

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

NK's Application [2009] NIQB 78

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

NK (Education Tribunal)

WEATHERUP J

[1] This is an application for leave to apply for Judicial Review of two decisions in relation to the transfer of a pupil to secondary education. First there is the decision of the Board of Governors of a Grammar School, pursuant to a special circumstances application, not to alter a C1 grade awarded to the pupil in the transfer test. Secondly there is the decision of the Independent Education Appeals Tribunal established by the Education and Library Board which affirmed the decision of the Governors. As a result of the pupil not being regraded she was unable to secure a place at the Grammar School. The matter came on for leave on 10 August 2009. By reason of the urgency of the matter, arising from the commencement of the school year in September, the application was adjourned for the filing of an affidavit by the Chairman of the Tribunal so as to facilitate a "rolled-up" hearing on 14 August 2009. Ms O'Brien appeared for the applicant and Mr McLaughlin for the proposed respondents.

[2] Special circumstances applications permit a pupil to secure a regrading because of particular difficulties that were confronted by the pupil when he or she undertook the transfer test. If it is established that those circumstances warrant an improved grade, to reflect the grade that the pupil might otherwise have achieved in the transfer tests, the Grammar School will apply its admissions criteria to that regraded pupil so as to determine whether or not the pupil will secure a place.

[3] A special circumstances application requires information to be furnished by the parents to the Grammar School in relation to the special circumstances. The application also requires educational evidence to be furnished by the primary school that the pupil attended so that the Grammar School might assess the pupil's performance throughout the year compared with other pupils sitting the transfer test. The guidance makes clear that it is the responsibility of the parents to ensure that all information be provided to the Grammar School, including the educational information.

[4] In the present case the primary school provided limited information to the Grammar School for reasons which the Principal of the primary school thought at the time to be in the pupil's best interests. That limited information did not contain all the comparable marks of the other pupils undertaking the tests in the current year, as might otherwise have been expected. While it is the responsibility of the parents to ensure that the information required to advance the special circumstances application is made available to the Grammar School, the guidance does not specify how the parents are to perform that duty when the obligation relates to the production of information in the possession of the primary school.

[5] In the event, on the basis of the limited information available, the Governors did not regrade the pupil. An appeal was then made to the Tribunal and at that stage the primary school provided further information which comprised the comparative information with other pupils that might have been provided to the Governors.

[6] However, the Tribunal did not assess the comparative information when determining whether there should be a regrade of the pupil. The Tribunal limited itself to the information that had been before the Governors. This approach accorded with that of such Tribunals generally, in that they undertake a review of a Governors decision on the basis of the information before the Governors. The Tribunal upheld the Governors' decision on the special circumstances application.

[7] In essence the applicant's challenge is directed to two matters. First of all the challenge is to the assessments that were made by the Governors and by the Tribunal based on the limited information provided by the primary school to the Governors.

[8] The second challenge is concerned with the failure of the Tribunal to assess the application for an upgrading of the C1 grade on the basis of the comparative information that was then available to the Tribunal.

[9] In relation to the first matter, namely the assessment made on the limited information made available by the primary school, I cannot fault the

Governors or the Tribunal. There was medical information that supported the adverse effect of the special circumstances on the pupil's performance in the transfer tests but with the limited educational information provided by the primary school the resulting refusal to regrade was a decision that I consider the Governors and Tribunal were entitled to reach.

[10] The second matter concerns the failure of the Tribunal to assess the comparative information provided by the primary school. Now it is clearly established that these Tribunals are review tribunals in that they are judging whether the Governors have applied correctly the schools admissions criteria. They are not considering the appeal afresh. The consideration of the criteria includes the reassessment of the grade awarded to the pupil, so that in this case the Governors and the Tribunal had the initial task of determining whether the C1 grade should be adjusted to take account of the special circumstances and thereafter determining the effect of any regrade.

[11] A number of cases in the past have demonstrated that primary schools may not provide to Governors all the comparative educational information they might usefully provide to enable the Governors to make these assessments. In KD's Application [2005] NICA 51 Girvan J at first instance recognised this problem and sought to introduce a requirement that, when limited information was provided by the primary school, notice would be given to the parents by the Governors. The Court of Appeal did not endorse that approach.

[12] In general when the necessary information from the primary school is not available to the Governors in making these assessments but that information becomes available to the Tribunals on appeal it seems to me that there is the risk of grave unfairness to the pupils if the information then available is disregarded.

[13] The Education (Northern Ireland) Order 1997, Article 15, provides for an appeal to the Tribunal and the basis of the appeal is only that the admissions criteria were not applied or were not applied correctly by the Governors. In the case of special circumstances that includes the assessment of the comparable pupils for the purposes of determining whether the pupil should be regraded. If the relevant information required from the primary school is not provided to the Governors to enable them to make a proper assessment by reference to the comparators in the primary school then, inadvertently, the criteria are not being correctly applied. The criteria proceed on the basis that there will be a reassessment of the pupil's grade by reference to the special circumstances and by reference to the comparisons to be made with the other pupils from the primary school and if the relevant information has not been provided by the primary school to allow that exercise to be completed then the criteria are not being correctly applied. In the present case the absence of the relevant comparative educational

information was not before the Governors because the Principal of the primary school was seeking to assist the pupil and provided information which the primary school thought was appropriate when that was not the case.

[14] In a special circumstances application, the information that is in the possession of the parents or which is to be provided by or through the parents to the Governors is a matter for the parents to organise. I am concerned here with information that is to be provided to the Governors by the primary school, information to which the parents do not have direct access and over which they do not have control. The only means by which they can secure this information for the Governors is to request the primary school to provide it. When the parents make such a request and limited information is provided by the primary school to the Governors it can not be the fault of the parents. At the hearing before the Governors, where the necessary information from the primary school has not been provided, it should become apparent to the parents that that is the case. An appeal by the parents against an unsuccessful application to the Governors provides the parents with the opportunity to make a further request to the primary school to provide the necessary information to the Tribunal. If certain conditions are satisfied fairness demands that the Tribunal should not disregard the relevant information provided to the Tribunal on appeal, even though the primary school did not provide that information to the Governors. The conditions are, first, that the information in question is in the possession of the primary school and not the parents. Secondly, that the Governors carrying out the assessment exercise have found that the information from the primary school is insufficient for the proper completion of the regarding assessment. Thirdly, that the primary school has provided further information to the Tribunal on appeal. Fairness requires that the Tribunal should take that information into account in assessing the pupil's grade. This exercise is a task that the Tribunal would be undertaking in some cases in any event because, had the information been available to the Governors and not led to a regrading by the Governors, the Tribunal would be making the same assessment on an appeal.

[15] I propose to treat this application as a rolled up hearing and remit the decision to the Tribunal to reassess the grade of the pupil in the light of the comparative information furnished to the Tribunal by the primary school.