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Ref: **TRE8336**

*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

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR 56's Application (No.2) [2011] NIQB 89

AN APPLICATION BY JR 56 FOR JUDICIAL REVIEW (No.2)

TREACY J

Introduction

[1] By this application for judicial review the applicant, an 11 year old boy, seeks to challenge the decision of the Board of Governors of St Paul's High School, Bessbrook not to admit him to the school. The decision was as a result of the application of the school's published admissions criteria which the applicant has also challenged as unlawful.

[2] The court has already concluded that the respondent did not have proper regard to the Departmental guidance and erred in approaching the impugned criteria on the basis that they were not contrary to that guidance. This decision is reported at [2011] NIQB 78. I made an Order quashing the refusal of the respondent to admit the applicant but made no determination in respect of the lawfulness of the impugned criteria pending reconsideration by the respondent.

[3] In light of the previous decision, agreement from the Department was sought for a supernumerary position to accommodate the applicant. However, such agreement was not forthcoming because the Department was, I was informed, unwilling to set a precedent.

[4] Accordingly I am now asked to rule on the remaining grounds upon which the judicial review was brought namely that the impugned criteria are *Wednesbury* unreasonable and Convention non-compliant.

[5] These remaining grounds were pleaded in the following manner in the Order 53 Statement:

“...

(c) The school's admissions criteria are unreasonable in the *Wednesbury* sense. Without prejudice to the generality of the foregoing, they are unreasonable in the following respects:

(i) They are conspicuously unfair and discriminatory in respect of candidates in the position of the applicant.

(ii) They provide an unwarranted and irrational priority over the applicant to pupils who also reside in the parish of Middle Killeavy but who attend a primary school which is further from St Paul's than the primary school which the applicant attends.

(iii) They provide an unwarranted and irrational priority over the applicant to pupils who reside further away from St Paul's than the applicant does (in the parish of Lower Killeavy) and who, like the applicant, attend Z Primary School.

(d) The said decision, and the said admissions criteria are in breach of the applicant's Convention rights and, in particular:

(i) Are a disproportionate breach of his rights under Article 2 of the First Protocol and/or Article 8 ECHR/ in that they will force the applicant to be educated otherwise than in accordance with his and his parent's wishes...

(ii) Are an unjustified breach of his right under Article 14 of the Convention not to be discriminated against (in conjunction with his rights under A2P1 and/or Article 8) on the basis of his socio-economic status and/or of being socially deprived and/or of living in a socially deprived area.”

Background

[6] The applicant is an 11 year old boy who recently concluded his primary school career as a Primary 7 pupil at Z Primary School in the Parish of Middle Killeavy (in the Archdiocese of Armagh). The applicant lives in this parish.

[7] Killeavy is divided into three parishes:

- (i) Lower Killeavy is to the north, the area around Bessbrook;
- (ii) Middle Killeavy is a small area to the south and west of Newry town; and
- (iii) Upper Killeavy is to the south and which runs from where Middle Killeavy ends down to the border with the Republic of Ireland.

[8] The applicant wishes to attend St Paul's Secondary School located in Bessbrook Co Armagh which is three miles from Newry town centre. For this reason it is his first choice on his transfer form.

The School Admissions Criteria

[9] In the admissions criteria applied by St Paul's, applications belonging to category A are given preference over applications belonging to category B and so on. Candidates are split into three groups:

- (i) Category A relates to "applications from pupils who normally reside in the traditional catchment area of the school" in certain named parishes;
- (ii) Category B relates to pupils whose parent or guardian is a permanent employee of the school; and
- (iii) Category C relates to all other applicants (i.e. those not in either of the two foregoing categories).

[10] Where the school is oversubscribed within any of the categories a number of sub-criteria are applied to determine which children should be admitted.

[11] The Court is concerned with Category A which accords priority to:

"1 Applications from pupils who normally reside in the traditional catchment area of the school namely:

- (a) Parish of Lower Killeavy**
- (b) Parish of Loughgilly**
- (c) Parish of Dromintee**
- (d) Parish of Upper Killeavy provided they attend Cloughhoge Primary or Killeen Primary or St Joseph's Primary Meigh.**
- (e) Newtownhamilton part of Lower Creggan Parish that traditionally contributes to St Pauls High School.**

(f) Cladybeg and Ballylane parts of Ballymacnab Parish, that traditionally contribute to St Malachy's PS Ballymoyer, Co Armagh.

(g) Parish of Middle Killeavy provided they attend Cloughoge Primary or Killeen Primary or St Joseph's Primary Meigh.

The above named parishes are not listed in any order or priority".[emphasis added]

[12] The difficulty with Category A as far as the applicant is concerned is that although Middle Killeavy is listed as part of the catchment area for St Paul's this is only if the child living there attended one of three named primary schools (Cloughoge Primary, Killeen Primary or St Joseph's Primary Meigh). Although the applicant lives in Middle Killeavy, as he did not attend one of these primary schools, he does not fall within Category A in the school's admission scheme. Since he also has no parent or guardian who works at the school he simply falls into Category C. Following the application of these criteria the applicant was refused a place in St Pauls.

[13] The applicant's mother, supported by the Chairperson of the Board of Governors of Z PS, contends that the proviso in A1 (d) and (g) limiting priority to the three named schools is unfair and discriminatory. This is because none of the three schools listed as feeder schools for children living in Middle Killeavy are actually *in* that parish. Rather they are all in *Upper* Killeavy. Moreover, each of them is *further* away from St Paul's than Z PS which the applicant attended. The result is that if parents living in Middle Killeavy wish to send their children to St Paul's they are better off sending their children to primary schools outside their own parish.

[14] The principal of St Paul's, Oliver Mooney, has filed a number of affidavits in these proceedings. He explained that the admissions criteria are long standing and have had only minor amendments in over 20 years: "The criteria are historically based upon feeder parishes and primary schools within those parishes that founded and have traditionally supported St Paul's" [para 3 1st affidavit]. He has averred that the Board of Governors in successive years have always recognised that its primary obligation is to service those feeder primary schools contained within the parishes that established and funded St Paul's High School in Bessbrook [para 11]. And in his second affidavit he has pointed out that the link with funding parishes in the cases of Upper Killeavy and Middle Killeavy are restricted to the specific schools that existed at the time of the erection of St Paul's Bessbrook.

[15] Mr Mooney has also averred that over the last number of years there have been substantial difficulties for those pupils within "the core catchment area" who wish to attend St Paul's but have not been able to do so. In recent years other factors have contributed to the school being heavily over subscribed from the core catchment area such as children who had opted for grammar schools opting for St Pauls instead. To include Z Primary School in the criteria would, he said, increase

the pressure on a school which is already over subscribed each year and which turns away children from its traditional feeder schools and parishes.

[16] The applicant submitted that the school's admissions criteria are *Wednesbury* unreasonable it being claimed that they are conspicuously unfair, devoid of logic and capricious in that they have provided an irrational priority to pupils who reside in a particular parish and attend a certain primary school. The problem with this contention, as the respondent has pointed out, is that a similar contention lay at the heart of the decision of Carswell LJ in *Re Moore & Ors* [1994] NIJB 99 and on appeal to the Court of Appeal (MacDermott LJ, Campbell & Kerr JJ) reported at [1994] NIJB 99 at 111.

[17] The four children in *Moore* were all aged 11, lived in the Parish of Upper Killeavy and received their primary education at Z Primary School. Their parents wanted them to attend St Paul's, Bessbrook which was given as the first preference. More applications were received by the Board of Governors of St Pauls than they could accept and they made a selection from among them by applying their published criteria. In the event none of them were admitted. In *Moore* it was argued that the impugned criteria (essentially the same as those at issue in the present case) involved a covert means of selection by reference to the ability or aptitude of applicants and that in adopting that method of selection that the Board of Governors was motivated by bias against residents of urban housing estates in Newry.

[18] In *Moore* Carswell LJ rejected the contention that the criteria were motivated by "the subterranean wish to take into account ability or aptitude which non grammar schools are specifically enjoined from doing".

[19] He nevertheless accepted that there was material to support a suspicion that the Board of Governors wanted to adhere to their traditional pattern of an entry of children from rural families. Although he did not find that this was proven he went on to hold:

"It might perhaps be argued that there is material to support a suspicion that the Board of Governors wanted to adhere to their traditional pattern of an entry of children from rural families and that they were not at all keen to dilute it with numbers of children from urban housing estates, whom they might well have regarded as a source of potential trouble. I do not find this sufficiently proved; but whether or not other people might agree with or disapprove of such an approach, the Board would, in my opinion, have been entitled as a matter of law to frame its criteria in such a way as to perpetuate such a social pattern of intake if it chose. If a court were to reach the conclusion that they were opposed to the idea of admitting

children from public housing estates in Newry, it does not follow that they would have been acting contrary to the statutes or regulations by which they were bound. I therefore conclude that this ground of attack on the framing of the criteria has not been made out.

By the same token, if they were entitled to frame their criteria in this way it cannot be said that they were guilty of unlawful bias. Nor is there any basis for holding that their decision was unreasonable in the *Wednesbury* sense. Parents, understandably enough, were incensed by what they regarded as gross unfairness to their children and all those attending the same school or living in the same area. But there is a sustainable basis for the Governors drawing of their admission lines, whether or not those who fall outside consider it unfair, and they are not in my view bound to review them so as to accommodate demographic changes if they do not chose. In so holding I am not concerned with the wisdom or fairness in the abstract of the admissions policy of the Board of Governors of St Paul's High School. My concern is solely to see whether they have complied with the law, and my conclusion is that they have done so. Nor has it been established that they took into account considerations to which they should not have had regard or omitted to consider matters which they ought to have taken into account. I therefore hold that the appellants have not succeeded in their claim that the Governors decision to adopt the criteria for 1994 should be set aside."

[20] In the Court of Appeal appellants also argued that the criteria involved a covert means of selection by reference to the ability or aptitude of applicants which was expressly forbidden by the relevant regulations and it was also suggested that in adopting that method of selection the Board of Governors was motivated by bias against residents of urban housing estates in the Newry area.

[21] That contention was roundly dismissed by the Court of Appeal. In the leading judgment Kerr J (as then was) stated:

"By their very nature, criteria adopted by a Board of Governors involves the preferring of some candidates or group of candidates over others.

When it is alleged that the objective of a Board of Governors in choosing a particular set of criteria is to achieve some concealed ulterior purpose it seems to us to be necessary that the person making that charge should prove it and that the Board of Governors should not be required to defend itself against a suspicion or possibility.

Even if we are wrong in that conclusion, however, we are satisfied that the explanations offered by Mr Ward are more than ample to acquit the Board of Governors of any charge of prejudice. He has explained that the criterion which gives preference to applicants who live in the Parish as specified in Category A1 of the admissions criteria reflect the traditional intake of the school. St Paul's was established in 1966; (Z Primary School)* in 1982. Although the latest criteria are a refinement of earlier years criteria they follow the same pattern established in the first year that criteria required to be published. *It appears to us to be not only permissible but also entirely reasonable that a school should seek to preserve a pattern of intake of pupils from areas established by tradition as the customary source of students from the school. We have concluded, therefore, that the allegation of bias against the Board of Governors cannot be sustained.*" * (brackets substituted)

[22] As MacDermott LJ in a short concurring judgment stated:

"All concerned with these cases appreciate the anxiety of the parents of the appellants that their children should receive the education which they believe to be the best and most suitable. It is however a sad fact of life that popular schools (that is those with a reputation for excellence) cannot always take in all the children who wish to go to that school. Accordingly, choices must be made. To be fair and objective a school must publicise and apply its admission criteria. This St Paul's did. As is made clear by the judgment of Kerr J neither the school nor the Board can fairly be criticised. The criterion for admission to St Paul's made it clear that pupils from (Z Primary School)* would only be considered after many others were chosen and if parents chose St Paul's in such circumstances they

must realise that they may be disappointed.”

*(brackets substituted)

Conclusion

[23] I see no reason for departing from the conclusion of the Court of Appeal in *Moore* not least of all because there has been no material change of fact or any material legal development which would permit or require the Court to depart from that clearly expressed judgment. Moreover, in the intervening years the pressure on available places in St Paul’s has only increased.

[24] As far as the discrimination claim is concerned the applicant eschewed any reliance on direct discrimination contending instead that the application of the impugned criteria constituted indirect discrimination on the ground of socio-economic status.

[25] The allegation of bias has previously been rejected by the High Court and Court of Appeal in *Moore*, albeit prior to the patriation of the Convention.

[26] As is acknowledged in *Moore* the real problem is that St Paul’s is heavily over subscribed and the situation is getting worse not better. The evidence is that if the criteria were modified in the way suggested by the applicant a difficult situation could be made worse. It is an unfortunate fact that parental preference cannot always be accommodated. However, as the Court in *Moore* recognised it is “not only permissible but also entirely reasonable that a school should seek to preserve a pattern of intake of pupils from areas established by tradition as the customary source of students”. Restricting admissions to heavily over subscribed schools by such criteria are neither *Wednesbury* unreasonable or discriminatory on any prohibited ground. Accordingly I reject the contention that the impugned criteria should be quashed.