| Neutral Citation No: [2022] NIQB 58 | *Ref:* **HUM11914** |
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| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **01/09/2022** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY JR212**
**FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

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**Joseph Aiken QC and Maria Mulholland (instructed by Peter Bowles & Co.) for the Applicant**
**Adrian Colmer QC and Laura Curran (instructed by Napier Solicitors) for the proposed Respondent**

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**HUMPHREYS J**

**This judgment has been anonymised to protect the identity of the child to whom the proceedings relate. Nothing can be published which will identify the child or any of the schools concerned.**

*Introduction*

[1] This is an application for leave to apply for judicial review, brought by a minor applicant whom I shall call BK. The challenge is to a decision of the Exceptional Circumstances Body ('ECB') made on 5 April 2022 whereby it refused the application of the applicant for a direction that he be admitted to a school which I shall call DS. The application proceeded by way of a 'rolled-up' hearing.

[2] The applicant originally attended a primary school, AS, but during his Primary 4 year he was the subject of a sexual assault when another boy exposed himself to him in the school toilets. As a result, he transferred to a different primary school, BS, where he completed his Key Stage 2 education.

[3] The applicant was one of the cohort of pupils who did not sit either the AQE or GL transfer tests in 2020 due to the impact of the Covid-19 pandemic. The

transfer process for entry into secondary education in 2021 was different from preceding years, based very largely on non-academic criteria.

[4] The applicant was offered at place at CS, a controlled secondary school near his home which was attended by an elder sibling. His first choice had been DS, a voluntary grammar school again in close proximity to his family home.

[5] The applicant and his family were content with the outcome of the transfer process until it came to their attention that the other child involved in the incident in the toilets would be attending CS. They had formed the opinion that it would not be possible for the applicant to attend CS in these circumstances and this prompted a first application to the ECB which was refused in August 2021.

[6] The parents decided to home school the applicant and to pursue a fresh application to the ECB with the support of evidence from a child psychologist, Dr Kerry Sweeney. The ECB declined to hear this fresh application which led to a previous application for judicial review. Ultimately the decision to decline to hear the application was quashed by consent.

[7] A hearing took place on 31 March 2022, and the outcome was communicated to the applicant and his family on 5 April 2022. By this application, it is sought to quash the decision of the ECB and direct that the applicant should be admitted to DS.

***The Legal Framework***

[8] The ECB was created by Article 29 of the Education (Northern Ireland) Order 2006, which inserted a new Article 16A to the Education (Northern Ireland) Order 1997 ('the 1997 Order'), and which provides:

> "(1) The parent of a child of compulsory school age may apply to the body established by regulations under paragraph (6) ("the body") for a direction that on the grounds of exceptional circumstances specified in the application the child is to be admitted to a grant-aided secondary school so specified ("the specified school").
>
> (2) On the hearing of an application under this Article—
>
> (a) if the body is satisfied that exceptional circumstances exist which require the admission of the child to the specified school, the body shall direct the Board of Governors of that school to admit the child to the school;

(b) in any other case, the body shall dismiss the application."

[9] It will be evident that the role of the ECB in the school admissions process is a limited one and the outcome of an application to it either entails a direction to admit to a specified school or the dismissal of the application.

[10] Under Article 16A(3), the Board of Governors of the specified school must admit the child where it is directed by the ECB to do so. Pupils admitted to a school by this route are treated as supernumerary and funded accordingly.

[11] The School Admissions (Exceptional Circumstances) Regulations (Northern Ireland) 2010 ('the 2010 Regulations') were made under Article 16A and these define "exceptional circumstances" as follows:

> "circumstances which are both exceptional and personal to the child in question and relate to admission to a specified school only."

[12] Regulation 5 gives certain examples of circumstances which the Panel may regard as exceptional:

> "(a) circumstances where in the opinion of a registered medical practitioner the child has been subjected to sexual abuse;
>
> (b) circumstances where a child is looked after by an authority."

[13] Regulation 6 identifies three circumstances which the ECB does not have discretion to regard as exceptional circumstances requiring admission to the specified school:

> "(a) circumstances related wholly or mainly to the kind of education provided at that school;
>
> (b) circumstances related to a child's academic ability;
>
> (c) circumstances related wholly or mainly to the availability of transport to that school."

[14] In *Re School X's Application* [2016] NIQB 87, Colton J succinctly summarised the task of a panel appointed:

> "[35] In approaching this task the Panel addresses three tests as follows:

> Test 1 – Are the circumstances that are claimed exceptional?
>
> Test 2 – Are the circumstances that are claimed "personal" to the child?
>
> Test 3 – Do the circumstances that are claimed require the child's admission to the school a parent has specified, and only that school?
>
> [36] It is only if a Panel answers yes to each of these questions that it will direct the Board of Governors to admit the child to the school."

***The Standard of Review***

[15] It is evident from the 1997 Order and the 2010 Regulations that the ECB is a specialist body, the membership of which is comprised of either persons who have relevant experience in the education or welfare of children or are solicitors or barristers entitled to practise in this jurisdiction (see Regulation 3 of the 2010 Regulations). The particular nature of the task being carried out by the ECB, and the specialist nature of those entrusted to apply the statutory tests, speaks to the standard of review to be applied by the courts when considering applications for judicial review.

[16] Recently, in *JR164's Application* [2022] NICA 22, I considered the role of the court in reviewing decisions of the School Expulsion Appeal Tribunal, a similarly constituted specialist decision maker in the education field:

> "It is well-established that where the legislature has created a specialist tribunal to determine disputes in a particular sphere, the courts should be slow to interfere with their decisions and apply only a light touch irrationality based standard of review. In the context of the Tribunal, Horner J said in *Re NM* [2014] NIQB 10:
>
> > "... when an independent tribunal which comprises members with specialist educationalist expertise and experience reaches a conclusion following a fair hearing, a court should grant it a wide measure of appreciation. It should only interfere when the tribunal has obviously erred." [para 15] "

*The Impugned Decision*

[17] An oral hearing took place at which both written and oral evidence was considered, and the applicant represented by solicitor and counsel. In relation to each of the tests, the panel found as follows:

(i) The circumstances claimed were exceptional;

(ii) The circumstances were personal to the child; and

(iii) The circumstances did not require the admission to the specified school and only that school.

[18] Self-evidently, it is the decision with regard to test (iii) which is under challenge in these proceedings.

[19] The evidence before the panel was that there were no pupils from BK's year group in AS attending DS. The other boy involved in the incident was attending CS.

[20] Reliance was placed on the report from Dr Sweeney in which she stated:

> "There is no doubt that this boy has had a specific traumatic event within the school setting and placing him with the pupil who perpetrated this traumatic event in the same school would have a detrimental effect on [BK's] mental health."

[21] This evidence was accepted by the panel and a finding made that CS could be ruled out on this basis.

[22] Dr Sweeney's report continued:

> "It is also worth considering allowing him the opportunity to attend a school where there is no connection with other pupils around from his previous primary as it is possible that this could be a trauma trigger for him."

[23] The report concludes:

> "My recommendation is that he is allocated a place in a grammar school where he is capable of achieving and where he is not in contact with the perpetrator or other children connected to his previous primary school."

[24] It is entirely unclear why Dr Sweeney thought it was any part of her role to recommend that BK be allocated a place in a grammar school. Such an approach is in direct contravention of Regulation 6 of the 2010 Regulations whereby academic ability cannot be regarded as an exceptional circumstance.

[25] The evidence before the panel was also to the effect that there were 21 places available at school ES, located just over half a mile from the applicant's home. Four of the pupils from AS were attending ES and, on this basis, it was ruled out as an option by the applicant's parents. The panel held that Dr Sweeny had found the attendance of other pupils from AS at the post primary school only created the possibility of a trauma trigger.

[26] Further, four spaces were identified at school FS, located almost six miles from the applicant's home. No pupils from AS were in attendance at FS. The parents rejected FS as an option on the basis of distance, travel time and the impact on after school activities.

[27] The panel determined that there were places available at other schools both with and without pupils from AS and therefore it had not been established that the specified school (DS) was the only one which BK can attend.

***The Grounds of Challenge***

[28] The grounds of challenge advanced on behalf of the applicant resolve into four categories:

(i) Procedural Unfairness;

(ii) Irrationality;

(iii) Illegality in the misinterpretation of the statutory scheme; and

(iv) Breach of article 1 of the First Protocol and article 8 ECHR.

***(i) Procedural Fairness***

[29] The procedural fairness argument is based on the contention that the panel has substituted its opinion for that of Dr Sweeney and that fairness, in this context, requires that the panel accept the recommendation of the psychologist and 'rule out' school ES since some pupils from AS are in attendance there.

[30] Properly analysed, this is not a procedural fairness point at all but a full frontal attack on the merits of the panel's decision. There is no complaint, for instance, that the panel did not consider Dr Sweeney's report but rather it is asserted that it was obliged to accept her recommendation.

[31] This misunderstands the nature of expert opinion evidence presented to specialist decision makers. Such bodies ought to take into account all relevant evidence presented to them but they are under no obligation to slavishly follow the views, recommendations or opinions of an expert, no matter how strongly they are couched. The reason that the legislature directs that such tribunals are made up of persons with expertise in the field is to ensure that decisions are made in light of all the facts and circumstances and which respect the legal test to be applied. If it were otherwise then there would be no need for any exercise of judgment on the part of the panel.

[32] Furthermore, and in any event, there is a marked difference in language between Dr Sweeney's views on CS and in relation to other schools. The panel, in the exercise of its judgement, accepted her evidence in relation to the attendance of BK at CS. The affidavit of Ms Anne Marshall, the chair of the panel, states that they fully considered the report of Dr Sweeney alongside the evidence of BK's parents. On the issue of schools other than CS, she says:

> "The Panel noted that this was couched in different language from Dr Sweeney's firm conclusion that [BK's] mental health would suffer a detrimental effect if he attended the same school as the perpetrator. The Panel did not reach a firm view on whether or not schools at which other children from [AS] attended would be suitable alternatives as Dr Sweeney did not state a firm conclusion on this point. The Panel was not required to make such a finding in light of its conclusion that there were also other suitable alternatives which did not have pupils from [BK's] former class, such as FS." [para 28]

[33] The claim that the panel failed to take the report of Dr Sweeney into account as a material consideration is flatly contradicted by the panel decision itself and by the evidence of Ms Marshall. The panel's role is to apply the statutory tests, not to form some broad view as to best educational establishment for BK. Having considered the evidence of the parents, and the report of Dr Sweeney, the panel concluded that DS was not the only school which BK could attend. It did so on the basis that there were alternative schools both with and without pupils from AS. This is a decision with which BK's parents vehemently disagree but it is no function of this court to conduct a merits-based review of that decision, which was arrived at having taken all the relevant material into account.

[34] The panel's decision also makes it clear that it considered the evidence of the parents in relation to the existence of a support network of friends at DS. It states:

> "There was reference made to the child having friends from the second primary school who attend the specified

> school but there was no supporting evidence that the child particularly required a supportive network."

[35] The panel's reference to a lack of supporting evidence is correct. The report of Dr Sweeney, for instance, makes no reference to the need for, or the existence of, such a network. Indeed, it specifically states that BK was looking forward to making new friends.

[36] The issue of travel time and the impact of BK attending FS was also taken into account. Having weighed this up, it arrived at the decision that these impediments did not require BK to attend DS and no other school. This was an evidence based analysis, arrived at by a specialist tribunal exercising its expertise in the field.

[37] There is simply no basis to contend that the panel's decision was infected by procedural unfairness and this ground is unarguable.

***(ii) Illegality***

[38] The applicant contends that the panel erred in law by misinterpreting the legislative scheme in requiring the applicant to prove why he could not attend other schools. It is said that the focus of the decision maker ought to have been on the specified school.

[39] In light of my decision in *Re SONI Limited* [2022] NIQB 21, the applicant contends that a different standard of review applies, namely that of correctness rather than the light touch irrationality approach to the merits of the decision.

[40] The applicant argues that the panel fell into error by effectively adding the words "and no other school" to Article 16A(2) of the 1997 Order.

[41] However, Regulation 2 of the 2010 Regulations defines "exceptional circumstances" as those relating "to admission to a specified school only." When one considers the legislative purpose behind the scheme, it is to meet a need which has been created by exceptional circumstances. If that need can be met elsewhere, then there is no requirement for the admission of a pupil to a specified school. It for this reason that the consideration of the availability and suitability of other schools is central to the reasoning of the decision maker. It is not possible to apply the statutory test by considering one school in isolation. The use of the word "only" in Regulation 2 must be interpreted as meaning solely, exclusively or "and no other school".

[42] The approach of the panel therefore accords with the statutory regime. Having identified that the circumstances were exceptional and personal to the applicant, the panel was duty bound to assess whether those circumstances require the child's admission to the school specified, and only that school. This question can only logically be answered by considering the other available schools.

[43] In carrying out this exercise, a list of schools with places within a 15 mile radius of the family home was provided. The panel's analysis was that:

(i) School CS was not a possible alternative to DS in light of Dr Sweeney's evidence;

(ii) School ES could have presented a suitable alternative given that the perpetrator was not in attendance there, albeit other pupils from AS would be;

(iii) In any event, school FS presented a suitable alterative without any pupils from AS in attendance.

[44] The fact that the panel had a list of other schools further away from the family home than FS did not play any material role in the decision making process since once FS was identified, the inquiry of the panel was at an end.

***(iii) Irrationality***

[45] As I have already outlined, the role of a supervisory court when considering the decisions of specialist tribunals is a light touch one, limited to cases of irrationality or clear error. For the reasons set out above, I find that the panel in this case approached the questions in an unimpeachable manner. Its determination could not be said to defy logic or be so unreasonable that no reasonable panel could have reached it. All material considerations were taken into account. The applicant's case does not begin to reach this high hurdle and these grounds are unarguable

***(iv) The ECHR Grounds***

[46] Article 2 of the First Protocol of the ECHR provides that no one shall be denied a right to an education. In the leading case, *Ali v Lord Grey School* [2006] 2 AC 363, Lord Bingham said:

> "There is no Convention guarantee of education at or by a particular institution."

[47] There is nothing on the evidence in this case which justifies an argument that BK has been denied the right to education, within the ECHR meaning.

[48] Similarly, there is no basis to contend that the applicant's article 8 rights have been breached. The ECB acted at all times within the statutory framework governing its operation and, as a result of the application of a statutory test, BK has been denied a place at DS. Such decision was in accordance with law. Attendance at FS would doubtlessly entail a commute from the family home but this is not unusual

and can result in an effect on extra-curricular activities. This does not mean that article 8 rights have been breached.

[49] The ECHR grounds are also unarguable.

***Conclusion***

[50] The court has every sympathy with the position which BK and his family find themselves. The impact of the traumatic events at primary school has been exacerbated by a transfer system which was driven by the pandemic. As a result, BK's parents have been left in an invidious position. However, the legislature has created a limited scheme to address the issue of exceptional circumstances and has ascribed responsibility for the implementation of this scheme to a specialist body. As such, this court exercises a supervisory jurisdiction which requires it only to intervene in the case of some error of law, unfairness or irrational decision. None of this was present in the instant case.

[51] For the reasons outlined, I have determined that none of the applicant's grounds for judicial review are arguable and the application for leave is therefore dismissed.

[52] I will hear the parties on the question of costs.