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*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)

**IN THE MATTER OF AN APPLICATION BY RS FOR
FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION BY A SCHOOL AND THE
INDEPENDENT ADMISSIONS APPEAL TRIBUNAL**

KEEGAN J

Introduction

[1] This is an application for judicial review dated 7 September 2017. Leave was granted on 25 September 2017. The challenge relates to decisions of a school and the Independent Admissions Appeal Tribunal ("The Tribunal") not to admit a child to the school to commence post primary education. I have anonymised this case at the request of all parties given that it involves a child.

[2] Mr Ward BL appeared on behalf of the applicant who is the mother of the student. Mr Sayers BL appeared on behalf of the first respondent, the school. Ms Kiley BL appeared on behalf of the second respondent, the Tribunal. I am grateful to all counsel for their focussed submissions.

[3] The first decision under challenge is dated 20 March 2017 and it is the decision of the school not to admit the child. This decision was appealed and an appeal was heard by the Tribunal on 16 August 2017 and a decision issued dated 18 August 2017. The appeal was dismissed and the reasons were received on 19 August 2017.

Background

[4] This is set out in the affidavit of RS and I summarise the salient details as follows:

- (i) The applicant's daughter is 11 years old. She has just completed her primary education at a local school and she hoped to progress to the school which is the first respondent in these proceedings. The school is a voluntary non-denominational grammar school.
- (ii) The applicant's daughter sat the relevant entrance assessment for admission to post primary schools known as the GL Assessment as provided by the Post Primary Transfer Consortium on 19 November 2016.
- (iii) The applicant avers that it had always been a dream of the child to attend the school in question and in the two years leading up to the transfer test she would have spoken about the school regularly. The applicant states that this resulted in the child placing a huge amount of pressure on herself to secure the grades that she required to gain admission to the school.
- (iv) At paragraph 7 of her affidavit the applicant states as follows:

"On the morning of the transfer test the child suffered significant stress and anxiety which severely inhibited her performance in the examination. When the results came out it was very clear to everyone who knows the child that she had performed well below what was expected of her. She received a combined standardised age score of 225, comprised of 116 in English and 109 in maths. This equated to an overall grade of B2."
- (v) In her affidavit the applicant also states that despite the child's obvious under-performance the family remained hopeful that she would secure a place at the school of her choice and on 7 February 2017 the applicant submitted the necessary Education Authority transfer form and applied for the child to be admitted to that school as her first preference.
- (vi) At the same time the applicant made an application (erroneously marked 2016) for special circumstances using the prescribed SE1 Form.
- (vii) The Admissions Sub-Committee of the Board of Governors of the school in question met on 20 March 2017. When considering the application the Board of Governors declined to accept the claim for special circumstances because the claim had not been registered before the required date namely 16 December 2016 and no reason had been given for the failure to register by that date. These facts are not contested by the applicant.

- (viii) As a result of this the child's score remained at 225 which was not sufficient for her to gain entry to the school. The school had an allocation of 100 places and the final cut-off score for admission to the school was 227.
- (ix) The applicant submitted an appeal to the Tribunal. The appeal was made on the sole ground that the school had not applied its admission criteria properly.
- (x) The appeal hearing was convened on 16 August 2017. The applicant was provided with papers in advance. The applicant was represented by counsel and submissions were made to the Tribunal.
- (xi) On 19 August 2017 the applicant received a written decision from the Tribunal dismissing the appeal. That appeal letter states that:

"The Panel agreed that the school should not have rejected the child's claim simply because no reason had been given for not registering the claim in December 2016. However, on a correct application of the special circumstances criteria, the claim would have been rejected as there was insufficient medical, social or other evidence provided to warrant acceptance under special circumstances. The Tribunal found that while the criteria had not been applied correctly, on a correct application of the criteria the child would not have gained a place in the school. The appeal was dismissed."

- (xii) In support of the application for special circumstances the applicant filed a statement which set out the position of the parents and included the following view:

"It has been such a shock not only to the child, us as her parents, but also to her Year 7 teachers and tutor. We feel that this is in no way an accurate reflection of the child's true ability. We know that the child is a very academic child but by being so desperate to succeed on that day the nerves and pressure really inhibited her performance. That same Saturday evening after sitting the test we knew that something was wrong, because the child was very emotional, that she had realised that it had all gone wrong. She even told us that during the test she was going back over her questions doubting herself, changing answers and just could not cope with the pressure. Her worst fears were realised when we received her results."

- (xiii) In addition the applicant submitted a letter from the child's primary school dated 8 February 2017. This is signed by two Year 7 teachers and it includes relevant educational information as follows:

“In our roles as Year 7 teachers, we are writing to you to state that in our professional opinion, the above-named pupil under-performed during the Post Primary Transfer Consortium entrance examination 2017.”

The letter goes on to refer to the academic progress of the child and in particular her ability as indicated by the standardised scores in maths and literacy. It provides an opinion that “the child is a well-motivated pupil, her work is superb, she is a talented musician and she excelled at sports”. The letter states that in the November internal school assessments the child was placed 5th overall out of 54 pupils in the year group (2nd in literacy; 12th in maths).

The nature of the challenge

[5] The Order 53 Statement claims certiorari, mandamus and declaratory relief. At paragraph 4 the grounds on which the said relief are sought are set out as follows:

- (a) The first respondent has not applied its admission criteria properly. In particular, the school has fundamentally misdirected itself with regards to the procedure governing the registration and submission of claims for special circumstances.
- (b) The first respondent has applied its admissions criteria unfairly and inconsistently in relation to special circumstances claims that were not registered at the relevant assessment centre on or before 16 December 2016.
- (c) The second respondent has erred by concluding that the child would not have gained admission to the school on a correct application of the admissions criteria. In particular the Tribunal has failed to have any or adequate regard to paragraph 4 of the criteria which makes it clear that the judgment of the importance of special circumstances will be at the absolute discretion of the Admissions Sub-Committee of the Board of Governors.
- (d) The second respondent has failed to have any or adequate regard to the SC1 form and supporting educational evidence which clearly amount to sufficient social or other medical evidence to fall within the scope of the special circumstances procedure provided for within the school's admission criteria.
- (e) The decision not to admit the child to the school is Wednesbury unreasonable in all of the circumstances.

[6] During the course of the hearing the issues set out in grounds 5(a) and (b) were not pursued. This was on the basis that that challenge had now been surpassed giving the ruling of the Tribunal that the time point should not have been an absolute bar in this case. During the course of the hearing Mr Ward also conceded that any relief against the school was redundant in any event given that the school term had started and that their allocation of 100 pupils had been filled. So, the case centred on a challenge against the second respondent. This related to the decision reached under the legislative framework that notwithstanding the fact that the Tribunal felt that the Board of Governors should not have ruled out the claim on the basis of a late submission, that the application was nonetheless not in satisfaction of the criteria and that the appeal should be dismissed. It is apparent from this that the case centred on a fairly narrow point which I now turn to in the context of the relevant statutory structure and the criteria for special circumstances.

Legal Framework

[7] The Education (Northern Ireland) Order 1997 (hereinafter referred to as 'the Order') is the relevant statute. Article 13 states the requirements for admission to primary or secondary school. Article 15 refers to appeals against certain admission decisions under Articles 13 and 14. Article 16 refers to the obligation upon schools to compile criteria.

[8] This case focussed on the provisions of Article 15 as follows:

“15(4) An appeal under this Article may be brought only on the ground that the criteria drawn up under Article 16(1) by the Board of Governors of a school –

- (a) were not applied; or
 - (b) were not correctly applied, in deciding to refuse the child admission to the school.
- (5) On the hearing of an appeal under this Article –
- (a) if it appears to the appeal tribunal that the criteria were not applied, or were not correctly applied, in deciding to refuse the child admission to the school, the tribunal shall, subject to paragraph (6), allow the appeal and direct the Board of Governors of the school to admit the child to the school;
 - (b) in any other case, the tribunal shall dismiss the appeal.

(6) If, in the case mentioned in paragraph (5)(a), it appears to the tribunal that had the criteria been applied, or (as the case may be) been correctly applied, the child would have been refused admission to the school, the tribunal shall dismiss the appeal.

(7) It shall be the duty of the Board of Governors of a school to comply with any direction given under paragraph (5)(a)."

[9] The admissions criteria for September 2017 entry to the relevant school was provided to me. In relation to a claim for special circumstances it is stated that the claim should be submitted to the assessment centre where the pupil took his/her entrance assessments by 2pm on Friday 16 December 2016 using the SCR form contained in the special circumstances pack which is available from the school or from its website. A further paragraph follows:

"It is the responsibility of parents/guardians claiming special circumstances to ensure that all appropriate independent, verifiable, supporting documentary evidence to corroborate the claim for special circumstances, along with the completed claim for special circumstances form, SC1 form are attached to the pupils transfer form in February 2017 at the time when an application is being made to the school."

[10] The relevant part of the criteria at paragraph 4 refers to special circumstances as follows:

"Special circumstances refer to the claim that, as a result of medical or other problems, a pupil's performance in the GL entrance assessments was affected. Special circumstances must be supported by independent, verifiable, documentary evidence of a medical and/or other appropriate nature in keeping with the PPTCS access arrangements and special circumstances policy which is available on the school's website."

Further, it states as follows:

"Special circumstances allow for a post assessment adjustment to the combined standardised age score of a pupil who is eligible for consideration. Any adjustment to a standardised age score will be based on the school's special circumstances protocol according to the nature of the special circumstances applicable at the time of the

entrance assessments using the standardised age score attained on that day. A copy of the school's special circumstances protocol will be available, on request, to parents/guardians whose claims for special circumstances have been registered and accepted. Supporting documentary evidence such as medical or other professional reports concerning the special circumstances should show that medical or other problems directly influence the outcome of the GL entrance assessments and that the pupil's ability is genuinely higher than that indicated by the combined standardised age score.

Where a problem is a medical one of short-term duration which affected the pupil only at the time of the GL entrance assessments, the school will require evidence that the pupil was examined by a medical practitioner in relation to the illness, that the medical problem was as described, and that the pupil's health and wellbeing were impaired in or about the time of the GL entrance assessments. Where the problem is of a non-medical nature, the parents/guardians must set out the precise details of the problem and provide appropriate independent evidence such as a written statement from an appropriately qualified individual who knows and/or works with the pupil in a formal and professional context and is able to give independent confirmation of the nature of the problem, when it occurred and its impact on the pupil.

Supporting documentary evidence should also include details of the pupil's educational attainment with special reference to English and mathematics. This should include scores obtained in all standardised tests in English and mathematics taken by the pupil since the start of Key Stage 2. Such information should be provided on the claim for Special Circumstances Form SC1.

Please note that judgment of the importance of special circumstances will be at the absolute discretion of the Admissions Sub-Committee of the Board of Governors."

[11] In addition to the criteria I have seen the school's special circumstances protocol which sets out a series of questions in terms of how to deal with an assessment of this nature, namely:

- (i) Was the claim for special circumstances registered with the Assessment Centre on time? Yes - proceed to Stage 3. No - proceed to Stage 2.
- (ii) Does the reason provided as to why the claim for special circumstances was not registered with the Assessment Centre on time warrant acceptance that this case can be considered under Special Circumstances? The Admissions Sub-Committee will examine all evidence submitted. Yes - proceed to Stage 3. No - claim for special circumstances rejected.
- (iii) Does the medical, social or other evidence provided warrant acceptance that this case is valid for consideration under Special Circumstances? The Admissions Sub-Committee will examine all evidence submitted. Yes - proceed to Stage 4. No - claim for special circumstances rejected.
- (iv) Does the educational evidence provided suggest that the child would have achieved a higher mark score than that attained on the day of the test in either English or mathematics or both? The Admissions Sub-Committee will examine all evidence submitted. Yes - proceed to Stage 5. No - claim for special circumstances rejected.
- (v) If the above provisions are met the Admissions Sub-Committee will award a certain percentage of the add maximum mark from the confidence band according to the table below provided by GL assessment. The percentage of the add maximum mark will take into account the nature of the special circumstances claimed by each individual and is detailed in the document relating to the school Special Circumstances protocol. There follows a series of percentage guidelines in relation to the amount whereby scores can be adjusted which can be 100%, 80%, 60%, 40%, 20% or 0%.

[12] I was provided with a breakdown of all special circumstances considered by the school in 2017 in anonymised form. I was also referred to the minutes of the Admissions Sub-Committee of the Board of Governors at the school held on 20 March 2017. From this document, I glean the following. The Committee considered 15 applications requesting consideration under Special Circumstances. Nine candidates applying for special circumstances had submitted SCR forms before the closing date. In addition 6 candidates had not submitted before the closing date. The Committee reviewed each application, initially for medical, social or other evidence which would warrant acceptance as valid under the term Special Circumstances. If the claim was warranted then adjustment to the GL test was made, providing educational evidence suggesting that the child would have achieved a higher mark score than that attained on the day of the test in either English or mathematics. The outworking of this process was recorded in a spreadsheet. Once the adjustments were made, the applicant's mark was placed into chronological order and the first 100 places were accepted to the school. The 100th place had a score of 227 after special circumstances were applied.

[13] I also received a document which is a guidance document which I have looked at entitled 'Claiming Special Circumstances - A Guide for Parents and Guardians'. Article 16 B of the Education (Northern Ireland) Order 1997 as amended requires all grammar school to have regard to any relevant guidance handed down by the Department of Education with regards to school admissions.

[14] I have read the evidence filed by the school comprised in the affidavit dated 10 October 2017. There is an acceptance within that affidavit at paragraph 4 that the school should not have rejected the application due to it being out of time. The exhibits also demonstrate that one pupil appeared to be afforded an uplift on the basis of special circumstances where there was an issue raised about performance by an invigilator however there was no independent vouching documentation i.e. pupil 7.

[15] I have also read the evidence of the Tribunal comprised in the affidavit dated 6 October 2017. In particular this affidavit confirms that there was full argument by Counsel at the Tribunal hearing. Paragraph 18 refers to the conclusion regarding the time point. Paragraph 19 refers to the fact that pursuant to Article 15(6) the Tribunal went on to consider whether the school would have refused the child admissions if it had applied the criteria correctly. Reference is then made to the criteria in paragraphs 19 and 20 and the conclusion is in paragraph 21 that:

“Unanimously we found that the school would have rejected the special circumstances claim because there was insufficient medical, social or other evidence to warrant its acceptance. The criteria make it clear that independent, verifiable evidence must be submitted to support a claim for special circumstances.”

Arguments made by the parties

[16] Mr Ward on behalf of the applicants focussed his argument on the rationale of the Tribunal. He submitted that the Tribunal should not simply have determined that the criteria, if applied, would have led to the applicant being refused admission. Mr Ward based this contention on a number of factors. Firstly, Mr Ward mounted a case that on the basis of the criteria the Board of Governors had absolute discretion to do this and so the Tribunal should not have undertaken this exercise. In the alternative he stated that if the Tribunal had undertaken the exercise properly they would not have dismissed the application for want of verification. He submitted that this was a case that straddled medical and/or other social problems and that the evidence presented by the parents was enough in addition to the letter from the school. Mr Ward also submitted that the treatment of pupil 7 disclosed upon affidavit showed that there was a circumstance where a claim was accepted by the school without independent verification. As a result Mr Ward enjoined the court to

quash the decision of the Tribunal and direct that the child should be admitted to the school.

[17] Mr Sayers on behalf of the school in answering the argument made by Mr Ward contended that the phrase 'absolute discretion' to judge the special circumstances related to the various weighting that could be applied. He argued that this case really came down to the absence of verifiable documentation and that was clearly required by the criteria. Mr Sayers made some concession regarding pupil 7 but he said that this was not material because that pupil was not admitted.

[18] Ms Kiley supported these arguments and she also pointed to the purpose behind the criteria that there would be independent verification of a child's situation and unfortunately in this case the documentation provided was not enough. Ms Kiley submitted that the Tribunal was acting within its powers under Article 15(6) to make the assessment that it did and that the Court should not overlook that statutory function. Ms Kiley referred to the mandatory language in relation to verification of special circumstances claims which differs from the language used in relation to the time limit for submitting claims.

[19] Counsel referred to various authorities in this area without much controversy as to the principles established within them. In particular I have considered *Ross & Others* [1994] NIJB 193, *Re Farrens Application* [1990] 6 NIJB 73, *RS's Application* [2016] NIQB 93 and *Re Cunningham's Application* [1995] GIR 1878, *Re Tuckers Application* [1995] NI 14. Specific reference was made to paragraph 99 of the *RS* case and the principle that The Panel does not have the power to rule on the lawfulness of the criteria. In that ruling Colton J states that a challenge to the actual criteria should have been mounted before the appeal. Mr Ward did not pursue any such challenge in argument until this point was addressed by Ms Kiley and even then Mr Ward was not arguing that the criteria were in themselves unlawful or incapable of being given a workable meaning. The issue of interpretation of criteria is dealt with in numerous authorities and can be summarised as a requirement to consider the ordinary and natural meaning rather - see *Re Farrens Application*.

[20] I was also referred to *Cunningham* and *Tucker* as authority for the proposition that the tribunal approach to Article 15(6) is to be focussed on the material before the school at the time. Counsel did not take any issue with the proposition from *Re Tucker* that:

"The statute however requires the appeal tribunal to look back to the situation as it was before the school when it purported to apply its criteria. Since *ex hypothesi* the school had incorrectly applied its criteria, the appeal tribunal is being asked to decide a hypothetical question, namely, how would the school under those criteria have acted if it had properly construed them."

Consideration

[21] It must be stated that judicial review is a supervisory jurisdiction. I am not exercising a merits appeal. It is important to restate this principle particularly given the subject matter of this case and the strain occasioned to the family involved. In exercising my supervisory function I have to look at two matters namely the lawfulness of the decision and the rationality or reasonableness of the decision. I have looked at the statutory framework as presented to me in particular Article 15 of the Order. I have also considered the school's criteria, the protocol and the policies. I am keenly aware of the fact that a child is at the heart of this case. I did enquire about the child and I was told that she has started her second preference school and by the time of this decision will have completed half of the first term.

[22] At the outset I repeat that there was no case made that the criteria were in themselves unlawful or incapable of application. This case came down to interpretation of the criteria. It was accepted that I must apply an ordinary and natural meaning to the criteria. As I have said, the case against the school was not actively pursued given the ruling of the Tribunal. However, I consider that I should offer some brief comment upon it as follows.

[23] I appreciate that this is with the benefit of hindsight and applying a comparative analysis however the school has clearly fallen into error in two respects in this case. Firstly the application should not have been dismissed without adjudication due to the time limit issue. Secondly, given the treatment of pupil 7 it seems to me that the school has exercised its discretion in applying the criteria inconsistently. I understand Mr Sayer's point that this made no difference as pupil 7 was not admitted but I equally understand that the parents may find this hard to comprehend. The situation is very unfortunate however I am bound to say that an incorrect application of criteria in one case should not provide a remedy in another case. This case has highlighted the need for fair and consistent application of criteria by schools.

[24] I now turn to the challenge against the Tribunal and its application of 15(6) of the Order. In my view, the Tribunal was correct regarding the time issue. I say this particularly as time was not a decisive factor in some of the other cases that were considered by this school. The language used in the criteria refers to the fact that the application "should" be submitted by 16 December 2016 and so it is not in strict mandatory terms. However, that determination does not end the matter as 15(5)(a) is subject to 15(6). The Tribunal correctly went on to consider the special circumstances. The criteria in relation to the supporting documentation that is required is expressed in mandatory terms illustrated by use of the word "must". The protocol of the school refers to the steps that are taken in this type of case very clearly. There are two types of evidence required namely independent verification of the special circumstances and evidence of educational under performance. The requirement is clear and the onus rests with the applicant.

[25] I can understand why the verification requirement is imposed in the educational sphere. It goes without saying that every parent wants the best for his or her child. However, the system must also be fair and so some independent verification of a parent's view is required. The documentation required for a medical or other reason is clear. Sadly, in this case on either basis the documentation was inadequate. If this was a medical reason including extreme distress at the time of the exam there was no vouching medical documentation provided. If this scenario straddles into another reason of a social nature as Mr Ward states there was no independent verification from an independent source. The letter from the school is very instructive of the child's abilities and it meets that part of the criteria but it does not set out how that issue correlates to a particular event causing under-performance. As such I consider that the Tribunal applying Article 15(6) of the Order was entitled to take the view that it did. In other words the Tribunal was entitled to conclude that on a correct application of the criteria special circumstances was not established. The decision does not fall into a category of unreasonableness or unlawful decision making.

[26] I cannot accept the argument made by Mr Ward in terms of absolute discretion being with the Board of Governors rather than the Tribunal. This sentence could not in any sense usurp the statutory function of the Tribunal. It also appears to me to be directed towards the weighting percentages if special circumstances are established. These are matters of judgment for the decision maker. But this case sadly did not get to that stage because of lack of evidence. So I do not consider that Mr Ward's argument is an answer in this case.

[27] There is no easy way to express this ruling for the family. I appreciate that this has been an extreme stress to them and I am sure it has affected their family life and it has unsettled the child at the heart of this case. I also want to state that the parents have acted with the best of intentions in this case. However, I sadly cannot see that a case has been established on the facts within the structure of judicial review. I appreciate that this will be disappointing for the parents and child but I hope that they can now move on, make the best of the situation and that the young girl at the heart of this case will excel in her educational career. Hopefully, where one door closes another one will open - if not immediately - in the not too distant future.

Conclusion

[28] In the circumstances of this case where no active case was made against the school I will not grant any declaratory relief. This judgment speaks for itself as regards the lessons to be learnt. I do not consider that any case has been made out against the Tribunal. Accordingly, I dismiss the application.