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2016 No. 055300/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

SK's (A Minor) Application [2016] NIQB 92

IN THE MATTER OF AN APPLICATION BY SK (A MINOR) BY HER MOTHER AND NEXT FRIEND FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

MAGUIRE J

[1] This is an application for leave to apply for judicial review. It is made in respect of two decisions: the first in time is the decision of the Education Authority (EA). This decision was made on or about 17 November 2015. It involved the EA stating its view of a CCMS proposal to alter the configuration of post primary single sex non selective secondary schools in the North Belfast/Glengormley area. It is argued that the EA, in stating its view on the proposal, acted in breach of its obligations. The second decision challenged is that of the Minister for Education who ultimately approved a set of proposals in respect of the closures of Little Flower Girls' School and St Patrick's Boys' School and the amalgamation of the two to make a new co-educational school.

[2] The framework for decision-making which is relevant for the purposes of this judicial review may be found in Article 14 of the Education and Libraries (Northern Ireland) Order 1986. This deals with the making of decisions to continue a grant-aided school or to establish a new one. There is what has been described as a tripartite process of decision-making involving –

(a) the relevant managing authority (here CCMS);

(b) the EA; and

(c) the Department which has the final decision-making power.

[3] The procedure has helpfully been summarised in the skeleton argument of Mr McLaughlin BL who appears on behalf of the EA. He states that in the case of a Catholic Maintained School (which is the case here) the procedure is as follows –

> "(a) The CCMS consults with representatives of the parents, teaching staff and Board of Governors of the school.
>
> (b) The CCMS submits a development proposal to the EA.
>
> (c) The EA consults with the trustees and managers of any school which is likely to be affected by the proposal.
>
> (d) The EA `shall submit the proposal to the Department together with its views thereon'.
>
> (e) The EA publishes the proposal for public consultation over a period of 2 months, with responses to be submitted to the Department.
>
> (f) Decision by the Department on the proposal or modification of it.
>
> (g) If approved by the Department, CCMS must implement it."

[4] In this case CCMS submitted development proposals to the EA. The EA then consulted upon them with trustees and managers of affected schools. However, the role of the EA at this stage is encapsulated in the words of Article 14 which are found in quotations marks at paragraph (d) above.

[5] In respect of the applicant's challenge to the EA in this case, it is that the EA did not comply fully with the obligation cast upon it to record "its views". In fact, the proposals made by CCMS and presented to the EA had been endorsed with the EA's views on them. What the EA said was brief. It said "the EA would support the proposals. The proposals were discussed and agreement given to publish at the EA Education Committee … meeting on 12 November 2015".

[6] Ms Kiley BL, for the applicant, claims that the approach of the EA in saying what it did say about the proposal was insufficient to amount to it carrying out its lawful function. On the other hand, Mr McLaughlin BL argued that the EA was entitled to say as much or as little as it wished about the proposal, provided it indicated its views.

[7] On this point, the court sees no arguable illegality on the facts in respect of the EA's treatment of the proposals. While what was said, and what was endorsed on the proposal, was brief, it seems to the court that the EA did provide its view. Only that is necessary.

[8] On this basis the court refuses leave in respect of the challenge to the EA.

[9] While the court will not go into detail on the point, even if the court had believed that there was an arguable case against the EA, it would not have granted leave *vis a vis* the EA on grounds of delay. There is substantial authority for requiring promptitude in respect of a challenge of this sort. Given that the EA decision was made in November 2015 and that no challenge was mounted to it until 22 June 2016, it seems to the court that the challenge is considerably out of time. If it had to, the court would therefore dismiss this challenge to the EA on the basis of delay, following such cases as McDonnell, Re XY and KE.

[10] The court therefore turns to the challenge directed at the Minister's decision. This is mounted on a number of grounds.

[11] The first of the grounds raised by the applicant is an alleged failure by the Minister and Department to perform their statutory obligations under section 75 of the Northern Ireland Act. It also, it is alleged, failed to comply with its Equality Scheme. On this point Ms Kiley submitted that the proposal to close Little Flower Girls' School and St Patrick's in order to effect an amalgamation of those schools into a new school had important implications for equality of treatment. She argued that the applicant (and other parents in her position) in the light of the proposed changes would be in a class which was being disadvantaged as a result of them. This class consisted of Catholic parents who lived in the relevant cluster (North Belfast and Glengormley) whose children were wishing to go to a non-selective secondary level school and who preferred to have their children educated in a single sex school. This class was, she argued, treated less favourably by the Department than similar parents in the State school sector with similar requirements. As regards the cluster in question there was evidence before the court that there were a number of non-selective secondary level schools available in the State sector which provided single sex education. Thus it was alleged that the applicant and similarly placed parents were at a disadvantage as a result of the Minister's decision. In this context it was alleged that the Minister's decision had the effect of eradicating single sex provision for the cluster in respect of catholic pupils in the non-selective secondary sector.

[12] The difference in treatment of the respective groups, Ms Kiley argued, meant that section 75 of the Northern Ireland Act was in play. Accordingly, she argued, the Minister had a duty to pay due regard to the need for equality of opportunity but he had failed to do so as there was no evidence that the issue had been subject to any process of screening, never mind equality impact assessment by the Department.

[13] In response to this argument Mr McAteer BL for the Minister argued that there was no warrant or need for such an assessment. But if he was wrong about this, he argued that the applicant's true complaint was that the Department had failed to perform its obligations under its Equality Scheme. Such a complaint, counsel submitted, had a tailor-made remedy provided in the 1998 Act. This can be found at Schedule 9 of the Act *viz* a complaint to the Equality Commission. Accordingly, there was an alternative remedy which was open to the applicant which should have been used instead of mounting a judicial review application, which was a remedy of last resort.

[14] The court concludes for the purpose of this leave hearing that the section 75 point is arguable, though this is not to say that it is necessarily a point which will succeed at a full hearing. The question for the court is whether it should grant leave on the point in the light of Mr McAteer's alternative remedy objection. In respect of that objection the court bears in mind that the Court of Appeal in its decision in Neill does not preclude the grant of leave though it clearly promotes the general approach that applicants should usually utilise their ability to complain to the Equality Commission where that course is open to them.

[15] It seems to the court that, subject to the issue of delay, what it ought to do is grant leave on this point while reserving the ability ultimately to reject the point on the basis that the matter should have been pursued *via* the route provided in Schedule 9.

[16] The court notes that it has been led to understand that the applicant has in fact started the process of mounting a complaint to the Equality Commission under Schedule 9 of the 1998 Act and it will expect the applicant to proceed with this, irrespective of these judicial review proceedings.

[17] The second issue raised by the applicant was whether Little Flower Girls' School met the terms of the entitlement framework. In essence, the applicant's case is that the original proposal for change put forward by CCMS had misunderstood the provision which existed at Little Flower in terms of the school's educational offer for Key Stage 4 and Post 16 age groups.

[18] The entitlement framework is a standard used in this area to determine whether a school provides the minimum offer of subjects at a particular stage. CCMS, it is argued, criticised the school for falling short of the minimum offer required. But this claim is said to have been falsified by representations made by teachers who were within the Teachers' Union at the school and who had made a submission to CCMS. Those teachers had argued to CCMS that there was no failure by the school to fall below the requisite threshold levels in respect of the offer available to pupils at the relevant stages. The letter, which the court was shown was, however, put in broad terms ("our members' understanding that") and refers to the position at Key Stage 5 and Key Stage 4.

[19] When the Minister was being briefed by his officials in respect of the decision he had to take it appears that he was presented with a series of figures relating to Key Stage 4 and Post 16. These figures, which the court understands to be the Department's own figures, revealed that the school was meeting the entitlement at Key Stage 4 but not at Post 16. There was no reference to any alternative set of figures from CCMS in the submission which went to the Minister. Neither the teachers at the school nor the Teachers' Union made any contact with the Minster about this aspect of the matter. In these circumstances inevitably the Minister will have proceeded on the basis that, in the absence of any challenge on this point, what had been stated by the Department was correct and was not contested. Certainly there was nothing patently wrong with the material put before the Minister, so far as the court can see. The figures on their face do substantiate a failure to meet the entitlement framework in respect of Post 16s.

[20] In these circumstances it seems to the court that there was no reason why the Minister should not have accepted the figures which were placed before him. Indeed, the court has no reason, even having seen the teachers' letter to CCMS, to reject them.

[21] The onus of proof in judicial review has therefore a part to play on how the court should deal with this issue. The court must ask itself whether there is any or sufficient proof before it that what the Minister was told in the submission was factually wrong. The answer to this question, it seems to the court, is that the court is unable at this stage to say that there was anything wrong with what the Minister was told. Consequently no evidential footing exists on this point which would cause the court to grant leave to apply for judicial review in respect of it.

[22] The third point raised by Ms Kiley related to the terms in which a particular point had been put by the Minister's briefing official in the submission he received concerning the proposals. It was argued that the content of what the Minister had been told in his briefing had the effect of attempting to down-value the importance of letters of objection received by the Department.

[23] Ms Kiley drew attention to paragraph 7.4 and 7.5 of the submission to the Minister where the following was stated:

> "7.4 The community of Little Flower Girls' School were behind the majority of objections and petitions lodged against the amalgamation. The central issues of contention raised by them related to the impact of the amalgamation (and particularly the closure of Little Flower School) on parental 'right' to Catholic single sex education as well as concerns about the educational experience of pupils attending a school operating on a split site, the potential performance levels to drop and the adverse impact of co-education in girls aged 11-14.

> 7.5 The Department … also notes that two of the three objection letters received were from the same parents who are concerned about the particular and specific needs of their children. The mother of those children was instrumental in the lodgement of the petition (of 1617 signatures)".

[24] In Ms Kiley's submissions read in context the above paragraphs sought to devalue the objections.

[25] It seems to the court that there is no strength in this point. The Minister, it notes, was provided with the letters of objection in question and it was therefore open to him to draw his own conclusions about them. In the circumstances there was and is no reason to fear that the Minister may have been misled in any way. But, even if this had not been the case and the Minister had not been provided with the letters of objection, the court does not regard the contents of the two paragraphs quoted above as being sufficient to render the Minister's decision arguably illegal.

[26] The final point raised by Ms Kiley related to what might be described generally "as surplus school places". Ms Kiley raised as a ground of judicial review what she identified as passages in the submission to the Minister which she says wrongly depicted the factual position in respect of the above. The court was told that in substance the submission contained material which unfairly depicted a decline in the enrolment at Little Flower Girls' School.

[27] In particular Ms Kiley referred to what the submission had to say about "stable enrolment trends" and she pointed to a table found at page 73 of the papers as depicting a misidentification of those trends.

[28] The court has considered the table which provided certain figures in respect of the school for the years 2010/11 to 2015/16 (which it will not set out here). There does not appear to be anything particularly controversial about the figures as set out in tabular form which meets the eye. The figures are straight forward to read and the court has no reason to believe that the Minister will not have read them. While it is correct that in a commentary accompanying the figures there is reference to the "trend for total enrolment at Little Flower Girls' School [to] show a decline" this does not seem to the court to demonstrate any obvious illegality. Indeed, the commentary which was provided seems, in the court's judgment, to be not outside the range of a reasonable commentary which could be made in the light of the figures which had been quoted save for the exception that there is a comment to the effect that the Year 8 intake had only once been fulfilled during the period which was covered by the table which appears to the court to be incorrect.

[29] However, the table and comments must be read as a whole. Doing so, the court does not believe that there is any error of sufficient materiality to cause it to grant leave for judicial review on this discrete ground.

[30] While there was a valiant attempt to marry this aspect of the matter to a broader attack on departmental policies which had been the subject of criticism by the Northern Ireland Audit Office on the one hand (see their report of 30 June 2015) and the Assembly's Public Accounts Committee (see their report dated 2 March 2016), it is the court's view that this attempt was without merit unless it could first be shown that the material actually provided to the Minister was incorrect or misleading in a sufficiently material way.

[31] The court does not consider that has been achieved on the evidence in the case and therefore sees no arguable case on this point.

Delay

[32] The Department strongly argued that, even if there had been any strength in any of the applicant's points against the Minister, leave should be refused on grounds of delay.

[33] The key dates in respect of delay were:

(i) The Minister's decision was made on 23 March 2016.

(ii) The application for leave was made on 22 June 2016 – a day before 3 months had elapsed.

(iii) The application lodged was lodged with incomplete evidence as there was no grounding affidavit provided until 27 June 2016.

[34] Mr McAteer BL argued that on any view the application was not made "promptly" as required by Order 53 Rule 4. Promptitude, he argued, was the true time standard in the Rule.

[35] This was, counsel went on, of particular importance in a case like the present where the challenge affected and affects a wide variety of interests and where the proposal challenged is linked to other steps – here a number of proposals affecting the schools within this area sector of the North Belfast/Glengormley cluster. Certainty, counsel reminded the court, was of great importance.

[36] In advance of the leave hearing the Department had filed an affidavit from a senior official indicating that in various respects the Department would suffer grave prejudice if leave was granted and the case went to a full hearing. That affidavit drew attention to the inter-related aspects of five different development proposals only two of which were being challenged in the proceedings before the court. The

deponent indicated that the various proposals were in the nature of a package of proposals. Consequently changes to one part of the package would affect other parts of the package.

[37] In addition, the deponent argued that a great deal of work had already been done in respect of preparing for the implementation of the development proposals. The basic proposal was concerned with the number of places that would be available in the area after the changes. It was expected that these changes would have to be in place by September 2017. Any risk to this timetable was likely to endanger the education plan for this area, involving all five proposals. It was also noted by the deponent that if the closure of Little Flower Girls' School did not go ahead this would have implications for the also proposed closure of St Patrick's College as well as for the new amalgamated school.

[38] A still further point made was that any uncertainty about the future shape of area provision would impact on the ability of schools to advise parents typically during January 2017 in respect of their choice of which post primary school they should list in order of preference in February 2017 for admission in the following September. It was also noted by the deponent that a range of steps had already been taken to advance the area development plan. An implementation plan detailing key actions and milestones was already in place. An interim Board of Governors had been appointed in May 2016 for the new amalgamated school. This included members of the Board of Governors of both Little Flower Girls' School and St Patrick's College. Various sub-committees had been established and had met. Ongoing was the process of recruiting a Principal Designate and interviews in connection with that post were due to occur in early December 2016.

[39] It was thus suggested that the grant of leave to apply for judicial review would cause serious difficulties in the near future.

[40] As against this Ms Kiley reminded the court that an explanation for the delay of the applicant's mother taking these proceedings on her daughter's behalf had been put forward at paragraphs 28 *et seq* of her grounding affidavit. In essence the applicant's mother maintained that she had no knowledge of the ability to contest a matter of this sort in the forum of a court and that such knowledge was only provided to her at a late stage. At a late stage, moreover, steps had to be taken to obtain legal aid, which took still further time.

[41] In the court's view the application for judicial review has not been made promptly. The court in those circumstances asks itself whether or not a good excuse for delay has been provided. The court having considered the applicant's mother's affidavit is unconvinced that the explanation put forward is enough satisfactorily to explain the delay.

[42] The court has given attention to the question of whether it should extend time in this case, in particular given that the outer limit of 3 months had yet to be arrived

at when the initial papers had been lodged. In this regard the court accepts that the points of prejudice which may arise in this case, if leave is granted, are substantial.

[43] The court, not without some misgiving, will defer any final ruling on the issue of delay to the full hearing of this case. In the result therefore the court will grant leave on one issue only: that of the alleged breach of section 75 of the 1998 Act. Given that a full hearing will be on a single issue it is the court's view that it should be possible for it to be brought on speedily and thereby minimise the extent of disruption which might otherwise result from the grant of leave.

[44] The court commends Ms Kiley on her careful and well-constructed submissions in this case which skilfully and economically focussed on the key matters at issue.