Neutral Citation: [2016] NIQB 93 | *Ref:* **COL10118**

Judgment: approved by the Court for handing down | *Delivered:* **5/12/2016**
*(subject to editorial corrections)**

2016 No 077203/

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

RS's Application [2016] NIQB 93

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

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

COLTON J

Anonymisation

[1] I have anonymised the name of the applicant in this matter by the use of initials. I have taken a similar course in relation to other persons involved in this matter including the identity of a number of schools. I have done so because at the heart of this application is a child MS. I make an order providing that no person shall publish any material which is intended or likely to identify any child involved in these proceedings or an address or school as being that of a child involved in these proceedings except insofar (if at all) as may be permitted by the direction of the court.

Introduction

[2] I am obliged to counsel in this matter for their able written and oral submissions. Ms Quinliven QC appeared with Michael Ward for the applicant; Mr Philip McAteer appeared for the first-named respondent and Mr David Dunlop appeared for the second-named respondent.

[3] The issue of admissions to secondary education in this jurisdiction continues to provoke strong emotions. The entire process is governed by a labyrinth of selection procedures, statutory obligations and regulations overseen by a number of specialist bodies. The court is no stranger to legal challenges to the decisions of these

specialist bodies. In this case the applicant seeks judicial review of a decision by School P ("first respondent") not to admit his son as a pupil to the school and a decision of the Independent Admission Appeal Tribunal ("second respondent") to dismiss the applicant's appeal against that decision following an appeal hearing on 25 July 2016.

Background

[4] The applicant's son (hereinafter referred to as "MS") was born in September 2004 and completed his primary education at his local primary school in 2016.

[5] He sat the GL Assessment ("transfer test") on 14 November 2015.

[6] On 15 October 2015 he broke his hand whilst playing football. As a result he required hospital treatment and his hand was immobilised and placed in a plaster cast which remained in situ for 6 weeks. As part of his treatment he had to attend up to 6 hospital appointments in the Royal Victoria Children's Hospital in Belfast and consequently missed out on preparation in the weeks leading up to the examination. The injury was to his dominant hand and as a result when completing practice papers had to do so with his left hand which proved both difficult and distracting.

[7] The applicant's son had been registered to sit the examination at a different school from the first respondent. Because of his injuries his mother applied for "access arrangements" to assist him complete the test on 23 October 2015. The application was successful and as a result MS was provided with a scribe and extra time to complete his examination paper. Because it was necessary to make the application so close to the date of the examination he did not have the benefit of a familiarisation exercise with the host school prior to the exam date.

[8] On the requisite date MS attended at the school to sit the transfer test. Upon his arrival at the school he was removed from the main hall and placed in a room of his own with the scribe and an invigilator. He was totally unprepared for this as he did not expect to be doing the examination in isolation from his peers. He told his father that he found the situation upsetting and distracting and felt that it had an adverse impact on his ability to concentrate and perform during the English assessment which was the first test he completed. He also indicated that throughout the test he had experienced an intense itching under his cast which further diminished his ability to concentrate. He did not experience the same degree of distress and anxiety during the second, mathematics, test because he knew what to expect.

[9] It should be noted that when applying for access arrangements MS was offered the possibility of doing the test on 5 December but his parents felt that this would only provide additional disruption in the preparation for the examination and there was no guarantee that by that stage the cast would be removed in any

event. Notwithstanding his upset his parents remained hopeful that he would get a sufficiently high mark to obtain entry to his chosen school.

[10] On 3 January 2016 he received his transfer results. He was awarded a combined standardised age score of 226. This result was comprised of a score of 120 for Maths and 106 for English. According to his parents the results of the transfer test were lower than had been anticipated, particularly with regard to the English test.

[11] It was MS and his parents' hope that he would progress to the first respondent for his post-primary education. The first respondent is a grammar school which is oversubscribed in terms of applications for entry at year 8 level. In accordance with the appropriate procedure MS's parents submitted a transfer form identifying the first respondent as his first choice.

[12] It is the circumstances of that application and the relevant admissions procedure applied by the school which are at the heart of this dispute.

The Application for Admission to the School

[13] Whilst, as indicated, MS was disappointed with his score his parents remained hopeful that the mark would be sufficiently high for him to be admitted to his first choice of school. However before completing the relevant transfer form the applicant in this case contacted the Principal of the first respondent to discuss his son's case. Whilst it is not in dispute that a telephone conversation took place between the applicant and the Principal the contents of that conversation are very much in dispute.

[14] Before outlining the nature of that dispute and how matters progressed I propose to set out the relevant admissions procedure and place it in its legal context.

Admissions Procedure/Legal Framework

[15] Article 16 of the Education (Northern Ireland) Order 1997 requires every grant-aided school in Northern Ireland to draw up criteria for admission.

[16] Article 16B of the Education (Northern Ireland) Order 1997 as amended by Article 30 of the Education (Northern Ireland) Order 1997 and Schedule 3 to the Education (Northern Ireland) Act 2014, requires all grammar schools to have regard to any relevant guidelines handed down by the Department of Education on school admissions.

[17] The most recent guidance was issued in 2015 and was entitled "Post Primary Transfer Policy". Paragraph 1 on the guidance states:

> "**Purpose of this guidance**

> 1. *This guidance sets out a framework for the procedure for the transfer of children from primary to post primary school from September 2015. The aims and objectives of the arrangements for the admission of these pupils to post primary schools, as set out in this guidance will be;*
>
> - *That admissions decisions are fair and give each child the opportunity to reach his/her full potential.*
>
> - *That the overall arrangements for admissions, and within that the respective roles of the Department, the Education Authority and primary and post primary schools' Boards of Governors are clear and understood; and*
>
> - *That post primary schools' Boards of Governors achieve robust and accurate admission decisions".*

[18] Of particular relevance to this case it is well recognised that in circumstances where grammar schools apply academic criteria by way of an "entrance test" there is an obligation on such schools to ensure that there is a procedure to deal with applicants who may have performed below their best due to particular circumstances. This has been referred to as a "special circumstances procedure" and such a procedure is in fact provided for in the admissions procedure of all grammar schools in Northern Ireland.

[19] This is perhaps best set out in Annex 1 of the post-primary transfer policy as follows:

> "**Special circumstances procedure**
>
> *Any schools that decide to include as part of their admissions criteria and academic criterion requiring an `entrance test' should understand the critical importance of such a process being supported by a special circumstances procedure. It is likely that the courts would consider it unreasonable for a school not to be able to factor into a test-based admissions decision, circumstances beyond the control of the candidate (eg bereavement, accident or illness) that on the date of the `entrance test' may have led to that candidate's performance being adversely affected. Schools that decide to use `entrance tests' must be aware that it is their responsibility to provide a special circumstances procedure."*

[20] I turn now to the relevant paragraphs of the Schools Admission Criteria.

[21] For the purposes of this application the relevant paragraphs are as follows:

Paragraph 2.2 states:

> *"The first respondent will allocate places based on the results obtained in GL assessment taken on Saturday 14 November 2015 or the supplementary GL assessment taken on Saturday 5 December 2015. Available places will be allocated to pupils in the strict order of their GL assessment standardised score, in rank order, highest score to lowest, until all places have been filled up to the school admission number of 189 places."*

[22] The question of special circumstances is dealt with in paragraph 3. The relevant portions are as follows:

> "3.1 *The Admissions Sub-Committee will consider applications on behalf of pupils whose performance in the assessment was affected by medical or other problems in accordance with the `special circumstances' information that is set out in the `Access Arrangements and Special Circumstances Policy' of the Post Primary Transfer Consortium (PPTC). Parents should carefully read this document together with the accompanying guidance in the claiming special circumstances pack, available from the school or from the school website;"*

[23] It will be seen that reference is made to "Access arrangements." Because of the injury sustained by MS he did avail of access arrangements whilst doing the test. The purpose of the access arrangements is to facilitate a pupil to perform to the best of his ability in circumstances where in this case a pupil suffers from a specific medical condition.

[24] It is the link between access arrangements and the special circumstances procedure which is at the heart of this dispute.

[25] The key provision for consideration by the court is the following paragraph namely paragraph 3.2 which states:

> *"It should be noted that where access arrangements were provided for a pupil during GL Assessment on 14 November 2015 or 5 December 2015 the basis for such provision cannot be considered subsequently by the Admissions Sub-Committee under a special circumstances claim."*

I will return to this paragraph later.

[26] The remaining parts of paragraph 3 deal with the procedure for a special circumstances claim and the material that is necessary to support such a claim.

[27] In particular the criteria set out that a parent who has a concern about problems affecting their child before or during the GL Assessment should register those concerns with the assessment centre in which the GL Assessment was done before 2.00pm on Friday 11 December 2015. It is asserted that claims for special circumstances that are not registered with the school will not be considered. Reference is made to a "Claiming Special Circumstances Pack" which is available from the school or school website. If an application for special circumstances is then to be pursued it must be submitted with the transfer form in February 2016 with a specific form SC1 provided for this purpose. The claim must include objective and relevant educational evidence about a pupil's academic ability sufficient to enable the Admissions Sub-Committee to reach a decision as to whether any adjustment should be made to the score achieved by the child in the GL Assessment. Specifically the educational evidence must include the results from the primary school administered standard tests in English/literacy and Mathematics/numeracy taken since the beginning of the Key Stage 2 period. In essence this material is considered by the Admission Sub-Committee of the school with a view to deciding whether or not a pupil's score can be adjusted upwards which could result in a student meeting the relevant criteria for admission despite having fallen short on the test itself.

[28] Importantly the criteria make it clear that the onus for the proper completion of a procedure rests with the parents.

[29] Thus at 3.4c the criteria state:

> "*It is emphasised that the onus is on the parent/guardian to ensure that all of the above information is verified and provided by the primary school to the parent/guardian … The Admissions Sub-Committee are not responsible for and cannot take into account educational evidence that cannot be verified or has not been presented in time, or at all*."

Furthermore at 3.7 the following is set out:

> "*Where special circumstances are requested by a parent/guardian it is the responsibility of the parent/guardian to produce sufficient, objective, probative documentary evidence to establish that a pupil should have achieved a higher score in GL Assessment than that actually achieved. This is an exercise in educational judgment, not precise calculation and the determination of the Admission Sub-Committee will be based only on consideration of the documentation attached to the transfer form.*"

[30] The preamble to the criteria provides that:

> "*Special Circumstances*
>
> *Any parent/guardian claiming special circumstances must complete the documentation in the special circumstances pack available from the first respondent or from its website. This documentation; form SCR, to be returned to the school by 2.00pm on 11 December 2015; and form SC1, together with the appropriate independent, verifiable documentary evidence, which corroborates the special circumstances claim, must be attached to the transfer form and returned to the EA by 12 February 2016. Any information or documentation which the parent/guardian seeks to rely upon must be included."*

The Completion of the Transfer Form and Subsequent Events

[31] I have already explained that the parents were concerned about the effect MS's injury had on his performance and the fact that the access arrangements had caused MS to express concern about his performance in the examination, particularly the English test. In his supporting affidavit the applicant avers that:

> "*24. Shortly after the test I discussed the situation with my wife and we both decided that in the circumstances it would be wise to make a special circumstances (sic) on behalf of MS.*
>
> *25. I had been provided with a copy of the first respondent's admissions criteria at the open night and checked it to ascertain what the procedure is for making a special circumstances claim. A copy of the admissions criteria was in the claim.*
>
> (At this stage I comment that in fact the open night for the Academy was on 22 February 2016 which was after the closing date for registration of a potential special circumstances claim – something the first respondent relies upon to challenge the applicant's account. At the end of the day I did not find this point crucial to my determination).
>
> *26. Section 3 of the criteria deals with special circumstances and I was quickly drawn to paragraph 3.2 which reads; (*I have set this out above).
>
> *27. Both my wife and I interpreted this to mean that we could not make a special claim on behalf of MS because he had already been granted access arrangements. I remember thinking at the time that this was unfair and that MS would*

have been better off not applying for access arrangements and making a special circumstances claim instead."

[32] I now return to the disputed telephone call which took place on 1 February 2016. In his affidavit the applicant describes the call in the following way:

> *"32. … I contacted the Principal of the first respondent … by telephone to discuss M's case. We still felt at that stage that a score of 226 would have been sufficient to gain M admission to the school, as had been the case on every other year to date but I wanted some guidance from the Principal about the special circumstances procedure.*
>
> *33. I explained the situation to the Principal and told him that it was clear from M's results that his performance in the English test had been adversely impacted by his wrist injury and that arrangements had been put in place. I asked him whether it would be possible for the school to consider a claim for special circumstances at that stage.*
>
> *34. The Principal was understanding and courteous but he told me in very clear terms that as access arrangements had been provided on the day, I would not be able to advance a claim for special circumstances on M's behalf.*
>
> *35. I asked the Principal if I could provide further medical or educational evidence for consideration by the Admissions Committee. He informed me that I was free to do so but in all likelihood the Committee would not be able to consider it."*

[33] In his first replying affidavit the Principal responds to this as follows:

> *"33. On February 1st I received a call from Mr RS with regard to his son M. This was the first contact I had with Mr S. He told me that his son obtained a B2 having sat the test in M Grammar School. He outlined that his son had broken his arm and had been facilitated with access arrangements and that he was downloading a special provision form to submit. I explained that this form would not be relevant to his case. Having revealed that he had not yet registered for special circumstances and was now considering applying for special circumstances for his son due to his broken arm and related issues I was careful not to give any indication that this would be accepted by the Admissions Panel. Without sight of the actual circumstances or any documentary evidence I could do no*

more than suggest that he should submit such documents that he felt appropriate."

[34] He then refers to a note of the phone call which sets out as follows:

"RS – 4.46 Son B2

Son broke arm before transfer test.

Sat in M – had access arrangements – scribe and extra time.

Had to write with left hand.

Download SP Form – explained not relevant in this case.

Hadn't registered special circumstances.

Explained how allocation of places is done and advised him to submit any information or forms that he thinks are relevant or which support his son's case.

Explained the admissions criteria.

Expressed thanks – concluded 4.55."

[35] In his affidavit the Principal goes on to state:

"I did not advise the applicant that as his son had already benefited from a successful claim for access arrangements he was now automatically precluded from applying for special circumstances in the circumstances described."

[36] The applicant returns to this telephone conversation in his second affidavit and at paragraph [14] thereof he states:

"… But wish to make clear that at no stage during any of my conversations with the Principal did he inform me that my interpretation of paragraph 3.2 was incorrect and that it would have been possible for me to make a claim for special circumstances, notwithstanding the fact that access arrangements had already been granted."

[37] It should be noted that this is somewhat of a retreat from his initial averment when he stated that the Principal expressly told him that he would not be able to advance a claim for special circumstances. In the affidavit he further states that "I understood" the Principal to affirm my interpretation of the guidance. In particular

"he did not advise me to submit a SC1 form and while informing me to send in documentation, he did not inform me that any material provided would not be considered unless appended to an SC1 form".

[38] Finally in relation to this phone call the Principal replied to the applicant's second affidavit in the following terms:

> *"(3) The applicant did not approach with me, or voice any concern about, the school's admissions criteria and he did not ever mention paragraph 3.2 of the criteria. I did not get the impression on 1 February 2016, that he wished to discuss specific criteria but rather that he wanted general advice. As my notes from this first telephone conversation show I responded to his queries and gave him general guidance. I did not prevent or discourage him from registering a special circumstances application."*

[39] After this telephone conversation the applicant submitted the required transfer form with the first choice for his son being the first respondent. Along with this form he submitted additional evidence to the school outlining the difficulties his son had suffered both before and during the transfer test. This included a letter setting out the background to his injury and a description of the access arrangements and how they worked out. The letter actually refers to the access arrangements in the following way:

> *"We applied for special circumstances at the time of the exam and M was provided with a scribe and had an additional 10 minutes for each paper."*

The applicant also submitted a letter from the Principal of MS's primary school supporting the applicant and concluding:

> *"I hope these exceptional circumstances as outlined above can be taken into consideration when considering M and his application."*

Medical confirmation from M's GP detailing the extent of his injury was also submitted.

[40] The transfer form was considered by the Admissions Sub-Committee of the Board of Governors of the school.

[41] It emerges that there were a total of 298 applications for admission to the first respondent. A total number of 45 special circumstances were claimed. Twelve grade scores were adjusted and 33 were not adjusted. MS's score of 226 resulted in him being ranked at number 215, which was obviously below the admissions

number of 189. Of the pupils not admitted 4 had a score of 229 and the remaining 105 including MS (score – 226) had a score of 228 or less.

[42] The Admissions Sub-Committee treated the applicant's submissions as a special circumstances claim but did not adjust MS's score upwards because "the Committee noted there was no SC1 and no educational evidence was submitted. The Committee also noted that Access Arrangements had been availed of".

[43] Thus the applicant was informed by the Education Authority on 17 May 2016 that MS had been offered a place in his second choice school and had not gained admission to the first respondent.

[44] After receiving this correspondence the applicant again had a telephone conversation with the Principal. As was the case in relation to the February 2016 conversation the contents of this conversation are also in dispute. The applicant indicates that the call was really "a courtesy call" to inform the Principal that he was intending to appeal the decision to the Independent Admissions Appeal Tribunal. It is the applicant's case that he informed the Principal that he intended to refer to the conversation that he had in early February 2016 when he alleges he was told by the Principal that he could not apply for special circumstances. It appears from the note taken by the Principal of this conversation that it took place on 7 June. His account as set out in his first affidavit is as follows:

> *"He explained his disappointment that his son had not gained a place and was seeking advice about the admission process and about appealing it. I explained the admission process as I do to all parents who ask – claims of special consideration are considered and adjustments applied as appropriate. I believe that I told Mr S that his son was not upgraded and that all of the pupils were then ranked according to the published criteria and first 189 admitted."*

[45] The notebook entry (7 June 2016 – 11.10 pm) states as follows:

> *"Mr S Re Son M*
>
> *Appeal process did apply for access arrangements.*
>
> *Applying for special circumstances – due to wider impact of his broken hand.*
>
> *Misunderstood at the time the rules regarding special access arrangements and SC – thought could only apply for one.*
>
> *I clarified as far as I could.*

Thanked me for assistance.

Offered to discuss again if necessary.

Call ended 1.33."

[46] In a subsequent replying affidavit the applicant confirms that notwithstanding the handwritten note he was very clear that he did tell the Principal that he did intend to place reliance on the exchange on 1 February 2016.

[47] In any event the applicant instructed his current solicitors who lodged an appeal against the decision to the Independent Admissions Appeal Tribunal.

Legal framework in relation to the Independent Admissions Appeal Tribunal

[48] The Appeal Tribunal is established under Article 15 of the Education (Northern Ireland) Order 1997. The article permits the parent of a child to appeal against the refusal of a school to refuse admission. It provides:

> *"(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."*

The appeal and subsequent events

[49] In response to the question set out in the application for appeal namely:

> *"State clearly the reason why you consider that the Board of Governors has not applied the admissions criteria or has not applied them correctly."*

The reply is:

> *"School criteria was not correctly applied."*

[50] The second respondent convened on 25 July 2016 and on 8 August 2016 the applicant received a written decision from the second respondent informing him that the appeal had been dismissed.

[51] On 8 August 2016 the applicant instructed his solicitor in relation to a potential judicial review challenge of the decisions of the respondents.

[52] On 10 August 2016 he sent a pre-action letter to both respondents.

[53] The first respondent replied on 17 August 2016. The second respondent replied on 23 August 2016. An application for judicial review was lodged on 26 August 2016.

[54] Leave was granted by Maguire J on 6 September 2016.

[55] Notice of Motion was served on 20 September 2016.

[56] The matter was heard by me on 13 October 2016.

The Order 53 statement

[57] The relief sought by the applicant is as follows:

> *"(a) An order of certiorari quashing the decision of the first respondent not to admit the applicant's son to the school.*
>
> *(b) An order of certiorari quashing the decision of the second respondent to dismiss the applicant's appeal following an appeal hearing on 25 July 2016.*
>
> *(c) An order of mandamus to compel the first respondent to admit the applicant's son to the school.*

(d) In the alternative an order of mandamus to compel the second respondent to rehear the applicant's appeal and to consider a claim for special circumstances.

(e) A declaration that paragraph 3.2 of the first respondent's published admissions criteria is unlawful insofar as it precludes a child from advancing a claim for special circumstances for a medical problem that has already been the subject of a claim for access arrangements.

(f) A declaration that the respondent has acted and continues to act in breach of Article 14 ECHR, as read with paragraph 6 of the Human Rights Act 1998 …

(h) Such further or other relief as may be deemed just.

(i) All necessary and consequent directions.

(j) Costs.

(k) Damages."

The applicant's case

[58] Essentially this entire case turns on the interpretation of paragraph 3.2 of the first respondent's admission criteria. It is argued by the applicant that paragraph 3.2 amounts to an apparent blanket policy precluding a child from advancing a claim for special circumstances for a medical problem that has already been the subject of a claim for access arrangements.

[59] In the alternative it is argued that if the court does not accept that paragraph 3.2 operates as a blanket policy, it is submitted by the applicant that paragraph 3.2 is ambiguous, imprecise and fails to provide any or any sufficient clarity to parents in circumstances in which access arrangements and special circumstances may be claimed in tandem.

[60] As an addition to this submission it is argued that if paragraph 3 does not operate as a blanket ban then the Principal should have provided clear guidance to the applicant when he spoke to him on 1 February 2016 and in particular he should have provided the applicant with the following advice.

(a) It remained open for him to make an application for special circumstances despite having already obtained access arrangements.

(b) The application would be late and the Panel might therefore reject it on that basis.

(c) The fact that M had obtained access arrangements would be a matter which the Panel would have regard to in determining whether to grant special circumstances.

(d) That, in making an application, it is necessary to submit an SC1 and supporting educational evidence.

Thus a combination of a lack of clarity in the guidelines taken with the guidance (or lack thereof) allegedly offered by the Principal resulted in an unfair and unreasonable decision.

How should the court interpret paragraph 3.2?

[61] It seems to me that the net issue in this case is whether the school's admission criteria are lawful. On first reading it could be argued that the terms of 3.2 appear to limit the discretion given to the Admissions Sub-committee under 3.1. There is a plausible argument that the limitation is arbitrary as there could be no guarantee the special access arrangements will work in every case. Thus the school has unlawfully fettered its discretion. If an applicant is granted access arrangements which he or she argues do not actually work then on any reading of the paragraph he would be precluded from seeking special circumstances if the basis for special circumstances is the same. Whilst it is obviously correct that the granting of access arrangements would be a relevant consideration there is a reasonable argument that not to provide a discretion in those circumstances is unlawful. In relation to this point Mr McAteer persuasively argues that even if the paragraph is considered to have been expressed in absolute terms that in and of itself does not exclude the possibility of exceptions. He refers to the judgment in the case of the Secretary of State for Communities & Local Government v West Berkshire District Council and others [2016] EWCA Civ 441 as follows:

> *"[17] But (2): a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions. As is stated in De Smith's Judicial Review (7th Ed) paragraph 9-013:*
>
> > *"… a general rule or policy that does not on its face admit of exceptions will be permitted in most circumstances. There may be a number of circumstances where the authority will want to emphasise its policy… but the proof of the fettering will be in the willingness to entertain exceptions to the policy, rather than in the words of the policy itself.'"*

[62] Therefore, whilst I have reservations about the way in which paragraph 3.2 is worded I would not on that basis alone declare it to be unlawful.

[63] The key to the decision in this case is the interpretation of paragraph 3.2 as to what it conveys to someone in the applicant's position and the interpretation of the paragraph by the respondents in the circumstances of this case.

[64] The starting point from the first respondent's point of view is that the wording of the paragraph does not preclude a parent from advancing a claim for special circumstances for a medical problem that has already been the subject of a claim for access arrangements. Mr McAteer says the key to understanding the wording relates to the basis for which the different arrangements are sought. He argues that the basis for the application for access arrangements was the need to accommodate MS whilst performing his test to ensure he is in an equal position to other pupils. The basis for a special circumstances claim is different in that the child was entitled to a higher score because of the alleged interference in his preparation and the failure of the access arrangements to provide the assistance required. He argues that there is a clear difference between the basis for each claim.

[65] In understanding the relevant paragraph he relies on the affidavit of the school Principal which sets out the rationale behind the wording and how it is interpreted by the school. He avers at paragraph 7 of his first affidavit as follows:

> *"Access arrangements and special circumstances are separate facilities and it is possible for a child to make a claim for both. It is not, however, possible to claim both for precisely the same reason as that would entail an over compensation. That does not necessary preclude a pupil having access arrangements and also claiming special circumstances for a different reason, even if connected to the original condition or injury."*

[66] The principal elaborates at paragraphs 17 and 18 as follows:

> *"17. The school does not exclude or refuse applications for special circumstances simply because access arrangements have been provided to a child at the time of the test. Where an application is made for special circumstances for a child who has already benefited from access arrangements, the Admissions Sub-Committee will however want to be clear that the basis for the claim for special circumstances is not something that has already been compensated for by granting access arrangements and further that there is evidence that the child has under-performed as a result. In this case the applicant did not submit evidence which demonstrated that his son was disadvantaged or that he had under-performed.*

> *18. The school does not operate a "blanket ban" where a child is prevented from claiming both access arrangements and special circumstances …"*

[67] The principal goes on to record that in this particular year a child did benefit from both access arrangements and special circumstances. In that circumstance the child's score was adjusted upwards but the adjustment was insufficient to secure a place when the adjusted score was considered with other applicants after the AS results. Indeed, it seems to me that the circumstances of that particular case are set out in a note in the Principal's diary dated 3 June 2016 which is in the same page as the entry concerning the telephone conversation with the applicant on 7 June 2016. The point made by the first respondent is that this demonstrates that no blanket policy is imposed and that special circumstances are considered in cases where access arrangements were provided. Furthermore, in support of the argument the first respondent points out that in fact the applicant fully appreciated the difference in the basis for access arrangements and special considerations. It is argued that he actually applied for special considerations. Thus in his first affidavit he carefully distinguishes these two basis for the respective applications notwithstanding the fact that the underlying cause may have been the same, namely his broken hand. He further argues that the applicant tailored his appeal to the second respondent in actually making a case for special circumstances.

[68] The applicant counters by saying that any fair interpretation of 3.2 leads to the conclusion that the granting of access arrangements on the basis of his hand injury amounts to a barrier to his making an application for special circumstances based on the same injury. It is submitted that an ordinary reading of the clause communicates precisely that.

[69] By way of support for this interpretation the applicant points out that this is exactly how the second respondent interpreted paragraph 3.2. Thus in the second respondent's decision letter; its response to the pre-action protocol correspondence; and in the affidavit from Mr Holywood served on behalf of the second respondent, paragraph 3.2 is interpreted in the same way as the applicant, namely that it precluded an application for special circumstances in the context of this case.

[70] The penultimate paragraph of the decision letter dated 5 August 2016 reads:

> *"The tribunal agreed that the school had correctly applied its admissions criteria in not considering a claim for special circumstances in respect of M's broken hand."*

[71] The response to the applicant's PAP letter includes the following paragraph:

> *"Paragraph 3.2 provides that where access arrangements have been made available, in advance of the test, the basis for this provision cannot be considered subsequently as amounting to special circumstances.*

…

> *The Board of Governors refused to consider the claim for special circumstances, on the basis of paragraph 3.2 of the Admissions Criteria. It was considered that the circumstances supporting the claim were the same circumstances which had enabled M to benefit from access arrangements. His GL assessment score was therefore not adjusted. The Board of Governors also noted that the parent's had not submitted any educational evidence to which it could compare M's test score."*

[72] Finally, the affidavit filed on behalf of the second respondent by Mr Holywood states at paragraph 10:

> *"We also consider that the school had been influenced by the fact that access arrangements had been granted and that the criteria precluded consideration of a special circumstances claim where two claims were advanced on the same basis."*

How does the court interpret paragraph 3.2?

[73] I confess that on my first reading of the paragraph my reaction was that on the face of it, it did preclude the applicant from subsequently considering a special circumstances claim on the basis of MS's hand injury. I accept on the basis of the evidence provided that as a matter of fact the first respondent does not exercise a blanket policy and retains a discretion in assessing whether the fact that access arrangements being provided to a particular child prohibits a special circumstances claim. Therefore, with some hesitation I do not find the paragraph unlawful insofar as it operates as a blanket policy.

[74] However, the matter does not end there. As I have already indicated the admissions criteria place a heavy burden on parents to ensure that they provide all relevant material to support applications for special circumstances. This is something which has been emphasised by the courts in this jurisdiction when considering cases in which it was alleged that special consideration applications were deficient. The heavy burden placed on parents in these circumstances places an obligation on the first respondent to ensure that its criteria are clear, unambiguous and easily understood. It is only by doing so that it will ensure admission decisions are fair to applicants and between applicants.

[75] In considering similar criteria under a previous regime Girvan J noted in the case of Re Cunningham (Unreported, GIR8178) as follows:

> *"It is clear that the criteria ought to be clear and precise so that parents will know with reasonable certainty what is*

> *expected of them and what they could expect of the school when it comes to make its decision, and I read Kelly LJ's comments in that light. In practice there are sadly occasions when the school's criteria falls short of what is expected of them. What criteria mean and how they fall to be applied may in some cases tax the ingenuity of learned counsel and judges although at the end of the day, after much legal debate, the proper interpretation of the criteria can be arrived at. Merely to have difficulty in construing a provision does not make the provision bad at law."*

[76] Applying this reasoning to paragraph 3.2 I have come to the conclusion that the provision is ambiguous, imprecise and fails to provide the clarity to which the applicant was entitled when considering whether to submit a special circumstances claim in the circumstances of this case. In my view it communicates to someone such as the applicant that consideration would not be given to special circumstances arising from his son's hand injury where access arrangements had been made because of that injury. I take the view that this provision is bad at law.

[77] The school Principal has lucidly set out the rationale behind paragraph 3.2 and the purposes behind access arrangements and special circumstances. I have set this out in paragraphs [64] and [65] above. However in explaining the paragraph he says "It is not, however possible to claim both for precisely the same reason". One difficulty with this is that the paragraph does not use this wording. Rather it refers to the "same basis". In my view the use of the words "precisely the same reason" goes further than "on the same basis". The added emphasis is extremely important.

[78] There is no reason why paragraph 3.2 could not have been drafted to make this clear. In the course of the hearing I was referred to the criteria from other schools which make it clear that a claim for access arrangements does not preclude a claim for special circumstances. Thus in the guidance provided by School L it is provided that:

> "If a claim for the consideration of special circumstances is made in respect of matters for which access arrangements were granted or could have been granted had they been made known to the assessment centre, the Transfer Sub-Committee may take into account the fact that the child was granted access arrangements or could have been granted access arrangements for those matters."

[79] A similar provision is included in the criteria in relation to entry to School O. The wording provided by School R is closer to that of the first respondent where it states:

> "Parents/guardians should note that a pupil who applies for access arrangements for the entrance assessments cannot then apply for special circumstances for the same reason."

[80] Mr McAteer argues that "for the same reason" has the same meaning as "the basis for such provision" in the first respondent's criteria. I was also referred to School J which has a similar criteria in relation to this matter as that of School L. In my view the latter is a preferable draft as it makes clear firstly that the school retains a discretion and secondly that an application for special circumstances does not automatically preclude a claim for special circumstances "on the same basis". Thus the deficiency which I have identified can be easily remedied.

[81] Even if this argument is correct the respondents argue that in fact the applicant did make a claim for special circumstances and that he was not misled in any way by the wording of paragraph 3.2. It is common case, leaving aside the dispute about the various telephone conversations, that in February 2016 before submitting the transfer form the applicant was told as per the telephone attendance note "to submit any information or forms (my underlining) that he thinks are relevant or which support his son's case". Having received that advice he submitted material with the transfer form namely a letter setting out the circumstances of his son's injury, medical evidence in support of the effect of the injury and also a letter from the principal of the primary school. In doing this the first respondent argues that in fact the applicant submitted a special circumstances claim. Indeed, this is the way it was treated by the school. It has been a feature of the submissions of the first respondent that in fact the applicant did submit a special circumstances claim and that this demonstrates clearly that he could not have been misled by the wording or that there is any doubt about the matter. In my view this is an unfair characterisation of what the applicant did. In relation to the school it is clear that the applicant did not submit an SC1 form. Nor did he submit the educational evidence which would be required to support a special conditions application. The applicant says quite simply that he did not do this because he believed that he was precluded from doing so. The fact that the school chose to treat the documentation he submitted with the transfer form as a special circumstances application does not mean that this was the applicant's interpretation of what he was doing. In relation to the subsequent appeal the grounds of the appeal could not be clearer – "School criteria was not correctly applied". It is correct to say that in the course of oral submissions the solicitor acting for the applicant set out what the special circumstances would be but was clearly making the case that his client was prohibited from making this case because of the criteria set out in paragraph 3.2. In my view it is unfair to argue that this means the applicant was making a special circumstances case. Indeed, the decision letter from the second respondent to which I have already referred clearly focuses on the criteria argument.

[82] Inevitably, when the first respondent treated the application as a special circumstances claim it was rejected for a number of reasons. Firstly, the applicant

had failed to register a special circumstances claim as required in December 2015. Secondly, and most importantly the educational evidence had not been submitted in support of such a claim. The record of the school's decision also refers to the fact that "access arrangements had been availed of". Thus, it was inevitable that the child's grade/score would not be adjusted.

[83] I agree with the contention that if in fact the applicant had made a special circumstances application in this way it would have been refused on the basis of the material submitted but I do not agree that in fact the application did amount to a special circumstances application for the reasons set out above.

Should the applicant have submitted a special circumstances application in the circumstances?

[84] The applicant has always made the case that right from the day upon which his son completed his examination he felt precluded from making an application for special circumstances. This was because of his interpretation of paragraph 3.2. This is why he did not register a claim in December and why he remained of the view that he could not submit such a claim when completing the transfer form. He says that the conversation with the principal in February 2016 reinforced and actually endorsed his interpretation of paragraph 3.2. As indicated there is a real dispute about the circumstances of the conversations. In his judicial review application there clearly is an onus on the applicant to establish any factual matter in issue. The court is not well suited to the resolution of such a factual dispute and none of the evidence was tested by way of oral testimony or cross-examination. In considering this matter I am strongly influenced by the notes of the principal which were made at a time when there was no question of judicial review proceedings. The notes are consistent with other notes relating to conversations with other parents at that time. I accept the averment of the principal to the effect that:

> *"In all cases in which parents raise queries with me about applications for admission, I exercise caution in imparting advice. I listen, record the facts and try to guide the person accurately. I am generally cautious because I would not want to lead a parent to believe that a score would be upgraded just because an application for special circumstances is submitted."*

[85] Dealing specifically with the applicant's case he avers:

> *"I was careful not to give any indication that this would be accepted by the Admissions Panel. Without sight of the actual circumstances or any documentary evidence I could do no more than suggest he should submit such documents that he felt appropriate."*

[86] As I have indicated earlier the note refers specifically to "any information or forms".

[87] I repeat that when the dispute about what was said crystalised the applicant retreated somewhat from his initial assertion and the height of his claim was that:

> *"At no stage during any of my conversations with the principal did he inform me that my interpretation of paragraph 3.2 was incorrect and that it would have been possible for me to make a claim for special circumstances notwithstanding the fact that access arrangements have already been granted."*

[88] The conclusion that I have reached in relation to the telephone conversations is that the applicant cannot rely on any of the conversations to justify an assertion that he was misled or that his views on the interpretation of paragraph 3.2 were reinforced.

[89] Indeed, insofar as the conversations are relevant it raises a question in my mind as to whether on the contrary he should have submitted a special circumstances form having regard to the advice that he should submit such information and forms as he felt appropriate. Given that he took the trouble to submit additional material with the transfer form it seems to me it would have been a short further step to submit the material which would have supported a special circumstances claim.

[90] In my view the matter comes back to and resolves around the interpretation of paragraph 3.2. It was the applicant's interpretation of the wording which has led to the impasse in this case and is the reason for the failure to submit a proper special circumstances claim.

The decision of the Second Respondent

[91] It appears that the hearing conducted by the second respondent was a fairly short matter. The written grounds of appeal asserted that the school criteria was not correctly applied.

[92] The circumstances of the appeal hearing are well set out in the affidavit sworn by Patrick Holywood who chaired the Tribunal which heard the appeal. He has also exhibited the handwritten notes of the Panel members which appear to provide a fair reflection of the course of appeal and the grounds upon which it was presented. A number of unfortunate errors arose in the presentation of the appeal. Firstly, the Panel were left with the impression that MS sat his test in the first respondent school and not in another school. Secondly, the Panel were left with the impression that the representations allegedly made by the Principal to the applicant were made in the course of a meeting as opposed to a telephone call. Thirdly, the case was made on behalf of the applicant that the scribe provided to assist his son had been "standing

over" him which had the effect of putting him off. This was something that was corrected in the course of the hearing when the Chairman addressed the parents directly. He was informed by the parents that the scribe had actually remained seated and had not stood beside MS.

[93] Whilst it is important to acknowledge these issues they do not impact on the decision the court has to make.

[94] My assessment of the affidavit from Mr Holywood and the notes of the Panel is to the effect that Mr Falloon on behalf of the applicant submitted that this was a case where special circumstances could be argued. In the course of his submissions he set out his analysis of what the special circumstances were, namely that the access arrangements did not actually work in practice. He then went on to make the case that the wording of paragraph 3.2 (together with the advice allegedly provided to the applicant) meant that the applicant could not avail of both access arrangements and special circumstances. He clearly made the submission that this was unlawful. He invited the Tribunal to seek legal advice on the issue as to whether or not paragraph 3.2 of the School's Admission Criteria were unlawful in precluding a special circumstances claim where access arrangements had previously been granted.

[95] Following the hearing the Panel members requested legal advice which was to the effect that it does not form part of the statutory function of the Panel to determine whether admissions criteria were lawful.

[96] The only information available to the Tribunal to explain the reasons for the school's decision was the content of the forms submitted for the purposes of the appeal. This included the form including the school's decision to which I have already referred.

[97] The Panel decided unanimously that the appeal should be dismissed. The Panel proceeded on the basis that the school had not considered this particular claim for special circumstances since paragraph 3.2 of the criteria prevented such a claim being made in this case. The Panel went on to conclude that in any event the school had acted in accordance with its criteria as an SC1 form or educational evidence had not been submitted. In relation to the second respondent's decision I come to the following conclusions.

[98] The role of the second respondent is statutory and relates solely to the grounds of challenge established under Article 15 of the 1997 Order. The role of the Tribunal is limited to assessing whether the Board of Governors applied its admissions criteria or applied those criteria correctly when deciding to refuse admission to the school. I accept that the Tribunal is not empowered to decide upon the legality of the admissions criteria formulated by a Board of Governors.

[99] It is clear that the submissions advanced before the second respondent sought to demonstrate the unlawful nature of paragraph 3.2 of the admissions criteria. The Panel does not have the power to rule that this paragraph was unlawful. It is clear that it was the second respondent's view that the applicant had not submitted a special circumstances claim, which is contrary to the view of the first respondent. It is correct that the second respondent came to the conclusion that where the applicant did not submit a special circumstances claim which was compliant with the first respondent's admissions criteria it had no option but to reject the appeal. In these circumstances it is difficult to see how the second respondent could have come to any other conclusion. The only potential option open to it was to decline jurisdiction but I do not believe that they can be criticised for this having regard to the way in which the matter was presented. If in fact as the applicant clearly contends the challenge was to the actual criteria in those circumstances it would have been better in my view to mount a legal challenge to the criteria at that stage before the second respondent had heard the appeal. The mischief if any again goes back to the wording of the criteria. If this decision is infected by error it arises from the criteria themselves.

Conclusion

[100] I have therefore come to the conclusion that I should make a declaration that paragraph 3.2 of the respondent's admission criteria is unlawful on the grounds that it is ambiguous, imprecise and fails to provide sufficient clarity to parents about the circumstances in which access arrangements and special circumstances may be claimed in tandem.

[101] I propose to make no order against the second respondent at this stage.

[102] I propose to give the legal representatives of the applicant and the first respondent an opportunity to make further submissions in terms of any further relief. I also set out some preliminary views I have in relation to the considerations to be taken into account in terms of any relief.

Important considerations in terms of any relief

[103] It must of course be recognised that even if a valid special circumstances application had been submitted with a transfer form and considered by the Panel it may not have resulted in the applicant being admitted to the school. Firstly, the application was late. Secondly, the school may not have accepted that there were special circumstances. In this regard I note the averment in the Principal's affidavit to the effect that:

> "It was the clear view of the Admission Sub-Committee that the applicant did not demonstrate that the access arrangements disadvantaged his son. This school would clearly have been entitled to take

> into account the fact that access arrangements had been provided. Thirdly, even if the school had been persuaded on the basis of educational evidence to adjust MS's mark it may still not have resulted in him being admitted to the school."

[104] Ideally the legal challenge to paragraph 3.2 should have been brought at an earlier stage. The applicant had formed his view on the paragraph as early as December not long after his son had completed the test. He did not pursue the matter at that stage because he was still hopeful that his son would do sufficiently well to be accepted into the school. At the time he submitted the transfer form he avers that he believed he could not submit a special circumstances claim because of the wording of the paragraph. He clearly was of a similar view when he instructed lawyers to appear at the independent tribunal hearing on 25 July 2016.

[105] This case was heard by me on 13 October 2016 by which stage the applicant's son has been attending another very reputable school in the area for approximately six weeks. As far as the first respondent is concerned it has filled its allocated quota of students who equally at the time of hearing will have been settled and begun their integration into the school.

[106] Any order to alter that situation if it is even possible will have implications for both schools. On no account could a student be removed from the first respondent on the basis of any court order. On what basis can the school admit a new pupil at this stage? Any order altering the current situation clearly will have an effect on good administration which is an important factor in considering how the court should exercise its discretion.

[107] All of this must of course be looked at in the context that the applicant was denied the opportunity to make a valid special circumstances claim which could have resulted in his son being admitted to the school of his choice. In this regard it is important to note that in the course of these proceedings the applicant did submit educational evidence which on the face of it could support a submission that he had in fact underperformed in the test. It is not for this court to make any assessment of that evidence other than to note that had such material been submitted to the Admissions Panel it may have affected the outcome.