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2016 No: 55300

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY SK (A MINOR) ACTING BY SJ1, HER MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW

and

IN THE MATTER OF DECISIONS MADE BY THE MINISTER FOR EDUCATION FOR NORTHERN IRELAND ON 23 MARCH 2016

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DEENY J

Introduction

[1] The applicant is a pupil at Little Flower Girls' School, Somerton Road, Belfast. She brings this application to challenge the decisions of 23 March 2016 of the then Minister for Education for Northern Ireland, Mr John O'Dowd MLA, to approve development proposals ("DPs") 440 and 442 to close the school and amalgamate it with St Patrick's College, Bearnageeha, immediately adjacent to it, in September 2017.

[2] The application was brought on 22 June 2016, three months after the decisions, a matter to which I will return later. Maguire J granted leave on 22 November 2016 for this application to quash these decisions on one ground only. That ground is to be found at paragraph 3(c) of the Amended Order 53 Statement which reads as follows:

> "The Minister acted unlawfully and/or in an irrational manner in taking the decision to approve the development proposals without having completed an Equality Impact Assessment or equality screening and/or failing to have due or any regard to the need to promote

equality of opportunity under Section 75(1)(a) of the Northern Ireland Act 1998."

[3] The judgment on the leave application is reported at [2016] NIQB 92. At [15] therein the judge expressly reserved the issue as to whether the Section 75 point would fail in any event because it should have been pursued by way of a complaint to the Equality Commission rather than by judicial review. In the concluding paragraphs the judge was of the view that the application had not been brought promptly and that as prejudice may arise in the case which could be substantial that was a live issue which he would defer to the full hearing of the matter. The applicant made representations to the court on 6 January 2017, when there were difficulties arranging a date convenient to all counsel, and I directed the listing of the matter before me on 12 January 2017.

[4] At the hearing Ms Denise Kiley appeared for the applicant. Dr Tony McGleenan QC and Mr Philip McAteer appeared for the respondent. Mr Donal Sayers appeared for the notice party, the Council for Catholic Maintained Schools. I am grateful to all counsel for their able written and oral submissions. I have taken all these submissions into account even if not expressly referred to in this judgment. It is obviously in the public interest to decide this matter and deliver this judgment before parents choose schools for their children currently in P7 for the next academic year.

[5] The essence of the applicant's case can be summarised succinctly. The Little Flower is an all-girls non-selective secondary school. It is a Catholic maintained school serving the North Belfast/Glengormley area. If it is amalgamated with St Patrick's College to become a co-educational school there will be no single sex non-selective secondary school for girls with a Catholic ethos available in that area thereafter. Dominican College will still be there but only for grammar school pupils.

[6] In contrast, points out the applicant, the two controlled non-selective secondary schools in North Belfast are not being merged. Boys' Model and Girls' Model will remain as independent schools. The applicant's mother and next friend deposed that this would be true of the Ashfield Schools for Boys and Girls also but I pointed out at the hearing that they are in fact in East Belfast and not in this area.

[7] The applicant through her counsel argues that there is a breach of the Section 75(1) obligation in that the Minister failed to have due regard to the need to promote equality of opportunity between persons of different religious belief. She was able to draw attention to clear statistical evidence that, at least in this area, the religious belief of the pupils attending the controlled school is almost entirely Protestant and that of the children attending the maintained Little Flower School almost entirely Catholic. (Dr McGleenan pointed out that the applicant is not herself Catholic but an adherent of another long-established religion.) Therefore, Ms Kiley says, the Minister failed to have due regard to this unequal outcome by which there will continue to be

a single sex school for girls in the controlled sector in North Belfast/Glengormley but not in the Catholic maintained sector.

[8] The respondent's response to this is a plural one which I consider best dealt with in the Consideration of the matter later in this judgment. It is necessary first to look at the history of the matter.

Factual Background

[9] The respondent and notice party stress the long iteration leading up to these decisions by the Minister. This is to be found set out in the affidavits of Jacqueline Durkin, Director of Area Planning, Admissions and Shared Campuses, in the Department of Education and of Edel Teague, Programme Manager with the Council for Catholic Maintained Schools ("CCMS").

[10] In 2006 the Trustees of Catholic schools established the Northern Ireland Council for Catholic Education ("NICCE") to take forward a review of post primary Catholic education. Working groups were established in different areas. The North Belfast group met six times and following consultations with the Boards of Governors from each school the options were confirmed by Trustees and published in 2010 for wider public consultation. These proposals included the genesis of the proposals now criticised by the applicant's next friend.

[11] Insofar as is relevant they were considered and approved by the CCMS who put forward these two development proposals, inter alia, to the Education Authority("EA"). The two schools, St Patrick's and Little Flower, are closely contiguous with the rear entrance of one facing the front entrance of the other. The proposal is for the amalgamation of the two schools into a larger school of about 1,300 pupils. The documents and the submissions of the parties have two salient features. Firstly, provision for a larger school would allow for a wider curriculum to be provided for pupils. The court was told that this would be of particular assistance in retaining post-16 pupils in education. Secondly, it has been the consistent policy of CCMS throughout its existence to favour co-educational schools. This policy has not been attacked or addressed in this application. I shall have to return to that point.

[12] The proposals were adopted by the Education Authority and published in November 2015 for consultation. They had, therefore, been approved by a third relevant and informed body.

[13] The CCMS proposals did include equality screening.

[14] The obligation to carry out equality screening arises from Section 75 of the Northern Ireland Act 1998. The relevant provisions are as follows:

"**Statutory Duty on Public Authorities.**

(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity-

(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

...

(4) Schedule 9 (which makes provision for the enforcement of the duties under this section) shall have effect."

[15] Schedule 9 then deals with the role of the Equality Commission for Northern Ireland. By paragraph 1 of that Schedule it is obliged to "keep under review the effectiveness of the duties imposed by Section 75". It also offers advice to public authorities and carries out the functions conferred on it by the Schedule. That includes, pursuant to paragraph 10, the obligation to consider a complaint and decide whether or not to investigate it. A complaint must be sent to the Commission within 12 months of the day on which the claimant first knew of the matters alleged. The complainant must go to the public authority first. The Commission may, pursuant to paragraph 11, investigate the matter and, where it considers that a public authority may have failed to comply with a scheme approved or made under paragraphs 6 or 7, send a report of its investigation to the public authority concerned and to the Secretary of State.

[16] This is of particular relevance here as the respondents submit that that is the proper remedy for any breach of Section 75 rather than these proceedings. I shall return to this in due course and consider the relevant case law. The Equality Commission published A Guide for Public Authorities in April 2010. Pursuant to Schedule 9 of the 1998 Act it points out that public authorities are required to submit an Equality Scheme to the Commission which is a statement of the authority's commitment to fulfilling its Section 75 statutory duties. It is not in dispute that the Department which is being judicially reviewed had such a scheme. Counsel placed emphasis upon competing aspects of this Guide published by the Equality Commission. In 'Annex 1 – Screening' one finds the following paragraph at internal page 51:

"Screening will help improve a public authority's service provision through a systematic review of all services, policies, procedures, practices and/or decisions. It should be completed <u>at the earliest opportunity in the policy development process</u>. For more detailed strategies

> or policies that are to be put in place, through a series of stages, a public authority should then consider screening at various times during implementation.
>
> Screening is more useful if it is introduced at an early stage when developing or reviewing a policy, or during successive stages of implementation (e.g. strategic review, options paper). To undertake screening after policy proposals have been developed may be inefficient in terms of time and may be ineffective if policy makers are reticent to make changes at a later stage. It may also duplicate policy development processes."
> [Authorial emphasis throughout.]

[17] I pause there to say that the respondent laid stress on these paragraphs. Here the equality screening was carried out by CCMS rather than by the Department. The respondent says that that is appropriate in the light of the Guide from which I have just quoted i.e. "at an early stage when developing … a policy".

[18] In contradistinction, Ms Kiley for the applicant, draws attention to a passage on internal page 52:

> "The Commission recommends that the lead role in the screening of a policy is taken by the policy decision-maker who has the authority to make changes to that policy."

Her point is that this screening was not done by the Department, whose Minister was the decision-maker.

[19] More neutrally one sees on internal page 53 the following:

> "Through screening a public authority can make an assessment of the likely impact, whether 'minor' or 'major', of its policy on equality of opportunity and/or good relations for the relevant categories. In some instances, screening may identify the likely impact is none."

[20] It is not in dispute that the Department of Education discharged its statutory duty by the publication of such an Equality Scheme which was published over the signatures of the (same) Minister and the then Permanent Secretary on 20 September 2013. At 4.3 of this document it is stated that the Department uses the tools of Screening and Equality Impact Assessment ("EIA") to assess the likely impact of a policy and the promotion of equality of opportunity and good relations.

[21] Under the heading 'Screening' we find the following at 4.4:

> "The purpose of screening is to identify which policies are likely to have a minor/major impact on equality of opportunity and/or good relations. This is completed at the earliest opportunity in the Policy Development Review process. The Team responsible for the development of the policy will lead the screening process and involve other colleagues, equality team and where possible key stakeholders in the process."

[22] If screening concludes that the likely impact of a policy is minor then the Department "may" proceed to an EIA or consider mitigation measures or alternative policies. (Par.4.7). If the screening concludes that the likely impact is major the Department "will normally" subject the policy to an EIA. (Par. 4.8).

[23] It is not in dispute that this policy was subject to equal opportunities screening. This was carried out by the Council for Catholic Maintained Schools. The applicant says it was not therefore done by the Department as it should be. The Department says that it was done by the body that was "developing proposals" and was done at the earliest opportunity. I have been referred to this screening document and it shows evidence of a measured and considered approach.

[24] However, the applicant points out that it does not advert to the point that the applicant now puts before the court i.e. that there will be more choice in the controlled sector in the future in North Belfast than in the maintained sector so far as single sex secondary education is concerned.

[25] The development proposals as a whole were, as I have said, put out for consultation by the Education Authority. It does not appear that anyone from the public drew attention to this issue.

[26] The applicant draws attention to a petition of which more than 1,600 copies were signed objecting to the proposals.

[27] The text of this petition objecting to the proposal to discontinue Little Flower Girls' School and amalgamate with St Patrick's College has two passages which were the subject of discussion at the hearing. I set them out:

> "Our right to choose a Catholic school offering single-sex education for our children is being removed unless we use the unregulated testing system or avail of buses to schools in other parts of the city.
>
> Research has proven that co-ed schools can have an adverse impact on the learning of girls at ages 11-14."

I shall have to return to both these paragraphs later.

[28] The applicant is a member of a group of concerned parents who supported this petition. They also sought to garner support and information from others. That included a visit to CCMS and a conversation which is relevant to the issue of delay. The Department noted that the policy had been the subject of equality screening and that no adverse impact having been detected it was not necessary to carry out an equality impact assessment.

[29] The two proposals objected to by the applicant were part of a suite of five proposals. The third involves the closure of St Patrick's College and its amalgamation with Little Flower. The other two proposals related to other schools in the area which again would cease to be single-sex and become co-educational. One of the grounds of opposition from the Department is that the development proposal in relation to St Patrick's College would be rendered incapable of implementation if the court were to quash both of the development proposals complained of, even though no party has objected to that development proposal.

[30] The Area Planning Policy Team of the Department, having considered the consultation responses received following the publication of the proposals then prepared a memorandum for the Minister on 16 March 2016 recommending approval of the whole suite of proposals including DP440 and DP442. The Minister agreed to these proposals on 23 March. Relevant parties were written to the following day by the Department.

[31] Of particular relevance here a press release was issued on the same day stating, inter alia, the following:

> "Education Minister, John O'Dowd, has made decisions on five development proposals affecting four Catholic Maintained Post-Primary Schools in the North Belfast and Glengormley areas.
>
> From 1 September 2017 or as soon as possible thereafter:
>
> - Little Flower Girls' School and St Patrick's College will amalgamate to form a new 11-19 co-educational post primary school with an admissions number 195 and an enrolment number 1,300."

[32] As stated above it is the development proposals 440 and 442 which are set out more fully in the press release which are challenged in this judicial review application. Those decisions were made pursuant to Article 14 of the Education and Libraries (NI) Order 1986, as amended.

The Law

[33] The applicant through her counsel contends that there are two principal breaches of the obligation under Section 75 of the 1998 Act by the Minister. First of all it is alleged that there was a failure to screen by the Department and as a result of that the "major impact created by the impugned development proposals" (paragraph 21 of the applicant's skeleton argument) was not detected and no Equality Impact Assessment was carried out by the Department. I shall therefore consider in due course whether the screening carried out by CCMS did discharge the Department's duty under its own Scheme and the Act and also whether there was, in truth, a major impact on equality of opportunity and/or good relations to warrant an EIA.

[34] The second heading was the failure of the Minister to have "due regard" to these issues in making his decision. The authority relied on is R (On the application of Baker & Others) v Secretary of State for Communities and Local Government and Another [2008] EWCA Civ 141. Counsel relied on this passage from the judgment of Dyson LJ at para 36:

> "What is *due* regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing."

[35] This case and that dictum were followed by the Court of Appeal in Northern Ireland in JR1s Application [2011] NIQB 5.

[36] It must be said here that as the point was not drawn to his attention and as it is not claimed that the Minister raised it himself he could not be said to have had "due regard" to the contrast in choice that will arise in the future if these development proposals are put into effect between the parents of children in this area who wish to send their children to Catholic maintained schools as opposed to controlled schools. But the court must consider what follows from that and what was "appropriate in the circumstances" in the words of Dyson LJ as he then was.

[37] The court must also consider the correct approach to a breach, if there was a breach, of the obligations on the Minister under Section 75 of the 1998 Act. The leading authority is Re Neill's Application for Judicial Review [2006] NICA 5. At first instance Girvan J had found that breach of Section 75 of the 1998 Act with regard to the passage of the Anti-Social Behaviour (Northern Ireland) Order 2004 was not open to challenge by way of judicial review, unlike Section 76 of the 1998 Act. On appeal the Court of Appeal per Kerr LCJ concluded as follows on this issue:

"[28] It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with section 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in section 76.

[29] Mr Larkin suggested that it would be incongruous if the failure to observe section 75 should be immune from judicial review while a failure to observe its precursor, the Policy Appraisal and Fair Treatment guidelines, would render a decision invalid. This argument fails, in our judgment, to recognise the impact of the statutory framework which provides for redress in a different form where an equality scheme has not been complied with. This remedy was not available to deal with failures on the part of public authorities to have regard to the guidelines.

[30] The conclusion that the exclusive remedy available to deal with the complained of failure of NIO to comply with its equality scheme does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Schedule 9 procedure ousts the jurisdiction of the court in all instances of breach of section 75. Mr Allen suggested that none of the hallmarks of an effective ouster clause was to be found in the section and that Schedule 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section. It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe section 75 would lie. We do not consider it profitable at this stage to hypothesise

> situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis.
>
> [31] It should perhaps be observed that, even if judicial review is available to challenge breaches of section 75, it is by no means automatic that, in a situation where legislation has been enacted following the breach, it would be thereby rendered invalid. Much will depend on the nature of the breach and the availability of other effective remedies. Again, however, further comment on this should await instances where the issue arises directly."

Pursuant to [30] therefore I should find whether there was a procedural failure here and whether there was a substantive breach of s.75.

[38] Re Ballyedmond Castle Farms Limited's Application [2000] NI 174 was in regard to the setting aside of the grant of leave in judicial review proceedings and alternative remedies. I have taken it into account.

[39] The approach of the courts to their judicial review role in respect of school closures has been the subject of several judgments in recent years, most recently the Department of Education v Cunningham [2016] NICA 12. I quote from the judgment of the court in the following paragraph:

> "[70] In the planning context, where very substantial sums of money may be at stake it is advisable to maintain a precautionary approach. The same might be said of public procurement. The price of probity is eternal vigilance. A test of "substantial doubt", as formulated by Lord Brown on behalf of their Lordships is appropriate. No doubt that might also be appropriate in certain other situations. But this appeal is concerned principally with the allocation of resources: whether a very small school requiring enhanced subsidy be closed or could it be operated as an integrated school, where financial and economic considerations also play an important part."

[40] The approach of the courts to executive decisions of this kind free of any imputation of improper motives should respect the different roles of the executive and judiciary, leaving a proper margin of appreciation to the decision-maker.

[41] The decision of Gillen J in Re McDonnell [2007] NIQB 125 also relates to the closure of a school. There is valuable consideration of the issue of delay with regard to bringing such applications at paragraph 21-25 of the judgment. Just to quote briefly from the opening of paragraph 21:

> "A claimant has a duty to act promptly, not an entitlement to wait for up to three months. The clock starts when the grounds first arise. This usually means the date of the decision or action being challenged. In this case, the Order 53 rule 3 relief is couched in terms of a challenge [to] the decision of the Department of Education "following a proposal by the CCMS and the Board" to discontinue St Joseph's High School, Plumbridge. I consider that the appropriate time to have made the challenge in this case was when the proposal was first made by the CCMS."

I shall take this into account when considering the issue of delay relied on by the respondent and expressly reserved to the hearing by Maguire J.

Consideration and Findings

[42] I consider it appropriate to deal first with the contention, at the forefront of the applicant's case, that the Minister's decisions are unlawful because the Department did not carry out a screening process itself but relied on the CCMS screening of 2015. Section 75 is silent on the topic of screening. Schedule 9 of the Act requires a public authority to have an equality scheme. The Department has such a scheme. By paragraph 4(3) a scheme shall –

> "(a) conform to any guidelines as to form or contents which are issued by the Commission with the approval of the Secretary of State …"

[43] No complaint was made about this scheme, it seems, until the applicant did so last November after taking legal advice. The Equality Commission has not yet decided whether that complaint warrants an investigation or not.

[44] The Equality Commission published, as set out above, a Guide for Public Authorities in April 2010 which in effect requires screening to be carried out for the purpose of discharging the statutory duty. But as set out by me at [16] above, at Annex 1, page 51, the Equality Commission expressly enjoins a public authority such as the Department to complete screening "at the earliest opportunity in the policy development process".

[45] I appreciate that as set out at [18] above the Commission "recommends" that the lead role is taken by the policy decision maker. However, by statute here the role of developing proposals for the closure, opening or amalgamation of schools in the Catholic maintained sector in Northern Ireland is vested in CCMS. It is there that the proposals are being developed. It seems to me therefore that the Department and the Minister were perfectly entitled to conclude that it was proper for CCMS to

carry out the screening process, in effect, on behalf of the Department. The ultimate decision rested with the Department but if no screening had taken place until that stage of the process the proposals would, contrary to guidance of the Equality Commission, have already been very largely fixed rather than fluid. I find that the Department was entitled to follow this aspect of the guidance and not to follow the recommendation that the decision maker should take "the lead role" in carrying out the screening. There is a potential inconsistency between these two parts of the guidance which the Department was entitled to resolve in this way in the light of the statutory scheme for the management of schools and in the exercise of its own judgment.

[46] The second principal aspect of the attack on the decisions here is that the CCMS screening, relied on by the Department, did not pick up this contrast between the degree of choice available to parents using the controlled secondary sector in North Belfast and Glengormley as opposed to the maintained sector. Therefore, it is suggested, as the Minister was not made aware of that point he had not paid "due regard to the need to promote equality of opportunity between persons of different religious belief". As the Minister was not made aware of this point until the issuance of these proceedings in a narrow sense he could not be said to have had regard to this point. As an equality of opportunity point it is not, in my view, a strong one. It was stated on behalf of the respondent and notice party that the evidence with regard to the advantages of single sex education for girls was indeterminate. This was not disputed by the applicant. I accept both the sincerity and the validity of the preference of the next friend to send her daughter to a girls' school. But it is not clear that her inability to do so amounts to an inequality of opportunity between groups in Northern Ireland of different religious beliefs. The proposed amalgamation provides the opportunity to those parents of both girls and boys who wish to send their children, if suitable, to the non-selective secondary sphere to a co-educational school.

[47] At page 794 of the papers, in the screening process, there is the following paragraph; it is dealing with gender as part of the screening process:

> "There is evidence of under achievement by boys across the entire education sector. Females generally perform better than their male counterparts. There is a need for provision which takes account of any under achievement by boys."

Further, there is a note of a telephone conference, at page 832 of the papers, between officials of CCMS, the EA and the Department. There the statement is made that "the change to co-educational settings did not disadvantage girls but that boys in co-educational settings did better than boys in single sex settings."
Therefore, one must balance the uncertainty as to whether girls suffer any disadvantage from co-educational schools against the statement, again not traversed in any way, that boys do benefit from co-educational schooling.

[48] The court also notes that although the particular point about the two Model Schools in North Belfast was not discussed the officials were alive to the underlying objection of parents like the next friend of the applicant to the loss of this single sex school available for their daughters.

[49] There were competing submissions, which I have taken into account, with regard to whether judicial review is an available remedy at all here for the applicant. The complaint procedure under Schedule 9 is really about a defective scheme. I do not think this is a case of a defective scheme. The only error which I identify is the fact that neither CCMS nor EA nor the Department had regard to the point, which only seems to arise for the first time in these proceedings, that there will be a difference following the implementation of these development proposals between the controlled and maintained sectors in this part of Northern Ireland. That is a 'procedural failure' and per Neill [30], not appropriate for judicial review.

[50] On the other hand even if the Equality Commission were now to act on the complaint brought in November 2016 it could not constitute an effective remedy as the schools will have been amalgamated unless the court orders otherwise. However, if the complaint had been brought promptly, a full year before, in November 2015 or shortly after when the CCMS proposals were published by the EA, the Commission would have had time to investigate, if it chose, and report adversely if this caused a significant impact on equality of opportunity. I am aware that the time limit for such complaints is 12 months. But prompt action would have made that remedy an effective one. I would therefore conclude that this is not one of those exceptional cases where an alleged breach of s 75 warrants judicial review.

[51] In case I am wrong in that view I shall, for the assistance of the parties, consider whether there was any 'substantive breach' of s. 75 which would warrant a remedy by way of judicial review. It seems to me that the argument that this difference between the controlled and maintained sectors would lead to some inequality of opportunity in North Belfast is a weak basis for a court to exercise its discretion to make Orders of Certiorari to quash these Ministerial decisions. Further examination weakens such a case still further. Would the Minister have come to any different decision if the matter had been brought to his attention? This was a proposal that had been developed over a period of years by the expert bodies charged with responsibility for schools generally and the maintained schools in particular. The decision was consistent with the general policy apparently adopted by CCMS of being supportive of co-educational schools.

[52] There is an obvious justification of a difference in approach to the controlled and maintained sectors. The Girls' Model School and the Boys' Model School in North Belfast are not far away from one another but they areon different sites. Turning them into one school would clearly be a quite different matter from amalgamating St Patrick's and the Little Flower which are immediately contiguous to one another.

[53] A parent dissatisfied with this development can do something about it. Some parents desiring single sex education will have daughters who will qualify for the Dominican College grammar school. Some parents, while preferring a Catholic ethos, will be content if they feel strongly about the gender issue to send their girls to the controlled Girls' Model School. No doubt a few may be able to avail of private educational opportunities. But what is expressly acknowledged in the petition presented by the parents opposed to this development and quoted above at [27] is that they are still at liberty to send their daughters to another single sex school in the city, albeit she will have to travel further by car or bus.

[54] I have set out above that the approach of the courts here is an example of what should be mutual respect between the legislature, executive and judiciary. No improper motive is suggested here for this decision. For the avoidance of doubt counsel confirmed that the Minister would be perceived to be from the Catholic community so there is no suggestion of any underlying reason for bias in arriving at the decision in any way. He accepted consistent advice from no less than four bodies possessing expert knowledge on the issue – NICCE, CCMS, EA and his own Department of Education.

[55] I conclude therefore that even if this was a case where judicial review did lie against the decision as a substantive breach of Section 75 it would not be right in the exercise of the court's discretion to quash the Minister's decisions or indeed to grant any other relief to the applicant. This point was not picked up by anyone until, it seems, the matter was referred to the applicant's legal advisers. It seems to me that that is because it was not in reality an issue of substance or one that was perceived to give rise to any injustice.

[56] For the avoidance of doubt it can be seen to be implicit in the findings I have made that even if screening had picked up this point about the difference in choice between the controlled and maintained sectors that would not, in my opinion, have amounted to a "major impact on equality of opportunity and/or good relations". Therefore, in my view an equality impact assessment need not have been undertaken by the Department.

Delay

[57] The proceedings here were issued on 22 June 2016, a day short of three months from the Ministerial decision. That decision was announced on 24 March. Maguire J, in my view correctly, held that the proceedings had not therefore been brought promptly and reserved the issue of delay to this hearing. As can be seen from this judgment the only error I find here is that the CCMS screening did not pick up this contrast in the range of choice available in the two sectors in North Belfast. Any error therefore was on the part of the CCMS screening. Given the recognition by the Equality Commission that screening should be carried out at the earliest opportunity I find that it was entirely proper for the Department to rely on that 2015

screening when the matter was put before the Minister for decision in early 2016. It would be a wholly unnecessary burden to good government and add to costs to have to go through the process all over again merely because a year had elapsed without a change in circumstances.

[58] Given that the only error was in that 2015 screening, and it can be seen that I consider it a modest error, the proper time to have raised an objection to that omission is when the proposals and the documents were sent out for consultation by the EA in November 2015. That was not done by the group to which the applicant's mother belonged. It was not done either informally or formally by a pre-action protocol letter or anything of that kind. I consider that would have been the appropriate time to issue proceedings of this nature.

[59] The strength of the respondent's case on this issue of delay is increased by three other factors. Firstly, it cannot be denied that the actual judicial review applications were brought almost at the last moment within the three month's limit after the Minister's decision. Secondly, it is acknowledged that when the group to which the next friend belongs attended at CCMS they were advised that if they were dissatisfied they could resort to judicial review as a potential remedy. The appropriate thing to do at that time would have been to consult solicitors but that was not done until a significant time later. Thirdly, like Gillen J in McDonnell, I take into account the prejudice caused to the respondent and many other parties by a belated halting of the process. At page 65 of the papers Edel Teague for CCMS says:

> "… the delay has caused substantial prejudice to CCMS in implementing the DPs and created instability within the school communities as we try and manage this process towards September 2017.
>
> Parents are obliged to express their preferences for schools in early February. In preparation for that secondary schools hold open nights. The open night for the amalgamated school has had to be postponed from 12 January until 25th and 26th to allow for these proceedings."

[60] In her first affidavit, Ms Durkin, at paragraph 21, deposes that the Interim Board of governors of the new school was appointed as long ago as May 2016. A series of sub-committees have been established to consider appointments, communication, resource management and special education needs. These have all met several times. Teaching and non-teaching staff have been engaged on the basis of the amalgamated school. Physical works are in hand to facilitate the implementation of the proposal. The principal of the new school has been appointed, I was told, and as it happens she is presently the principal of Little Flower. It cannot be denied therefore that to halt this process at this late stage would cause disarray and prejudice in a scheme that has been in gestation for a period of years and which

effects more than a thousand adults and children. No point of law of general importance is at stake. It seems to me that even if I had not found against the applicant for the reasons set out above it would be my duty to hold that this is a case where the failure to act promptly should lead, in any event, to the refusal of the application.

[61] I therefore conclude that for the reasons set out above and for the reason of delay the application is dismissed.