have knowledge or information and he or she should be asked by the Board to consider any advice which parents may submit independently from a fully qualified educational psychologist. This is a re-statement of the Regulations.

[9] Part IV of the Code deals with Statements and at para. 4,16 deals with the decision to make and maintain a formal Statement of those needs under Article 16. Para. 4.18 provides that all advice obtained and taken into consideration during the assessment process must be attached as appendices to the Statement. It then sets out the six categories of advice that may be received as appear in Regulation 5. Para. 4.20 states that the Statement should describe all the child's learning difficulties identified during the statutory assessment and the appendices may contain conflicting opinions open to interpretation which the Board must resolve, giving reasons for the conclusion reached.

[10] Regulation 5 applies "for the purposes of making an assessment under Article 15". The obligations under Regulations 8 and 9 also apply to the making of an assessment under Article 15. There is a stage at which the Board is making an assessment under Article 15 and then there is a stage at which the Board is making a Statement under Article 16. The obligations referred to above arising under the Regulations in relation to advice and consultation are part of the assessment process. At the Statement stage there are other procedures specified under the Regulations. For the purposes of determining the circumstances in which the advice and consultation provisions under Regulations 5–9 apply it is necessary to identify when the assessment stage begins and ends and when the Statement stage begins and ends.

[11] Article 15 applies at the stage where the Board forms an opinion and issues a notice to the parent that it proposes to carry out an assessment. The Statement stage begins at the point where the Board decides that it will consider the issue of a Statement and issues a proposed Statement to the parents. Between the time that the Board forms its opinion and issues the notice to the parents and the time when the Board decides that it will issue a

Statement and issues a proposed Statement the Article 15 assessment exercise is being undertaken. I turn then to the dates and facts of the particular case of NBE to ascertain how they apply in relation to the assessment stage and the Statement stage.

[12] The Board's psychologist was Ms Maginn who produced a report on 9 October 2003 for the purposes of an Article 15 assessment. The applicant's psychologist was Ms Douglas who produced a report in September 2004. Ms Maginn produced a further report in February 2005. Professor Fitzgerald was the applicant's child psychiatrist and he produced a report on 14 February 2005. They are the four reports that are relevant. The Board issued a proposed Statement on 9 January 2004 and issued the Statement on 13 January 2005. The assessment process was completed when the Board issued its proposed Statement in January 2004. The applicant's reports followed. Indeed, Professor Fitzgerald's report followed the final Statement. Ms Maginn's second report in February 2005 was part of the annual review of the Statement.

[13] Regulations 5 – 9 apply for the purposes of making an assessment under Article 15. In the case of NBE the Article 15 assessment was concluded on 9 January 2004 when the Board issued its proposed Statement. First of all, Regulation 5(1) provides that when the Board is making this assessment it has six matters upon which to seek advice. The last is the general ground of any other advice which the Board considers appropriate for the purposes of arriving at a satisfactory assessment. Mr Kennedy QC relied on that general ground on the basis that the Board ought to have taken up other advice in order to achieve a satisfactory assessment by seeking advice from other sources. This assessment was completed by the Board in January 2004. At that time the Board had no notice of the views of Ms Douglas or of Professor Fitzgerald, neither of whom had reported. The Board had the advice of Ms Maginn, with which of course the applicant does not agree, but nevertheless at that stage the Board had no basis for considering advice from some other quarter on matters about it which it has no information. There was no shortfall in the advice sought by the Board at that stage, it had taken the advice that it was required to take, there was no basis for it being on notice that it ought to look elsewhere for advice. There was no shortfall in the advice obtained by the Board under Regulation 5(1).

[14] Under Regulation 5(3) "a person from whom advice referred to is sought may consult other persons it is considered expedient to consult". When Ms Maginn was completing her advice she was not aware of any other adviser who was contradicting her views and Mr Kennedy QC did not suggest that Ms Maginn should have gone searching for any professional colleagues with whom she might consult. The position might be different if the Board or its adviser already had a report prepared for the applicant which stated that the child had a certain condition, so that the psychologist would

consider that matter and form a view as to the need to consult, but that is not this case. The additional obligation in relation to the Board was to specify that the advisor should consult with someone who it was believed might have relevant knowledge or information. Again it is the position that the Board did not have any notice upon which it might have specified any such person at that time. There was no failing in regard to either of the aspects of Regulation 5(3).

[15] Regulation 8 focuses on psychological advice. It would have required that Ms Maginn, before she gave her opinion, should consult with any other psychologist who has relevant knowledge. In October 2003 when Ms Maginn was completing her advice she had no knowledge of Ms Douglas' views as her report did not arrive until September of the following year. Ms Maginn was not in breach of Regulation 8 when she gave her psychological advice in October 2003.

[16] The applicant then contends that the Board had notice of Ms Douglas' views in September 2004, and therefore the Board should have reverted to Ms Maginn with the Douglas report at that time. In other words Regulation 5(3), and/or Regulation 8 should have been called into play and would have required further advice from Ms Maginn. However the advice being sought under Regulations 5 and 8 is for the purposes of making the Article 15 assessment and the statutory obligation ends when the assessment is complete. The assessment was complete in January 2004 so the other reports came too late to influence the assessment.

[17] If the report of Ms Douglas had been furnished during the Article 15 assessment, that is to say before the proposed statement, what would have been the position? At that stage the Board should have considered whether to specify that the advisor, Ms Maginn, should consult for the purpose of Regulation 5(3). If at that point Ms Maginn had already given her advice, Ms Gibson for the Board contended that it would have been too late to consider consultation. If a parent submits a report before the Article 15 assessment is complete and the report raises an issue such as in the present case, the Board has a discretion whether to specify consultation. The Board would be aware of the conflicting views and would have to consider whether to specify consultation. In some cases a conflict between the two psychologists may not be clear and the Board might refer the report to its psychologist and a view would be formed in the circumstances. The outcome will differ from case to case. But that is not this case because the Douglas report came in after the assessment had been completed and Professor Fitzgerald's report is in the same position as it post-dates the Statement.

[18] Under Regulation 9 it is necessary when making an assessment to take into account written evidence. In this case written evidence was submitted by

Ms Douglas and Professor Fitzgerald but again it is the position that the assessment had already been completed before the reports were received.

[19] Accordingly, on the application of Regulations 5 – 9, I am against the applicant because the Article 15 assessment had been completed before the applicant's reports were presented. That is not say, however, that the reports are not relevant because the reports, having been received, feed into the process at the stage then reached, namely the Statement stage.

[20] The next stage began in January 2004 with the issue of the proposed Statement and it was completed in January 2005 with the issue of the final Statement. Ms Douglas' report was received during that period in September 2004. At that stage the process was governed by Schedule 2 of the 1996 Order and paragraph 2 provides that a copy of the proposed Statement will be served on the parents and the parents may make representations to the Board about the content of the Statement and may attend meetings and require meetings to be held, and the representations must be considered before the Board makes the Statement. Accordingly there is a separate regime that applies once the proposed Statement has been issued. Ms Douglas' report, which was received in September 2004, must be taken into account as required by the terms of Schedule 2. Do the statutory provisions extend to requiring consultation with the advisor? Not at that stage. The Regulations require that there be meetings and representations by the parents and that the Board takes into account the matters raised. There is not at this stage a statutory requirement to consult. That is not to say that the applicant's reports are disregarded because they must be taken into account by the Board in making its decision on the final Statement. Has the Board complied with the duty at this stage to take the reports into account? The Board states that it did take into account the Douglas report. The applicant disputes this. There is nothing in the papers to suggest that the Board has failed to take into account the report. The Board has said that it has taken the report into account and there is an issue about that to which Mr Kennedy QC says he will perhaps return. On the present papers the Board has fulfilled the obligations in relation to the processing of the proposed Statement.

[21] The Statement was issued in January 2005. At that stage a new regime applied and there are obligations that arise in relation to the annual review. Ms Maginn's further report was received for that purpose in February 2005. Professor Fitzgerald's report was submitted by the applicant at that stage. There is not, during the annual review process after the Statement has been issued, a statutory requirement to consult with the applicant's advisors. Again, while there is no statutory requirement to consult there is, of course, still a duty on the part of the Board to consider the reports that are being submitted by the parents for the purposes of carrying out the review of the Statement. Did the Board take into account the reports that it had received at that stage? The Board says that it did. Again, that is disputed and there is

nothing in the papers to suggest that the Board did not take the reports into account. However the Board says that in the event there will yet be consultation with the advisors, although there is no statutory requirement to consult at this stage. The Board must, as in all these cases, consider relevant reports in the manner that is required in the circumstances, and that may involve consultation. So, there will be consultation for the purposes of the annual review. The Board has not failed to comply with the statutory requirements as to consultation.

[22] Mr Kennedy raised a supplementary point to the effect that the Statement and the explanation for the finding of the Board do not provide satisfactory reasons for the Board's conclusion. The reasons seem broadly clear. The Board does not accept the conclusion of the applicant's experts. Why is that? The Board has adopted its own psychologist's report. Now, the applicant may say that she is not suitably qualified or that the applicant's experts are better qualified or that she is wrong and they are right. It is not for this Court to decide who is right and who is wrong on this issue. This may be undertaken by the Tribunal. I do not accept that the reasons are deficient because it is apparent that the Board has preferred the approach of its own psychologist.

[23] For the reasons set out above I am not satisfied on any of the applicant's grounds in the case of NBE.

[24] The case of DK raises the same issues, although there is no dispute about the diagnosis of his condition but rather a dispute about the content of the Statement. The psychologist for the Board, Ms Harrington, reported in April 2005. There was then a proposed Statement on 23 May 2005 and a Statement on 13 October 2005. The background to this case is complicated by the fact that there had been prior Statements, but I proceed on the agreed basis that an Article 15 assessment was being undertaken.

[25] Dr Fitzgerald's reports are dated 21 July 2004 and 1 November 2004. His reports were not furnished until later, but are referred to in a letter of 9 November 2004. That letter sets out sufficient notice of the existence of the reports and the contents when it states that DK was currently being monitored by Professor Michael Fitzgerald, professor in child psychiatry, who had confirmed a diagnosis as Asperger's Syndrome with the secondary diagnosis of Attention Deficit Hyperactivity Disorder and also that of Oppositional Defiant Disorder.

[26] Further, there was a report from Mr Willis, the applicant's psychologist, of 31 January 2005. That report was produced to the Board's psychologist, Ms Harrington, in February 2005 when she was preparing her report for the Board, as appears from DK's mother's second affidavit at paragraph 10. She states that she obtained a report from Mr Alan Willis in

January 2005, that unfortunately she did not make it available to the Board and that "…when Joy Harrington came to meet [DK] I showed her Mr Willis' report and she read that report". Ms Harrington is apparently unable to address this matter and I am proceeding on the basis of the mother's account of what occurred at the meeting in February 2005.

[27] There was a process of assessment that was carried out under Article 15 that began with the notice being given to the parents and ended with the issue of the notice of the proposed Statement on 23 May 2005. During that process the applicant's parents outlined Dr Fitzgerald's position in the letter of 9 August 2004 in sufficient manner to put the Board on notice of the issues that he raised. Mr Willis' report of 31 January was submitted to the Board's psychologist in February 2005. Both events occurred before Ms Harrington reported in April 2005 and all of this occurred before the proposed Statement of 23 May 2005, that is to say all of this occurred during the Article 15 assessment.

[28] The Regulation 5(1)(f) obligation is to obtain any other advice which the Board considers appropriate for the purposes of making the assessment. The Board obtained advice from Ms Harrington and as a psychologist she would have been able to advise on how to deal with the matters raised on behalf of the applicant, and there is nothing to suggest that it would have been appropriate to obtain any other advice in order to make a satisfactory assessment. The requirements of Regulation 5(3) are that the advisor may consult or the Board may specify that the advisor consults with another person who has knowledge or information relating to the child. It should have been clear to Ms Harrington and the Board, if they were co-ordinating together, that Professor Fitzgerald and Mr Willis had knowledge of and information relating to the child and that consideration should have been given to whether it was appropriate for Ms Harrington to consult with the applicant's advisers. It does not follow that there should have been consultation with both Mr Willis and Professor Fitzgerald, but it does not appear that either was considered. The Board failed to address the issue of consultation under Regulation 5(3) when it had notice of the position of Professor Fitzgerald and Mr Willis.

[29] In relation to Regulation 8 there was an obligation on the psychologist to consult with another with relevant knowledge and information before she gave her advice. Ms Harrington had knowledge of Mr Willis' report before she reported and that imposed upon her an obligation to consult with Mr Willis before she produced her report of April 2005.

[30] The affidavit of Margaret Hart sworn on behalf of the Board at paragraphs 12 and 13 deals with the Board's view of the report of Mr Willis. It is stated that the report was only received by the Board on 5 August 2005. That is correct although, of course, the report was given to Ms Harrington

before she reported. She goes on to say that the Board considered that Mr Willis' recommendations were not appropriate and that he was not fully informed and that he should have done other things to complete a wholly accurate objective and holistic assessment. That may well be so. It is not for the Court to determine who is right and who is wrong in the contents of these reports. Nevertheless the obligation to consider consultation arose upon notice to Ms Harrington of the applicant's report. It may be that if Ms Harrington had consulted she would have taken the same line as Ms Hart has taken on behalf of the Board. In order to reach that point she must first fulfil the obligation under the Regulations to complete the consultation process.

[31] I turn then to Regulation 9 and the further obligation that when making the assessment the written evidence submitted is taken into account. In this case the Board states that it did take account of the evidence submitted by Mr Willis and Professor Fitzgerald. The applicant again disputes that but there is nothing in the papers to suggest that the Board did not consider the reports.

[32] So, what is the effect on the Statement of the absence of consultation? It is not sufficient to show that there has been some irregularity in the process unless it has some effect. It cannot be said that consultation would not have impacted on the content of the Statement. It is not known what effect it might have had. The consultation might have led to the Statement being produced with different content and perhaps the contents which the applicant desires. On the other hand the Statement may have been the same. The absence of consultation is a material omission. There has been failure to comply with the procedural requirements under the Regulations in the case of DK.

[33] The Board raised a number of preliminary issues, although I have first considered the substance of the applicants' grounds. The first point was the standing of the applicants. The Board contended that the applicant in each case was the child rather than the parent and that the child had not sufficient interest. By implication the Board contends that there was an abuse of the system because choosing the child as applicant ensured legal aid for the application and thereby avoided having to pay the costs of the case if the application is unsuccessful.

[34] The Court of Appeal decision in Anderson & O'Doherty [2000] was a case concerning schools admissions and the applications were made in the names of the children. While the Court of Appeal considered that in relation to schools the parent was probably the proper person to bring the application, the application was not dismissed on that ground. The issue arose in Connor Green's Application [unreported, 2005] where Mr Justice Girvan questioned whether the child was the proper applicant. In Jonathan Nolan's Application [2005] NIQB 46 Mr Justice Morgan decided that the child was an appropriate applicant in a case concerned with the educational provision that would be

made for the child. I reviewed the authorities in Theresa Murphy's Application [2004] NIQB 85 where a child of the family made an application in relation to a telecommunications mast near the family home where the parent might equally have made the application. I took the view that where a child has sufficient interest then that child can be the applicant even though the parent might also have been an appropriate applicant. This is that type of case where both the parent and the child have interests in the subject matter of the application, and although in some cases those interests may be different, in a case such as this the child has sufficient interest.

[35] The second point the Board relied on was alternative remedy, namely that there is a Tribunal that will determine the issues between the parties. In both of the present cases there is a Tribunal hearing pending very shortly which will deal with some of the educational issues between the parties. However the points about consultation are well taken before the Court rather than the Tribunal. There is a statutory scheme providing for consultation that I have found has not been complied with by the Board in one of the cases. The object of the applicant in both cases has been to seek to secure that consultation is completed in advance of the Tribunal so that the Tribunal may make a fully informed decision. That is a matter that was appropriately brought before the Court and would not be rectified so effectively before the Tribunal.

[36] The final point made by the Board concerned delay. The Statement in the DK case was issued on 13 October 2005 and the judicial review was issued on 10 January 2006, so the proceedings were issued within three months. The Board contended the application was not made promptly. The applicant's solicitor's affidavit set out the steps that occurred in relation to the obtaining of advice and seeking legal aid and the drafting of proceedings. I am satisfied with the steps that were taken by the solicitor in processing the matter and I do not consider there has been delay. The Board contended that the point about lack of consultation had been known since before the issue of the Statement and that there had been a long delay. It was appropriate for the applicant to wait until the issue of the Statement even though there had been some irregularity which they may or may not have been identified at the time it occurred. I do not fault the applicant for waiting until the Statement had issued before proceeding with the application. I do not find for the Board on any of the three preliminary matters.