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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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School X's Application [2016] NIQB 87

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

AND IN THE MATTER OF A DECISION OF THE EXCEPTIONAL CIRCUMSTANCES BODY MADE ON OR AROUND 22 AUGUST 2016

NOTICE PARTY – AA3

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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. I have done so because at the heart of this application is a child, AA. 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 written and oral submissions. Mr Stephen Shaw QC appeared with Mr William T Gowdy on behalf of the applicant; Mr Peter Coll QC appeared with Mr David Dunlop on behalf of the respondent and Ms Fiona Doherty QC appeared with Mr Damien Halleron on behalf of AA3, the notice party.

[3] The desire of parents to secure the best education for their child is a strong and understandable one. The issue of admissions to secondary education in this jurisdiction provokes strong emotions. The entire process is governed by a labyrinth

of selection procedures, statutory obligations and regulations overseen by a number of specialist bodies. It is the aspiration of AA3 for the best education of his son AA which lies at the heart of this application.

Chronology/background

[4] AA was born on 15 November 2004. He is originally from a country in Asia and first came to Northern Ireland in October 2012 to live with his father who was granted political asylum in the United Kingdom, becoming a British citizen in January 2016.

[5] When he came to Northern Ireland AA was enrolled in primary school Y. Prior to that he had not been exposed to education in a school setting. When he arrived here he could not speak English.

[6] In the Autumn of 2015 he sat the AQE examinations for entrance to selective post-primary school.

[7] AA performed poorly in the tests obtaining a score of 56. Although school X was only his second choice on his application, he applied to that school for an increase in his score based on "special circumstances". The school did increase his score from 56 to 62 but this remained well below the lowest score in respect of which admission was granted i.e. 94. Accordingly, AA was not offered a place at school X.

[8] AA3 then instigated an application to the respondent (the ECB) on 25 June 2016 for a direction that AA be admitted to school X on grounds of **exceptional circumstances**. On 28 June 2016 the ECB contacted school X by e-mail seeking confirmation that AA had not been offered a place at the school – the said confirmation was provided the following day.

[9] A hearing before an ECB Panel was arranged for 26 July 2016. On 4 July 2016 the ECB Secretariat sent by recorded delivery to school X notification of the hearing and a copy of the application.

[10] The ECB hearing took place on 26 July 2016 as scheduled. The hearing was attended by AA's father and his interpreter. No one from the school attended but according to the ECB there was nothing remarkable or unusual about that.

[11] After the hearing the ECB by decision promulgated on 29 July determined that there were exceptional circumstances in AA's case that required his admission to the school and the appropriate notification was sent to school X.

[12] The absence of school X from the hearing on 26 July 2016 can be explained by a series of unfortunate events. It transpired that the 4 July letter was not delivered to the school and was returned to ECB on 26 July 2016. The correspondence was then resent to the school and received by it on 27 July 2016.

[13] The school then received notification of the Board's decision on 29 July 2016.

[14] There appears to have been some telephone discussion between representatives of the school and the ECB on 1 and 2 August 2016, the contents of which appear to be in dispute but which is not germane to my decision.

[15] On 16 August 2016 the school's solicitors wrote to the ECB challenging the decision of 26 July 2016 hearing on procedural and substantive grounds.

[16] In response on 17 August 2016 the ECB offered the school a hearing on 22 August 2016 to consider written or oral submissions from the school.

[17] On 19 August 2016 the school sent written submissions to ECB.

[18] A second hearing then took place on 22 August 2016 with the same Panel consisting of three members (Chairman Timothy Mayes, a solicitor, Mary McCartan and Deirdre Brown). At that hearing the Principal of school X made oral submissions in support of the written submissions of 19 August 2016. There was no appearance by or on behalf of AA at that hearing.

[19] Following the hearing the Panel determined that there were exceptional circumstances that required the admission of AA to the school and by letter of 23 August 2016 the Board of Governors were directed to admit AA on a supernumerary basis for the remainder of the school year.

[20] By e-mail on 23 August 2016 the Principal of the school wrote to the ECB asking for details of the exceptional circumstances which had been identified by the ECB Panel. The e-mail also asked the Panel to "justify their decision to admit a pupil to a grammar school without academic evidence of suitability and to what extent the written and oral evidence submitted by the Principal of school X were taken into account". The e-mail concluded "In the interim I am not in a position to admit AA to school X".

[21] On 25 August 2016 the ECB sent a letter to the school outlining the reasons for its decision.

[22] Because of the school's refusal to admit AA he issued an application for leave to apply for judicial review against the school on 25 August 2016.

[23] A leave hearing took place on 26 August 2016 at which the school indicated that it was not opposing the grant of leave and agreed to admit AA to the school under protest and without prejudice to its right to challenge the ECB's decision.

[24] AA commenced attendance at the school on 30 August 2016.

[25] On 2 September 2016 the school sent a pre-action protocol letter to the ECB.

[26] On 6 September 2016 the school issued an application for leave for judicial review.

[27] Leave was granted on 28 September 2016 and the hearing of the substantive application was before me on 5 October 2016.

The legal framework

[28] The Exceptional Circumstances Body was created and constituted pursuant to Article 16A of the Education (Northern Ireland) Order 1997 and the School Admissions (Exceptional Circumstances) Regulations (Northern Ireland) 2010. Article 16A was enacted by Article 29 of the Education (Northern Ireland) Order 2006 and provides as follows:

> *"**Admission to secondary school: exceptional circumstances***
>
> *29. – (1) After Article 16 of the 1997 Order insert –*
>
> > *'**Admission to secondary school: exceptional circumstances***
> >
> > *16A. – (1) The parent of a child of compulsory school age may apply to the body established by regulations under paragraph (6) ('the body') for a direction that on the grounds of exceptional circumstances specified in the application the child is to be admitted to a grant-aided secondary school so specified ('the specified school').*
> >
> > *(2) On the hearing of an application under this Article –*
> >
> > *(a) if the body is satisfied that exceptional circumstances exist which require the admission of the child to the specified school, the body shall direct the Board of Governors of that school to admit the child to the school;*
> >
> > *…..*

> *(3) It shall be the duty of the Board of Governors of the specified school to comply with any direction given under paragraph (2)(a).*
>
> *(4) The Department shall make regulations as to the meaning of 'exceptional circumstances' for the purposes of this Article."*

Article 16A goes on to provide such Regulations may specify matters to be taken into account or not to be taken into account in determining whether there are exceptional circumstances and may also provide for the constitution and procedure of the body to determine applications under this Article.

[29] These Regulations are to be found in the School Admissions (Exceptional Circumstances) Regulations (Northern Ireland) 2010.

[30] The key Regulations for the purposes of this application are Regulation 2 ,which *inter alia* provide:

> *"'Exceptional circumstances' means circumstances which are both exceptional and personal to the child in question and relate to admission to a specified school only;"*

Regulations 5 and 6 which state as follows:

> "***Examples of Circumstances***
>
> *5. Examples of circumstances which may be regarded as exceptional circumstances requiring the admission of a child to a particular school are –*
>
> *(a) Circumstances where in the opinion of a registered medical practitioner the child has been subjected to sexual abuse;*
>
> *(b) Circumstances where a child is looked after by an authority (as defined in Article 25 of the Children (Northern Ireland) Order 1995.*
>
> *6. The following circumstances may not be regarded as exceptional circumstances requiring the admission of a child to a particular school –*
>
> *(a) Circumstances related wholly or mainly to the kind of education provided at that school;*

(b) Circumstances related to a child's academic ability;

(c) Circumstances relating wholly or mainly to the availability of transport to that school."

Regulation 4 also provides that the schedule to the Regulations shall have effect in relation to the procedure for applications to the body.

[31] Schedule 1 provides as follows:

"1. Each application shall be determined by a panel.

2. A panel shall not issue a direction for a child to be admitted to a specified school unless that school has refused to grant a request for that child to be so admitted.

3. An application shall be made by notice in writing to the body setting out the grounds on which it is made.

4. On receipt of an application to the body, a panel may require a parent to provide relevant documents within a specified time.

5. A panel shall give the parent an opportunity to make written representations or appear before it to make oral representations.

6. A panel shall give the Board of Governors an opportunity to make written representations or appear before it to make oral representations.

7. A panel may have regard to any views expressed by the child concerned.

8. A panel may request the parent, the Board of Governors and any other person to supply further information which appears to it to be relevant to the determination of the application.

9. The application for a direction shall be decided upon by simple majority of a panel.

10. The hearing of the application shall take place within a period of four weeks beginning with the date on which the application is sent to the body, or as soon as possible thereafter.

11. A panel shall issue its decision within a period of three weeks beginning with the final date of the hearing, or as soon as possible thereafter.

12. A panel shall sit in private unless the parent requests otherwise in writing.

13. Two or more panels may sit at the same time.

14. In this schedule –

'Board of Governors' means the Board of Governors of the grant aided secondary school specified in the application;

'parent' means the parent applying for a direction under Article 16A of the Education (Northern Ireland) Order 1997."

[32] The ECB has published both a Secretariat Manual and a Member Information Manual providing guidance to the Secretariat and Panel members.

The Panel's decision

[33] As is clear from the legislation and Regulations set out above the task of the ECB Panel is to establish whether there were "exceptional circumstances" which "require the admission of the child" to school X. If so satisfied the Panel "shall direct the Board of Governors of that school to admit the child to the school".

[34] In the interpretation section of the Regulations "exceptional circumstances" mean "circumstances which are both exceptional and personal to the child in question and relate to admission to a specified school only".

[35] In approaching this task the Panel addresses three tests as follows:

- Test 1 – Are the circumstances that are claimed exceptional?
- Test 2 – Are the circumstances that are claimed "personal" to the child?
- Test 3 – Do the circumstances that are claimed require the child's admission to the school a parent has specified, and only that school?

[36] It is only if a Panel answers yes to each of these questions that it will direct the Board of Governors to admit the child to the school.

[37] In this case the Panel received a written application from AA's father dated 28 June 2016. The application is contained in a *pro forma* application form which sets

out the background to the application process and is in effect divided into four parts as follows:

- The B**asic Details** section which establishes essential information to facilitate the processing of the application.

- The **Three Tests** section which sets out the questions referred to above.

- The **Documentation enclosed with your Application** section which relates to documents enclosed with the application to prove the claim of exceptional circumstances.

- The **Declaration** section which requires the applicant to sign a declaration to confirm that all of the information provided is truthful.

[38] In relation to Test 1 the application form sets out the background to AA's arrival in Northern Ireland. Unfortunately after his arrival here AA was exposed to significant traumatic events. In particular, in October 2014 his home was attacked, the family car was burnt and a threatening racist letter was left at the door of the family home. The matter was treated by the PSNI as a hate crime. Subsequent to this event AA developed understandable psychological symptoms which required his attendance at the Trauma Family Centre. As a result AA was in constant fear and could not be left alone. AA's father set out specific examples of how this traumatic event had affected AA in particular. The incident is described as having a very significant effect on his life in the context of his already troubled background.

[39] In relation to Test 2 it was clear that the circumstances described by AA's father were "personal" to AA.

[40] In relation to Test 3 it is clear that AA's father felt that AA was an intelligent child who could learn quickly and that he would benefit from attending a grammar school which would make him work hard and get more homework. He referred to the fact that AA's sister was attending a school which had a relationship with school X and he felt that the school would help him to build his personality and develop trust in his community again. He suggested that other secondary schools would not have the skills to look after a student such as AA. Of particular relevance in the context of this case was his assertion under the Test 3 section of the application form that *"some classmate in school Y will attend this school and that encourage him to qualify to be familiar with his new environment"*.

[41] Mr Mayes has set out the procedure adopted for the hearing on 26 July 2016. AA's father and an interpreter attended at the hearing. In advance of hearing the submissions the Panel discussed and agreed that it would listen to the representations of AA's father through the interpreter. Each of the Panel members were provided with a pre-printed form by the ECB Secretariat which provided a

template for the Panel members to insert their observations addressing the three tests to which I have already referred.

[42] Each Panel member separately completed the relevant form addressing their own views and expressing, on the basis of the material including the evidence provided orally, whether they were individually satisfied that the requisite tests were met.

[43] It was clear that English was not AA's father's first language and in the course of oral submissions through the interpreter and through questioning by the Panel he was able to elaborate and develop the themes presented in his written application form. In particular, Mr Mayes avers that AA's father stated that there were a number of pupils with whom AA was friendly who were due to transfer to school X. This, of course, went beyond the reference in the application form to a single classmate in primary school Y attending school X. In the course of his oral presentation he referred to the fact that there were a number of boys who were going to attend school X and that they visited AA at home and also attended a local Leisure Centre with him. This was conveyed to the Panel as a network of friends who were supportive and provided reassurance for AA.

[44] This is supported by the handwritten notes of each of the Panel members. Thus Mr Mayes' notes indicate:

> "*He has a supportive network of friends who support him at home and at the local leisure centre for sporting activities. As this support network attends school X it is essential that this vulnerable child has all relevant support at all times where possible. The support network is not available at any other school so he must attend school X.*"

Notes of another Panel member, Mary McCartan, read:

> "*The child is in a nervous, fearful and fragile state following the incident. He has a group of supportive school friends who visit him at home and often attend a local Centre. These boys are going to school X and would provide a supportive and reassuring network for him as he embarks on secondary education. The school is very easily accessible from his home and will provide the type of environment that will help this very vulnerable child settle in his new school. …..*
> *I believe that school X is the only school suitable for the child which will cater for his needs and help him to feel more relaxed when surrounded by his friendship group.*"

Again this is echoed in the handwritten notes from Deirdre Brown dated 26 July 2016 as follows:

> "*The parents of the child feel that school X would be an excellent school for him because friends from his primary school are going there and the school is very close to where he lives.*"

[45] Whilst there are some differences in the notes, they clearly point towards the case being made by AA3 that there were a group of boys who were friendly with AA who were going to school X.

[46] In any event, after hearing the oral submissions on 26 July 2016 the Panel convened immediately thereafter to discuss what they had heard. They unanimously agreed that the applicant had met each of the tests and concluded that there were exceptional circumstances, personal to the child, which required his admission to school X and to only school X.

[47] When Mr Mayes learned that school X was not prepared to accept the pupil and that it had not been made aware of the date of the hearing, the Panel was reconvened to enable school X to make representations. Prior to that date school X's solicitors wrote to the ECB on 16 August 2016 setting out their concerns about the substantive and procedural propriety of the decision of 26 July 2016 promulgated on 29 July 2016. In summary these concerns related to the fact that the school did not have an opportunity to make representations or appear before the ECB. There was a concern about the absence of any reasons contained in the decision of the ECB. The letter commented on the application form, identifying the reasons advanced for the exceptional circumstances, which the letter summarised as:

- AA is intelligent and can learn quickly (i.e. that he is suited to the form of education offered at the school).

- That the school is a grammar school, and that the type of curriculum on offer will distract AA from his trauma.

- The school is close to his home, such that he will not feel scared on the way to and from the school.

- Classmates from his primary school have been admitted to the school.

- His sister is at school Z, Belfast.

- The education offered at a secondary school would be less suited to addressing AA's trauma and loss of trust.

- The all boys' education at school X will provide him with a supportive education.

[48] Prior to the hearing on 22 August the Principal of school X made a written submission to the ECB on 19 August 2016. In particular, the Principal responded to several points and assertions made in the written application on behalf of AA as follows:

> *"Section 19*
>
> - *AA3 states his house was attacked on 5 October 2014, however school X understood it was the neighbour's house which was attacked. Is it is possible to have this clarified?*
>
> - *Reference was made to an inability to achieve a score of over 100 AQE in part due to the trauma of the past and having fewer than three years education in primary school Y. Having spoken to the head teacher of primary school Y (who taught AA) there is no academic evidence to support AA as capable of a score of 100 or that 56 was not a fair reflection of his ability.*
>
> - *AA3 states that AA was unable to sit all of the exam. There are three AQE tests and having contacted AQE, I have established they do not have a record that AA left any AQE assessment early. The AQE records showed all three exams were completed.*
>
> - *It would also concern me greatly that attending a grammar school where there is significant focus on examinations across a wider number of subjects will have an adverse effect on AA; emotionally and for his long term mental health and well-being.*
>
> ***Section 21***
>
> - *Reference is made to proximity to school X however school X is not the nearest post primary school.*
>
> - *AA3 states "Some classmate will attend". Whilst this is the case, from speaking to the head teacher of primary school Y AA's closest friend is attending school XX and not school X.*

The comment that school X and school Z worked together, equally applies to other schools.

- *I am concerned that the assertion that secondary schools do not know how to look after students with AA's experience is given credence. It would be insulting to my post primary colleagues to assume only school X or grammar school supports students with past or personal difficulties."*

[49] The Principal then attended a hearing on 22 August 2016 during which she addressed the Panel as to her concerns about the absence of any academic evidence to support AA's current or potential aptitude for a grammar school curriculum. In her affidavit the Principal outlines the school's submissions in the following way.

> *"At the hearing I addressed the Panel as to my concerns about the absence of any academic evidence to support AA's current or potential aptitude for a grammar school curriculum, my concerns that, as set out above, the pupils with scores significantly below 94 cannot only struggle but may drop out of grammar school education, and my view that given the academic ability and aptitude shown in AQE exam that AA would struggle with a curriculum at school X, and that that would have an adverse effect on his well-being. I refer to my Churchill Fellowship and the importance of a pupil's well-being linking to academic attainment and progress. In the course of that submission I handed up an anonymised table giving examples of boys with low AQE scores who had left the applicant to go to non-selective secondary schools or who had struggled in their GCSEs."*

[50] Having heard the submissions from the Principal of school X Panel members completed their individual forms addressing the relevant tests in the same way as had been done in relation to the hearing on 26 July 2016. After hearing the evidence from the school Principal and reviewing all of the material including the written submissions made on behalf of school X, the Panel completed the relevant forms and collectively agreed that all three tests had been met and that the school should be directed to accept AA. In relation to Test 3 the summary of the decision of the three Panel members is set out as follows:

> *"The Panel was addressed by the Principal of school X. Her primary concern was that the child may not be able to cope with the high academic demands of school X especially considering the breadth and pace of the curriculum. She expressed the view that children who score significantly below the entry point level often failed to stay on in the*

> *school and gave an anonymised detail of such pupils who dropped out at key stage 3. She was concerned about the stress on the child and how it would affect his mental and emotional well-being if he could not keep pace with the school's expectations."*

[51] The Panel looked at the school's prospectus especially the aims and ethos. It was noted that the school placed particular emphasis on the following:-

- The comprehensive pastoral care.
- The school being a school of the whole community not a section only.
- The importance of good health, mental well-being and physical fitness.

[52] It was clearly the view of the Panel that the child suffered and continues to suffer from on-going distress of a psychological nature. He has a support network of close friends who visit him at home and regularly attend the local leisure centre with him. These boys attend school X and the Panel believed it essential that this traumatised and vulnerable child has the relevant support as he embarks on secondary education. The father stated *"he needs to be comfortable in his present state"* and *"he would be feeling more relaxed with them around"*. As this support network would not be available at any other school, and given that school X is a short direct bus route from the home, the Panel accepted that he must attend this school and that Test 3 is met.

[53] As set out in the chronology above school X was sent a letter setting out the reasons for the decision on 25 August 2016. The letter did not give details of the exceptional circumstances on the ground that that would breach data protection. The letter stated that the Panel did not take academic suitability into account and suggested that academic suitability is not something that the ECB Panel members take into account when making a decision of whether or not there are exceptional circumstances. The letter continued setting out the key reasons for the decision as follows:

> "*The child suffers and continues to suffer from on-going distress of a psychological nature. He has a support network of close friends who visit him at home and regularly attend the local leisure centre with him. These boys attend school X and the Panel believe that it is essential that this traumatised and vulnerable child has the relevant support as he embarks on secondary education. The father stated 'he needs to be comfortable in his present state' and 'he would be feeling more relaxed with them around'. As this support network would not be available at any other school and given that school X is a short direct*

bus route from his home, the Panel accepts that he must attend this school and that test three has been met."

The Order 53 Application/Grounds of challenge

[54] The Order 53 relief sought is:

(a) An Order of C*ertiorari* to bring up into this honourable court and quash a decision of the Exceptional Circumstances Body made on or around 22 August 2016 whereby the Exceptional Circumstances Body decided that the applicants should admit AA to year 8;

(b) A declaration that the said decision is unlawful, *ultra vires*, void and of no force or effect;

(c) An order remitting the consideration of AA's application for admission to a different Panel of the Exceptional Circumstances Body;

(d) Such further or other relief as the court shall think fit;

(e) All necessary and consequential directions;

(f) Costs.

[55] The grounds of challenge are focused on two main themes – a procedural challenge, and a substantive error of law challenge.

The procedural challenge

[56] This can be summarised as follows:

(a) The same Panel conducted both the July and August hearings;

(b) The Panel relied on evidence given at the July hearing to reach its August decision;

(c) The Panel did not approach the August hearing as a *de novo* hearing;

(d) The Panel relied in its August decision on evidence which was not taken in the presence of any representatives of the school;

(e) In coming to its decision the Panel took account of material of which the school was unaware;

(f) As a result of (e) the school had no opportunity to comment or respond to the material upon which the Panel relied;

(g) There was no evidence to support the finding made by the Panel.

Substantive error of law challenge

[57] In support of this ground the applicant argues that the Panel erred in law in its interpretation of the scheme and Regulations in determining that it cannot take academic suitability into account in deciding whether there are exceptional circumstances in a particular case.

Discussion

[58] In terms of the procedural challenge clearly the Board is obliged to ensure that its procedure is fair and complies with the requirements of natural justice. However, what is fair depends on the context of a particular case. It must be borne in mind that the ECB Panel is a specialist Panel uniquely created to consider the question of exceptional circumstances for children seeking admission to a particular school. It is not bound by strict rules of evidence or procedure and is entitled to tailor its procedure to the particular decision it is obliged to make. As Lord Bridge said in **Lloyd v McMahon** [1987] AC 625, at 702:

> "*The so called rules of natural justice are not engraved in tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.*"

[59] Bearing this in mind I do not believe that there is any validity in the procedural criticisms made in (a) to (d) above. The Panel which sat in July had the benefit of hearing evidence from AA3 and was fully apprised of the grounds being put forward on AA's behalf. A decision to permit the school to make written and oral submissions was entirely appropriate and I see no reason why the original Panel should not receive those submissions in the process of coming to a final decision. I accept that as per Mr Mayes' affidavit it is not unusual for a Panel to hear parties to ECB hearings separately. I do not believe that there is any legal obligation for one party to be present while another makes submissions. This is a matter which can be left to the discretion of the Panel. As Mr Mayes says in his affidavit:

> "*I was aware that the Panel had already reached a decision without hearing the submissions of school X and made it clear to the other Panel members that we would have to review all the evidence again in light of the representations on behalf of the Board of Governors of school X. At the reconvened hearing the school was fully aware that it was the same Panel that had received evidence from AA3 on 26*

> *July 2016 and that he would not be present at the reconvened hearing.*"

[60] I can find no procedural fault in this approach.

[61] Equally, I reject the contention on behalf of the school referred to in (g) above that there was 'no evidence' available to the Panel supporting the conclusion it reached. The ECB had the written application from AA's father which was expanded and elaborated upon in the oral evidence he gave before it. It is clear from the notes of the Panel members that they were persuaded by the evidence of AA3 whom they assessed as being a sincere and credible witness.

[62] This is explained in paragraph 18 of Mr Mayes' affidavit as follows:

> "After referring to the written submissions made by AA3 in which he had stated that 'some classmate will attend' he avers:
>
> > *'It was clear to the Panel that the standard of English on the application form was fairly poor. This was unsurprising having regard to AA's father's background and need for an interpreter. The oral evidence of AA's father made clear that he was not referring to a single friend of AA but, instead, was referring to the network of boys who were accustomed to visiting AA at his home and also who accompanied him to a local Leisure Centre. The Panel was told that these boys went to school X. It was not suggested that they necessarily attended Y primary school'.*"

[63] I have also considered the handwritten notes of each of the Panel members and in my view they are consistent with the submission that the Panel clearly came to the view that AA3 was making the case that there was a network of friends attending school X. In my view there clearly <u>was</u> evidence to support their view.

[64] I now turn to paragraphs (e) and (f) of the procedural challenge. It is clear from the procedure set out in the Regulations governing the ECB that the Board of Governors of a school affected by an application should have the opportunity to make written representations or appear before the Panel to make oral representations. Indeed, subsequent to any such representations the Regulations provide that:

> *"A panel may request the parent, the Board of Governors and any other person to supply further information which*

appears to it to be relevant to the determination of the application."

[65] Mr Shaw referred me to the well-known principle that a party subject to a decision making process should know the detail of the case against him. He refers me to the passage in **Re McBurney's Application** [2004] NIQB 37, at paragraph [14]:

> *"Procedural fairness requires that a party has the right to know the case against him and the right to respond to that case. The right to know and to respond requires the disclosure of material facts to the party affected, such disclosure being within a reasonable time to allow the opportunity to respond."*

He further referred me to the passage in **R v Deputy Industrial Injuries Commissioner ex parte Moore** [1965] 1 QB 456, 490:

> *"Where however there is a hearing, whether requested or not, the second rule requires the Deputy Commissioner*
>
> *(a) to consider such "evidence" relevant to the question to be decided as any person entitled to be represented wishes to put before him;*
>
> *(b) to inform every person represented of any "evidence" which the Deputy Commissioner proposes to take into consideration, whether such "evidence" be proffered by another person represented at the hearing, or is discovered by the Deputy Commissioner as a result of his own investigation;*
>
> *(c) to allow each person represented to comment upon any such "evidence" and, where the "evidence" is given orally by witnesses, to put questions to those witnesses; and*
>
> *(d) to allow each person represented to address argument to him on the whole of the case.*
>
> *This in the context of the Act and the regulations fulfils the requirement of the second rule of natural justice to listen fairly to all sides."*

[66] I have already indicated that what fairness requires in a particular case is of course contextual. The school is not in the same position as the applicant in McBurney or the claimant in Moore but clearly was a body which would be directly affected by the Panel's decision. Furthermore, it must have been abundantly clear to

the Panel that the school strongly opposed the admission of AA to the school. The Panel were aware that the school had instructed solicitors to challenge the propriety of both the procedure and the merits of the original decision. In the course of its written submissions the school did refer to the assertion that "some classmate will attend". Whilst it did accept this it went on to point out that AA's closest friend was attending a different school according to the head teacher of primary school Y.

[67] It is, of course, correct to say that the entire focus of the oral submission made by the Principal on behalf of the school on 22 August related to their concern about AA's ability to cope with the academic demands of the school. They did so in circumstances where they clearly were unaware of the basis for the original view adopted by the Panel. If one were to rely on the written application on behalf of AA alone, then certainly one would not find the basis for the decision made by the Panel. This is not to say that the Panel was not entitled to come to that view having heard AA's father's oral evidence but certainly the school could not have been aware of the basis of the Panel 's decision when it made its oral and written submissions. In my view if it was to participate meaningfully in the process the school should have been told of the basis of the Panel's reasoning and should have been given the opportunity to comment upon that.

[68] In **Osborn v Parole Board** [2013] UKSC 61 [2014] NI 154, the Supreme Court looked at the issue of procedural unfairness in the common law. Lord Reed, giving the judgment of the Supreme Court, said at paragraph [87]:

> *"There is no doubt that one of the virtues of procedurally fair decision making is that it is liable to result in better decisions, by ensuring that the decision maker receives all relevant information and that it is properly tested."*

[69] He also pointed out that two other important values were engaged. The first was the avoidance of the sense of injustice which the person who is the subject of the decision might otherwise feel. The second is the Rule of Law.

[70] Lord Reed said at paragraph [71]:

> *"Procedural requirements that decision makers should listen to persons who have something relevant to say promote congruence between the actions of decision makers and the law which should govern their actions."*

[71] Mr Coll QC on behalf of the ECB responds by saying that:

- The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.

- Fairness will very often require that a person who might be adversely affected by the decision will have an opportunity to make representations on his own behalf, either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification or both.

- Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

- It is not enough for the applicant to persuade the court that some procedure other than the one adopted by the decision maker would be better or fairer. Rather they must show that the procedure is actually unfair.

[72] In the instant case he submits that even if the school had known the basis upon which the Panel had reached its original decision it would not have made a material difference to the outcome. Thus, he says there is no actual unfairness to the school in this case.

[73] He argues that it is incumbent upon the applicant to demonstrate that the procedure actually employed visited unfairness upon the school. Judicial review cannot issue for mere failure to follow best practice. It is not enough to show potential or theoretical unfairness. He refers to Lord Russell's comments in **Fairmount Investments Ltd v Secretary of State for the Environment** [1976] 1 WLR 1255 as follows:

> *"All cases in which principles of natural justice are invoked must depend on the particular circumstances of the case … Fairmount has not had … a fair crack of the whip."*

[74] In **R v Devon County Council ex parte Baker** [1995] 1 All ER 73, at 85(c)-(d) Dillon LJ held that:

> *"Obviously it could be said to be best practice, in modern thinking, that before an administrative decision is made there should be consultation in some form, with those who will clearly be adversely affected by the decision. But judicial review is not granted for a mere failure to follow best practice. It has to be shown that the failure to consult amounts to a failure by the local authority to discharge its admitted duty to act fairly."*

[75] As was held in **Malloch v Aberdeen Corporation** [1971] 1 WLR 1578 at 1595B:

> *"The appellant is first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether it is called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by its failure. The court does not act in vain."*

[76] It is clear from the material that I have seen post the decision that the school does take issue about the extent to which the supposed network of friends truly existed. There was a hint of this in the school's original letter prior to the hearing and during the course of these proceedings they have continued to challenge the existence of such a network. Mr Coll QC asked what the school could have done had it been made aware of the gist of the oral submissions made by AA3. As the school which the alleged network of students is attending it seems to me that they were in a position to test this matter and provide important relevant information. Ultimately, the purpose of the ECB Panel is to test applications for exceptional circumstances and to ensure that the procedure is not abused as a route to gaining access to a school in circumstances where a child has not met the necessary criteria for admission to that school. Clearly it is the function of the Panel to test submissions made in support of applications. I stress it is not for this court to usurp the function of the Panel in this regard and it is perfectly entitled to come to a view on the credibility and sincerity of cases made by parents in support of such applications and this of course applies equally to AA's application.

[77] I take the view that in this case, had the school been aware of the basis for the decision, they would have tailored their submissions accordingly. They would undoubtedly have asked the Board to test the assertions made on behalf of AA. The school was also in a position to provide relevant information on the strength of the assertions.

[78] By failing to inform the school of the basis for its decision in July prior to the August hearing, and thereby failing to give the school an opportunity to meet this submission, I have come to the conclusion there has been a procedural unfairness in the decision making process. I do not say that this would necessarily have resulted in a different decision by the Panel but at the very least it would have raised issues about the basis for the Panel's findings.

The substantive error of law challenge

[79] The applicant contends that the respondent erred in law in determining that it cannot take academic suitability into account in deciding whether there are exceptional circumstances. As indicated above, Regulation 5 of the Regulations

gives examples that "*may be regarded as exceptional circumstances requiring the admission of a child to a particular school*". Clearly none of those circumstances are relevant to this particular case.

[80] Regulation 6 identifies three factors that are not to be regarded as exceptional circumstances which include:

> "*(a) circumstances related wholly or mainly to the kind of education provided at that school; and*
>
> *(b) circumstances related to a child's academic ability.*"

[81] Thus clearly Regulation 6 prohibits the ECB from considering that circumstances relating to the type of education at a school do amount to exceptional circumstances or that academic ability of the child do amount to exceptional circumstances.

[82] Mr Shaw argues that there is nothing in that Regulation or in the rest of the Regulations which prohibits the ECB from taking into account, on the one hand, the academic ability of the child and, on the other, the nature of the education offered by the school in considering whether it should make an order directing a school to accept a particular child.

[83] It has been submitted on behalf of the ECB that it has been its longstanding practice that considering the existence of exceptional circumstances relating to admission to a specific school academic ability should not be taken into account.

[84] Mr Mayes deals with this issue in his affidavit in the following way:

> *"21. In relation to the academic ability of AA, the Panel were fully cognisant of the views expressed by the school principal. These views were strongly emphasised by her in the course of the hearing on 22 August. The Panel did not consider that AA's academic ability was an exceptional circumstance – indeed it is quite clear from Regulation 6(b) of the School's Admissions (Exceptional Circumstances) Regulations (Northern Ireland) 2010 that circumstances related to a child's academic ability may not be regarded as exceptional.*
>
> *22. The Panel were satisfied that AA's circumstances were exceptional having regard to his background and the circumstances of his relocation to Northern Ireland and the attack on his home in October 2014 giving rise to his subsequent psychological symptoms. The Panel did not treat his academic ability (or lack of academic ability) as part of his exceptional circumstances.*

> *23. The Panel were also satisfied that the exceptional circumstances were personal to AA.*
>
> *24. The third test required the Panel to address the admission of AA to school X and no other school. This issue required the Panel to have regard to all the evidence concerning AA's own circumstances which clearly involved a young child suffering from psychological distress who would have the benefit of the support network of close friends at school. The Panel was satisfied that this network would not be available at another school. In addition, the Panel considered the school X prospectus.*
>
> *25. The school principal was very focused on demonstrating that in her opinion school X would not best meet the needs of AA and in particular his low score in the AQE and lack of other educational attainment suggested he would struggle at school X. The Panel noted that AA's English was at a "formative stage" and were aware that his first language was Arabic. The language barrier faced by A was obviously a factor in his educational attainment but the Panel were clear that the aims and ethos of school X and in particular the supportive network of friends who would be attending school X with the applicant were essential to provide AA (a traumatised and vulnerable child) with the support he required."*

[85] Mr Shaw argues that the Panel's interpretation of Regulation 6, as expressed in pre-action correspondence, that it precludes it taking academic suitability into account is an error of law. The meaning of Regulation 6 is clear and also sensible because it ensures that the ECB is not used by parents disappointed with their child's performance in the AQE assessment to in effect appeal against those results.

[86] He developed his submissions by arguing that, having identified exceptional circumstances that are personal to the child in question, the requirement in the third test that those circumstances relate to admission to a specified school only must require the consideration of the nature of the school and the suitability or otherwise of the child for that school. Mr Shaw argues that the child must be a 'good match' for the school and that in determining this a relevant factor can be academic ability in an appropriate case. He argues that this is just such a case.

[87] It is correct that on a narrow interpretation of the Regulations they do not expressly exclude academic capability as a reason for refusing an application based on exceptional circumstances. The legislation and Regulations need to be considered as a whole. The key Regulation is in fact Regulation 2 which interprets 'exceptional circumstances'. I repeat they are:

> *"Circumstances which are both exceptional and personal to the child in question and relate to admission to a specified school only."*

[88] It seems to me, therefore, that if exceptional circumstances are established which are personal to the child in question, the relevant "match" to be determined is whether or not those circumstances relate to admission to a specified school only.

[89] In this particular case the exceptional circumstances identified were the vulnerability of AA having regard to his background and his traumatic experience in Northern Ireland. Those circumstances required the support of a network of friends who were attending school X and only school X. No such network was available at any other school. The "match" which is relevant is the applicant's circumstances and the existence of the network of friends at school X. Given those findings it seems to me that the Panel is in fact compelled to direct the school to accept AA. It would be wrong for the Panel to then take into account further considerations or to displace its findings on the basis of AA's alleged lack of academic suitability to school X.

[90] It seems to me that having answered questions 1, 2 and 3 in the way they did the statutory test at Article 16A(2)(a) of the 1997 Order has been established, namely:

> *"The body is satisfied that exceptional circumstances exist which require the admission of the child to the specified school,{and therefore} the body shall direct the Board of Governors of that school to admit the child to the school."*

[91] Furthermore, this makes sense having regard to the scheme as a whole. It is clear from the examples given in Regulation 5 that the focus of such applications will normally relate to what might be determined as social or psychological factors. This is further exemplified by the examples in the ECB guidelines relating to the sort of proof that is required to support exceptional circumstances applications where reference is made to evidence from a medical practitioner, social worker, educational psychologist, educational welfare officer, PSNI.

[92] The entire point of the scheme is to avoid debates about academic suitability. The only way in which academic suitability is built into the system is that children with special educational needs are not permitted to apply to the ECB.

[93] In the vast majority of cases the ECB will be dealing with students who have not met the academic criteria for a particular school. The ECB scheme is not there to deal with disputes about academic ability but to look at special circumstances which exclude academic ability.

[94] If the applicant is right in its submissions then lack of academic ability would act as a brake upon or a usurpation of the statutory test set out in Article 16(2)(a).

[95] I have therefore come to the conclusion that the ECB is correct in its submission that academic suitability is not something that the ECB Panel members should take into account when making a decision of whether or not there are exceptional circumstances that necessitate a child being admitted to a specific school.

Conclusion

[96] I have therefore come to the view that the decision of the Exceptional Circumstances Body was procedurally unfair in that it took into account material of which the applicant was unaware and had no opportunity to challenge or comment on.

[97] It is obvious in the circumstances of this case that there are significant issues about the appropriate relief that should be granted having regard to my finding.

[98] I indicated that I would give the parties an opportunity to address me on the appropriate relief before coming to a final decision on what orders the court should make.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

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

AND IN THE MATTER OF A DECISION OF THE EXCEPTIONAL CIRCUMSTANCES BODY MADE ON OR AROUND 22 AUGUST 2016

NOTICE PARTY – AA3

_____

COLTON J

[1] I gave judgment in this matter on 9 November 2016.

[2] My conclusions were as follows:

> *"**Conclusion***
>
> *[96] I have therefore come to the view that the decision of the Exceptional Circumstances Body was procedurally unfair in that it took into account material of which the*

> *applicant was unaware and had no opportunity to challenge or comment on.*
>
> *[97] It is obvious in the circumstances of this case that there are significant issues about the appropriate relief that should be granted having regard to my finding.*
>
> *[98] I indicated that I would give the parties an opportunity to address me on the appropriate relief before coming to a final decision on what orders the court should make."*

[3] In considering this matter I have had regard to the written submissions from counsel which were augmented by oral submissions from Mr Gowdy on behalf of the applicant and Ms Doherty QC on behalf of the notice party.

[4] Echoing the written submissions made by Mr Shaw QC Mr Gowdy argued that the normal remedy where a decision is vitiated by procedural irregularity is an order of *certiorari* quashing the decision in question. He submitted that an order of *certiorari* should be made to quash the decision of the ECB requiring the admission of AA to school X. Failing that, he argued that at the very least given the procedural irregularity which was found by me the matter should be remitted for the consideration of a different panel of the Exceptional Circumstances Body.

[5] He stressed that the applicant school was motivated by concern for the welfare of AA. He referred to the professional opinion of the Principal that the education offered by the school would not be in the best interests of AA. Rather it would be harmful to his well-being and welfare. He indicated that this remained the view of the school. His instructions were that since commencing his studies there AA has been struggling to cope with the requirements of the school.

[6] Ms Doherty QC, who appeared on behalf of the notice party, (and whose views were endorsed by Mr Joseph Napier, solicitor, on behalf of the ECB) argued that given the findings in the judgment this was not an appropriate case for *certiorari*.

[7] In support of her submissions she referred to a statement from AA dated 4 October 2016 indicating that he was enjoying his school. Given the focus on the "network of friends" which formed the basis of the ECB decision AA set out the names of his friends who are currently at the school. Five of the boys he knew from primary school and from the local Leisure Centre were there, although they were not all in his year. He also referred to another boy whom he knew from a youth football team and a friend he knew from a Mosque. Two of these boys were his "best friends" who attended his house whilst he was at primary school. He referred to a recent school trip which he enjoyed and also the fact that he is enjoying his participation in sport at the school. In his statement he elaborated on the difficulties he encounters with youths outside the school and he referred to the incident at his

home which largely contributed to his initial problems. He summarised his position in the following way:

> *"I would feel angry and sad if I had to leave the school now. If I went to another school I wouldn't know anyone there and they wouldn't encourage me. They wouldn't know my story. I think it would make it more difficult for me to deal with my problems."*

[8] It seems to me that the Panel's reliance on the network of friends to which AA's father referred has in fact materialised in practice. Whilst the Panel were unaware of the names of the relevant friends when they made their decision, this information has now been provided and I note that some of the boys were also named in notes retained by the Family Trauma Centre where AA attended for help before he was admitted to school X.

[9] Ms Doherty submits that it is open to the court to refuse a remedy or a particular type of remedy if the circumstances of the case dictate such an approach. She argues that this is such a case.

[10] The remedy sought in this case, in particular *certiorari* and remittal are always at the court's discretion.

[11] As was said by Hobhouse LJ in *Credit Suisse v Allerdale Borough Council [1997] QB 306*:

> *"The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy."*

Sir John Donaldson MR put it this way in *Nichol v Gateshead Metropolitan Borough Council [1988] 87 LGR* –

> *"The court has an overall discretion as to whether to grant a remedy or not. In considering how that discretion should be exercised the court is entitled to have regard to such matters as the following:*
>
> *(1) The nature and importance of the flaw that challenges the decision.*
>
> *(2) The conduct of the claimant.*
>
> *(3) The effect on administration of granting the remedy."*

[12] What do the interests of justice require in the particular circumstances of this case?

[13] I have come to the conclusion that I should not grant *certiorari* or remit the decision to a new Panel and should confine any relief to the declaration I have made about procedural unfairness in this case.

[14] In making the declaration I would expect and hope that in any future case the ECB would ensure that there will be no repetition of the error I have identified.

[15] In terms of the circumstances of this case, as a general proposition any judicial review challenges concerning the attendance of children at a particular school should be lodged and dealt with prior to the start of term. I appreciate that there were specific factors in this case that meant this was not possible. However, one consequence of that has been that AA has been at school X since the 30 August, a period in excess of two months. Self-evidently any decision by this court to require him to be moved from school X where he professes to be happy is bound to be very distressing for him. He will be removed from the influence and support of the friends he has identified and will need to seek a placement in another school in circumstances where classes have been in place for over two months.

[16] It is important, of course, to look at the nature of the error I have identified in this case. Whilst I have made it clear that there was procedural unfairness, I have found that that procedural unfairness would not necessarily have resulted in a different decision by the Panel. The fact that AA does appear to have a network of friends at the school suggests that the initial assessment of the Panel was correct. As indicated in my judgment, the court is wary of usurping the function of the Panel in assessing the credibility and sincerity of cases made by parents in support of such applications. It seems to me, therefore, that the logic of my findings is that I should confine relief in this case to the declaration that I have made.

[17] Of crucial importance in this case is the impact of my decision on the welfare of AA, who is the person who is most affected by this decision. His position is markedly different from what it was when the decision was taken by the ECB. He is now established and settled at the school. The removal of AA from the school by a court order would in my view be a wholly undesirable outcome. I have, therefore, come to the conclusion that it would not be in AA's interest to order that he be removed from school X.

[18] Any failure to grant the relief sought by the applicant would not visit a material injustice on the school.

[19] In all these circumstances, and in particular having regard to the extent of the error in this case and the overall best interests of the child, I have come to the

conclusion that I should not grant an order of *certiorari* or remit the matter back to a new ECB Panel.