Neutral Citation No: [2023] NIKB 48 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SCO12135** *ICOS No:* **19/061108/01** *Delivered:* **19/04/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY 'RG' (A MINOR) FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF EDUCATION

_____

RULING ON COSTS

_____

SCOFFIELD J

Introduction

[1] Happily, the parties have resolved all of the issues in these proceedings. The case concerned a school placement for the applicant, with which he has been provided. A more general point also arose, which the applicant suggests was of public importance, and this has also been dealt with to the satisfaction of all parties. The applicant therefore asks the court to strike out the proceedings as now being academic. However, he also seeks an order that the second respondent, the Department for Education, pays his costs of this judicial review. He does not seek any costs order against the first proposed respondent (now described by the applicant as a notice party), School B. He is a legally assisted person and also therefore asks the court to make an order for taxation of his costs for legal aid purposes.

[2] The parties have agreed that the issue of costs may be dealt with by way of written submissions only and I am grateful to Ms Askin for the applicant and Mr McAteer for the proposed respondent for their helpful written submissions.

Factual background

[3] The proceedings were lodged in late June 2019. At the time of the application, the applicant (referred to as "RG" in these proceedings) was 13 years of age. He should have started Year 9 of school in September 2019 but had not been attending school since June 2018. He had therefore been out of school for an entire academic year. The applicant had applied to attend School A, to start in Year 9. He was refused admission and complained to the Department, which dismissed his complaint.

[4] The applicant also then applied to School B for admission. He was refused admission and again complained to the Department. The Department initially dismissed his complaint; but later upheld his complaint although it declined to *direct* School B to admit the applicant, instead *requesting* it to do so. School B again refused to admit the applicant, indicating that it had, by that date, exceeded its numbers for his year group (although at the time of its first decision, there would have been a place for the applicant.)

[5] The applicant challenged (i) the first decision of School B to refuse to admit the applicant, made in January 2019; (ii) the decisions of the Department to refuse to direct School B to admit the applicant, made in March and June 2019; (iii) the decision of the Department to refuse to direct School A to admit the applicant, made in December 2018; and (iv) the second decision of School B to refuse to admit the applicant, made in April 2019.

[6] A pre-action letter was sent to School A; but no proceedings had been issued against it by the time the applicant was later offered a place there. Accordingly, there were no proceedings against School A at any time.

[7] The matter was reviewed by the then Senior Judicial Review Judge, McCloskey J, in June 2019 and directions were given which included listing an urgent hearing in August 2019. Leave was not granted but a 'rolled-up' hearing was planned. The judge encouraged engagement between the parties, and at the beginning of July 2019, the applicant was offered a place at School A to start in September 2019.

[8] As a result of these developments, the proceedings became academic between the parties. However, an issue then arose as to whether there was a good reason in the public interest for the application to be heard and determined in any event. Directions were agreed for the parties to provide written submissions on this issue and for the matter to be determined at a hearing in October 2019.

[9] The applicant submitted that the proceedings *should* continue as there was a point of general public interest, namely whether schools and the Department were complying with Article 13(4) of the Education (Northern Ireland) Order 1997 ("the

1997 Order"). Article 13 of the 1997 Order is headed 'Admission to primary or secondary school' and, insofar as material, provides as follows:

> "(4) Where an application to which this paragraph applies is made, the Board of Governors shall –
>
> (a) if, at any time the application is considered, there are vacant places at the school –
>
> (i) admit the child to the school, if the total number of such applications falling to be considered at that time does not exceed the number of vacant places;
>
> (ii) in any other case, apply the criteria drawn up under Article 16(1) to select for admission to the school the number of children equal to the number of vacant places and admit, or refuse to admit, the child to the school accordingly;
>
> (b) if, at that time there are no vacant places at the school, refuse to admit the child to the school.
>
> (5) The Board of Governors may refuse to admit a child to the school in the circumstances mentioned in paragraph (4)(a)(i) or (ii) where it is of the opinion that the admission of the child to the school would prejudice the efficient use of resources."
>
> [underlined emphasis added]

[10] The point of wider public interest was considered to arise because two schools had refused the applicant a place at a time when they had available spaces for reasons (it was contended) *other than* the efficient use of resources. School A recorded in a letter to the applicant's father in October 2018 that the reason for refusal of admission was the applicant's previous behaviour at the school. School B had refused to provide the applicant with a place because of behavioural concerns and because a school 0.9 miles closer to his home would be more accessible. In refusing the applicant a place, neither school referred to prejudice to the efficient use of resources as the reason for their refusal.

[11] By virtue of Article 13, it was argued that the schools could only refuse the applicant a place (where they had a place available) if his admission would prejudice the efficient use of resources. In spite of this, the Department initially dismissed the complaints to it about both schools. It later changed its mind about the complaint against School B but, by that stage, School B no longer had a space available for the applicant. The Department further declined to *direct* either school to admit the applicant using its statutory powers of direction. This gave rise to the question of whether schools generally appreciated their legal obligations and were complying with Article 13 of the 1997 Order; and the question of whether the Department was acquiescing in non-compliance with the provision.

[12] In an attempt to resolve the proceedings, confirmation was therefore sought from the Department as to its interpretation of the statutory provisions referred to above and, further, that it would reinforce the correct interpretation of Article 13 with schools.

[13] The Legal Services Agency then suspended the applicant's legal aid certificate. As a result, the hearing scheduled for October 2019 was adjourned so that the applicant could apply to have his certificate reinstated. The parties also indicated to the court that they would attempt to resolve the wider issue of interpretation of schools' legal obligations by agreement.

[14] The applicant's legal aid certificate was reinstated and further discussions between the parties continued. In May 2021, the applicant's representatives sent a proposal to the Department setting out their interpretation of the legal position and asking the Department to confirm agreement with this and to further confirm that it would correspond with schools to underline their legal obligations as to admissions. The Department responded to indicate that it was content to do so; but that it would raise the issue with schools in September 2021 in order to also address forthcoming changes to the school admissions complaints process. Some time later the Department confirmed that it had in fact written to schools, as it had agreed to, in October 2021. The Departmental letter contains the following advice – with which the applicant agrees – as to the legal effect of Article 13(4) of the 1997 Order:

> "Where a school receives an application [for admission] and it is below its approved enrolment number the child should be admitted unless it can be clearly shown that to admit the child would 'prejudice the efficient use of resources.' Such decisions should only be made in exceptional cases and the general presumption should always be that where places remain within a school's approved enrolment number, the child should be admitted."

[15] The applicant submits that, had School A and School B applied the above approach, then each school would have admitted him. He further submits that if, in

determining the complaint against each of these schools, the Department had considered whether the school applied the above approach, then it would have decided that it had not and would have upheld the complaint.

[16] Discussions then took place between the parties in relation to the costs of the proceedings. In September 2022, the Department indicated that it was not willing to pay the applicant's costs.

Summary of legal principles

[17] There is no significant dispute in relation to the relevant legal principles in relation to the award of costs in proceedings such as these. I recently considered these principles – although in the context of a contested application for judicial review – in *Re Glass's Application (Costs Ruling)* [2023] NIKB 22. As I observed there, McCloskey J had also considered these issues and provided a helpful commentary on the legal principles applicable in *Re YPK and Others' Application* [2018] NIQB 1. The overarching principles are that costs lie in the discretion of the court; and that, where the court makes an order as to costs, the unsuccessful party should normally pay the costs of the successful party.

[18] Specific guidance was provided in the case of *Boxall and another v London Borough of Waltham Forest* [2000] All ER (D) 2445; (2001) 44 CCLR 258 in relation to the situation which has arisen in this case, namely where judicial review proceedings have been resolved without a full hearing but where the parties have not agreed a position on costs. In *Boxall*, Scott Baker J set out guiding principles where a case has been resolved or compromised, at para [22] of his judgment, in the following terms:

> "(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
>
> (ii) It will ordinarily be irrelevant that the claimant is legally aided.
>
> (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.
>
> (iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the

circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

(v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.

(vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

[19] I am conscious that the *Boxall* principles set out above have been superseded in some respects in further decisions of the superior courts of England & Wales. For example, in *R (Tesfay and Others) v Secretary of State for the Home Department* [2016] EWCA Civ 415, Lloyd Jones LJ described some further developments which post-dated the decision in *Boxall*. The *Boxall* principles had been considered in the final report of the Jackson Review of Civil Litigation Costs in England & Wales. That review considered that the *Boxall* approach made "eminently good sense" at the time the case was decided but was in need of modification in light of the pre-action protocol which had been introduced for judicial review claims. It recommended that if the defendant settles a judicial review claim after issue by conceding any material part of the relief sought and the claimant had complied with the protocol, the normal order should be that the defendant pays the claimant's costs. Assuming the issues were fairly set out in the pre-action protocol correspondence, such an approach would tip the balance in favour of an applicant where they were nonetheless required to issue proceedings and the respondent climbed down at that point.

[20] Then in *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895 the English Court of Appeal had returned to this territory. In that case, the defendant Secretary of State granted the claimants what they had sought for what was said to be "purely pragmatic reasons." Pill LJ gave the judgment of the court. Amongst other things, he emphasised (at para [61]) that the fact that one of the parties is publicly funded is not a good reason to decline to make an order for costs. He had serious misgivings about the defendant's claim to avoid costs because the claim had been settled for pragmatic reasons only. Where such a claim is made, the explanation should be closely analysed in order to ascertain whether it is being used as a device for avoiding an order for costs which ought to be made. At paras [64]-[65], Pill LJ said this:

> "In addition to those general statements, what needs to be underlined is the starting point in the CPR that a successful claimant is entitled to his costs and the now recognised importance of complying with Pre-Action Protocols. These are intended to prevent litigation and facilitate and encourage parties to settle proceedings,

> including judicial review proceedings, if at all possible. That should be the stage at which the concessions contemplated in *Boxall* principle (vi) are normally made. It would be a distortion of the procedure for awarding costs if a defendant who has not complied with a Pre-Action Protocol can invoke *Boxall* principle (vi) in his favour when making a concession which should have been made at an earlier stage. If concessions are due, public authorities should not require the incentive contemplated by principle (vi) to make them.
>
> When relief is granted, the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party and that the burden is likely to be a heavy one if the claimant has, and the defendant has not, complied with the Pre-Action Protocol. I regard that approach as consistent with the recommendation in para. 4.13 of the Jackson Report."

[21] As Lloyd Jones LJ later commented in *Tesfay*, Pill LJ in *Bahta* declined to "tack on words to the *Boxall* guidelines" (at [66]) and warned against too readily adopting a default position. He considered that the circumstances of each case required analysis if injustice was to be avoided.

[22] In *M v Croydon London Borough Council* [2012] EWCA Civ 595 it was held that the judge had been wrong to make no order as to costs in a case where a local authority had conceded a claim made by an asylum seeker in relation to his age but were not prepared to agree to pay his costs of proceedings. Lord Neuberger MR, in his judgment with which Hallett LJ and Stanley Burnton LJ agreed, departed from *Boxall* in his analysis (at paras [58]-[59]). He concluded that the position should be no different for judicial review litigation from what it is in general civil litigation. He observed that, in that connection, at any rate at first sight, there may appear to be a degree of tension between the general rule that costs follow the event and the fifth guideline in *Boxall* in a case where a judicial review claim has been settled by a concession from the defendant. On closer analysis, however, he considered that there was no inconsistency for the following reason:

> "Where, as happened in *Bahta*, a claimant obtains all the relief which he seeks, whether by consent or after a contested hearing, he is undoubtedly the successful party, who is entitled to all his costs, unless there is a good reason to the contrary. However, where the claimant obtains only some of the relief which he is seeking (either by consent or after a contested trial), as in *Boxall* and *Scott*, the position on costs is obviously more nuanced. Thus, as

> in those two cases, there may be an argument as to which party was more 'successful' (in the light of the relief which was sought and not obtained), or, even if the claimant is accepted to be the successful party, there may be an argument as to whether the importance of the issue, or costs relating to the issue, on which he failed."

[23] In the *M v Croydon LBC* case, the court repeated the orthodoxy that in every case the allocation of costs will depend on the specific facts. Nonetheless, Lord Neuberger identified a "sharp difference" between three distinct situations. First, where a claimant has been wholly successful: it is then hard to see why he should not recover all his costs, unless there is some good reason to the contrary. Second, where he has only partially succeeded: the court would then normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim and by how much the costs were increased as a result of pursuing the unsuccessful claim. (It was this type of analysis which was significant in the *Glass* ruling referred to above). Third, there may be a case where there has been some compromise which did not actually reflect the claimant's claims: in such a case the court is often unable to gauge whether there is a successful party in any respect and there is an even more powerful argument that the default position should be no order for costs. However, in some such cases it might be sensible to look at the underlying claims and ask whether it was tolerably clear who would have won if the matter had not settled.

[24] This analysis caused Sir Stanley Burnton in *Emezie v Secretary of State for the Home Department* [2013] EWCA Civ 733 to conclude that the test in *Boxall* was no longer applicable and had been superseded by *M v Croydon LBC*. Rather, the current starting point was whether the claimant had achieved what he sought in his claim. In *R (TH) v East Sussex CC* [2013] EWCA Civ 1027 the English Court of Appeal emphasised that the first principle stated by Lord Neuberger MR in *M v Croydon* LBC is not absolute and should not apply where there is a good reason to the contrary. Jackson LJ also remarked that there is a high duty on both parties to public law litigation to take advantage of any reasonable and sensible opportunity for settlement which presents itself.

[25] McCloskey J cited *M v London Borough of Croydon* with approval at para [18] of his decision in *YPK*. The *Boxall* principles continue to be applied in this jurisdiction (see, for instance, *Re JR186's Application* [2022] NIQB 20, at para [28], *per* Colton J); but the courts here also take into account the modifications or adjustment to the *Boxall* principles which are appropriate in light of the additional judicial consideration discussed above (see, for instance, *Re Coleman's Application* [2022] NIQB 25, at para [12], again *per* Colton J; and *Re JR115 and JR116's Application* [2021] NIQB 105, at paras [16]-[19], *per* Sir Declan Morgan).

The parties' respective positions

[26] The applicant submits that it is clear that he would have succeeded against the Department had the case been required to proceed and that, therefore, the appropriate order is that the proceedings be struck out as now being academic but that the Department pay his costs. He further contends that, if the Department had dealt properly with his complaints to it under Article 101 of the Education and Libraries (Northern Ireland) Order 1986 ("the 1986 Order") and directed either School A or School B to admit him, then these proceedings would have been unnecessary. The applicant has achieved the remedies he sought, both in relation to a school placement *and* in relation to guidance being sent to schools in relation to the proper interpretation and application of Article 13 of the 1997 Order. The applicant benefits from legal aid and, therefore, although (in conformity with the guiding principles set out above) this is generally irrelevant to the court's consideration of where costs should fall, the applicant's representatives are bound to seek costs where there is a proper basis for doing so in order to comply with their obligation to safeguard the legal aid fund.

[27] The respondent emphasises that the challenge was to its decision not to direct School A or School B to admit the applicant. It denies that it endorsed the approach of either school. Instead, as set out in its pre-action response, the Department, having reviewed its decision regarding School B, decided that the complaint should be upheld and wrote to School B asking it to admit the applicant. The problem (the respondent submits) is that, by the time this occurred, the school's year group into which the applicant should have been admitted no longer had a spare place. The Department therefore advised the school to place the applicant on the waiting list. It was at this point that the proceedings were commenced.

[28] The focus of the proceedings was on the approach of School B and the Department's decisions regarding School B. However, independently, School A accepted the applicant and offered him a place within days of the proceedings having been issued. It was this development, the respondent submits, which made the proceedings academic; but this occurred independently of both the Department's actions and the initiation of the proceedings. The applicant then amended his Order 53 statement in order to contend that the matter should proceed on the basis of it raising a point of law of general public importance. The respondent resisted that; but the hearing to determine the issue was vacated at the applicant's request and (the respondent submits) the issue was then not pursued by the applicant.

[29] The respondent stands over its decision-making as set in its pre-action response and says that it has not changed its position at any time in relation to the proper application of its functions under Article 101 of the 1986 Order. It contends that there was no negotiated resolution on the facts of this case or in relation to Article 101 generally; and that the applicant's analysis of how the wider point was resolved is strained, merely in order to support his costs application. The

Department's approach to Article 13 of the 1997 Order remained as it always had been.

Consideration and conclusion

[30] Properly analysed, this is a case where the applicant has been partially successful. Moreover, the partial success has arisen through a range of factors and principally by virtue of an independent decision by School A to admit the applicant, even though it (School A) was not the subject of challenge in the proceedings. The Department has not directed any school to admit the applicant under Article 101 of the 1986 Order, nor was it required to do so. On the question of the meaning and effect of Article 13 of the 1997 Order, in truth there appears to have been little if any dispute between the parties as to how it was to be interpreted. The Department was content to reiterate its previous advice to schools about this. I add parenthetically that the brief discussion of the issue in this ruling may also assist in promulgating the correct legal position when that provision is to be applied. Put simply, the change in position which rendered the applicant's case academic did not result from a significant change in position or climb-down on the part of the respondent.

[31] In these circumstances, it seems to me that this case is most closely embraced by the guidance in para [62] of the *M v Croydon LBC* case where "there is often much to be said for concluding that there is no order for costs." Alternatively – since the applicant's admission to school was not by the means pursued in the proceedings (a Departmental direction to School B) – this may be a case where the guidance in para [63] of that case is engaged and "there is an even more powerful argument that the default position should be no order for costs." I do not consider this case to be one where it is appropriate to look at the underlying claims and enquire whether it was tolerably clear who would have won if the matter had not settled. There was little if any dispute on the proper approach to Article 13 of the 1997 Order; but the question of whether it was unlawful for the Department not to have exercised its discretion under Article 101 to direct School B to admit the applicant at a time when it had an available place is less clear-cut. As a matter of good administration, there may be much to be said for the Department making a simple request of school authorities before moving to use its statutory power of direction. The question of what relief would or should have been granted had the case proceeded, at a time when School B no longer had an available place for the applicant, is also not necessarily straightforward.

[32] In these circumstances, I consider the appropriate order to be that there is no order for costs between the parties. I will, however, of course make an order that the applicant's costs be taxed as a legally assisted person.