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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

TCM (a minor)'s Application [2013] NICA 31

IN THE MATTER OF AN APPLICATION BY TCM A MINOR FOR JUDICIAL REVIEW

Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal against a decision of Gillen J dismissing an application for judicial review of a decision of the Special Educational Needs and Disability tribunal (the tribunal) made on an appeal by the appellant's parents of a Statement of Special Educational Needs prepared on 24 March 2011 by the South-Eastern Education and Library Board (the South Eastern Board). Mr Ronan Lavery QC and Ms McCrissican appeared for the appellant and Ms Murnaghan for the respondent. We are grateful to counsel for their helpful oral and written submissions.

Background

[2] The appellant is a Down Syndrome child who was born on 30 July 1998. She has severe learning difficulties. Her verbal reasoning and literacy and numeracy skills fall within the well below average range. She has weaknesses in reading skills but good functional communication. She also has hearing problems as a result of being prone to ear infections. She was due to commence secondary education in September 2011.

[3] At the beginning of 2010 the appellant's mother approached St Joseph's College Belfast with a view to having the child admitted to that mainstream secondary school. That would have been a convenient outcome for the child's mother as she works as a classroom assistant in a school which shares a site with St Joseph's College. The tribunal found that the appellant's parents were encouraged to believe that the child would be admitted to the school during the initial interviews but it appears that the school had not been provided at that stage with the then current Statement of Special Educational Needs in respect of the child. At some stage

during those discussions the St Joseph's College Special Educational Needs Coordinator suggested that some consideration be given to whether the child would be better accommodated at a special school. The appellant's mother was passionately opposed to such a solution.

[4] On 28 February 2011 the principal of St Joseph's College advised the South-Eastern Board that the school had determined that a place was not appropriate for the appellant as the school was not sufficiently resourced or equipped and did not have the necessary expertise within the staff to cater adequately for the needs detailed in the child's Statement.

[5] Mr Shivers of the South-Eastern Board wrote to Ms McKenna of the Belfast Board on 3 March 2011 raising a number of queries as a result of this response. He pointed out that the South-Eastern Board had a number of pupils with significant or severe learning difficulties and a diagnosis of Down Syndrome in mainstream post-primary schools. Those schools sought support from their local school for pupils with severe learning difficulties to differentiate the curriculum within a mainstream setting. He pointed out that advice and support could be provided from special schools where there is expertise in working with children with these difficulties. The Inclusion Officer from the South-Eastern Board had offered to provide some training to school staff and there was information from the Down Syndrome Association that could be useful. He noted that there was no evidence to confirm that a mainstream post primary school would be extremely detrimental to the child's education and considered that it could be equally difficult for her to move to a special school.

[6] Ms McKenna responded on 8 March 2011. She stated that the Belfast Board and St Joseph's College considered that the child's needs would significantly impact on her efficient education and on the efficient use of Board and school resources. She said that the school was experiencing difficulty in meeting the needs of a number of pupils with moderate learning difficulties. She stated that the Belfast Board and the school were aware of the support that was available and offered but that even with these reasonable adjustments the school felt unable to meet the needs of the child's severe learning difficulties. Ms McKenna noted that the Educational Psychologist who assessed the child had recommended a small class setting with individual tuition and the implication of the correspondence was that a special school might provide a better educational environment.

[7] Despite the views expressed by Mr Shivers on 24 March 2011 Ms Morrison of the South-Eastern Board sent the parents an amended Statement setting out the child's special educational needs and in respect of placement providing:

> "The child should attend a special school.
>
> The child's parents have expressed a preference for a mainstream education.

> The child will attend St Columbanus College in September 2011."

St Columbanus College is a mainstream secondary school. By notice dated 12 April 2011 the parents appealed to the tribunal indicating that they wanted their daughter to attend St Joseph's College.

[8] An oral hearing of the appeal took place on 31 August 2011. The chair was a solicitor who had acted in this capacity since the inception of the tribunal in 1997. One lay member had a 40 year career with the Northern Ireland Health and Social Services and had been a Trust Director for Mental Health and Learning Disability Services. The other lay member had a number of distinguished teaching qualifications, had taught in a secondary school for pupils with specific difficulties, had been school support coordinator sourcing and funding special-needs requirements and was vice principal of a school in Belfast for 7 years. The learned trial judge regarded this tribunal as highly qualified and experienced in the services provided for persons with learning disabilities such as the appellant in this case.

[9] The hearing commenced at 10:50 AM and finished at 4:15 PM with a break for lunch. The tribunal issued its decision on 14 September 2011. In relation to placement the tribunal determined that it was reasonable for the South-Eastern Board in light of all the evidence to consider that a special school was appropriate to meet the child's needs. The tribunal considered, however, that the wording was "overly dogmatic". It then went on to consider the appropriate placement for the child. The kernel of its decision lies in the following passage:

> "In this case we have Mr McCourt clearly stating that they would love to have [the child] but unfortunately could not cater for her needs. He said that the school was striving to emulate St Columbanus and hoped to get there some time. Unfortunately we are making a decision to be implemented in September 2011. On the other hand it was abundantly clear that St Columbanus wanted [the child], had experience of dealing with pupils with needs similar to the child and had a dedicated department capable of delivering the provisions that the parents legitimately required."

In light of its conclusions the tribunal removed the reference to the special school being appropriate for the child from the Statement and revised the placement provision to read:

> "A place is to be provided for the child at St Columbanus College in September 2011".

[10] On 13 February 2012 the appellant launched judicial review proceedings. In an amended Order 53 Statement dated 6 July 2012 the appellant contended that the tribunal had irrationally distinguished between the facilities and resources available to St Joseph's College and St Columbanus College, that the decision created or imposed a policy that Down Syndrome children should only be educated in schools with previous experience of children with that syndrome, that the policy breached the appellant's rights pursuant to Article 2 of the First Protocol and Article 8 of the Convention, and that the decision was in breach of the parents' entitlement to prefer a particular school.

[11] In his oral and written submissions Mr Lavery advanced the further argument that the tribunal and the learned trial judge had erred in comparing the appropriateness of each of the schools rather than concentrating on the issue of whether St Joseph's College was unsuitable. He also contended that the tribunal had not considered what reasonable adjustments might have been made by St Joseph's College to render the school suitable for the appellant. Although not directly arising on the Order 53 Statement we consider that the substance of these matters was argued in the court below and that we should deal with these submissions.

[12] The learned trial judge concluded that the Convention arguments did not assist the appellant as the relevant Articles were not engaged. He noted that the tribunal was sitting shortly before the child was due to start school in September 2011 and timing was, therefore, important and relevant. He accepted the finding of the tribunal that St Columbanus College had staff experienced in dealing with pupils with special educational needs similar to those of the appellant and had acquired expertise in working with such pupils whereas St Joseph's College did not. He accepted that it was reasonable for the tribunal to conclude that the deficit of training and expertise in St Joseph's College could not be repaired within the timeframe appropriate to the best interests of the child. He noted the expertise of the tribunal in making judgements as to these issues.

[13] The learned trial judge accepted that the tribunal made a finding of fact that there was a material distinction between class sizes in the 2 schools and he accepted that the significance of that fact would have been apparent to the experts on the Panel. He accepted that it was appropriate for the tribunal to take into account St Joseph's lack of confidence and the difficulties that they were experiencing catering for pupils with moderate learning difficulties. In a passage which was criticised by Mr Lavery the learned trial judge concluded that he could see "no basis for concluding that it was irrational to conclude as it did that it was more appropriate for the applicant to be taught by people trained in teaching pupils with severe learning difficulties". The appellant submitted that this was an indication that both the tribunal and the court had engaged in a comparison of the schools rather than concentrating on whether St Joseph's College was unsuitable. Although he recognised that a differently constituted tribunal might have come to a different conclusion about the efforts which St Joseph's College should have made towards

making the school appropriate for the child, he concluded that he could see no basis to challenge the decision made by this experienced tribunal.

The relevant legislative framework

[14] Although there was considerable debate at the hearing about the statutory architecture of the Education (Northern Ireland) Order 1996 (the 1996 Order) this was a case in which it was now agreed that the child should be placed in a mainstream school. The circumstances in which the Board can specify a school other than that for which the parents have expressed a preference is dealt with in Paragraph 5 (3) of Schedule 2 of the 1996 Order.

> "(3) Where a board makes a statement in a case where the parent of the child concerned has expressed a preference in pursuance of such arrangements as to the grant-aided school at which he wishes education to be provided for his child, the board shall specify the name of that school in the statement unless-
>
> (a) the school is unsuitable to the child's age, ability or aptitude or to his special educational needs, or
>
> (b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources."

[15] This provision sets out three circumstances in which the Board may specify a school other than that preferred by the parents. The first is where the school is unsuitable for the child's needs, the second is where the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom the child would be educated and the third is where the attendance of the child at the school would be incompatible with the efficient use of resources. In this instance we are only concerned with the first of those circumstances.

[16] Article 4 of the 1996 Order empowers the Department of Education to prepare a Code of Practice to which Boards, schools and the tribunal must have regard. In September 2005 the Department published a supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs (the Supplement). The Supplement deals with the duty to make reasonable adjustments in section 3.

> "3.4 Chapter 1 of Part III of the SENDO, as it relates to disability discrimination, places new disability discrimination duties on Boards and schools (including independent schools) in Northern Ireland. These duties are included in Articles 13 to 26 of the SENDO. The following points set out an overview of the new provisions:
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> - a duty not to treat pupils who have a disability less favourably, without justification, for a reason which relates to their disability;
>
> - a duty to make reasonable adjustments so that pupils who have a disability are not put at a substantial disadvantage compared to pupils who do not have a disability; and
>
> - a duty to plan and make progress in increasing accessibility to schools' premises and the curriculum, and in improving ways in which information provided in writing to pupils who do not have a disability is provided to pupils with a disability…
>
> 3.6 The SENDO provisions prohibit schools from discriminating against disabled children in their admission arrangements, in the education and associated services provided by the school for its pupils and in relation to exclusions from the school. It should be noted that the duty of reasonable adjustments on schools does not require the provision of auxiliary aids and services or the removal or alteration of physical features. Decisions about the provision of educational aids and services for children with SEN will continue to be taken within the SEN framework."

[17] Section 4 of the Supplement deals with the general duty to ensure that a child with a Statement will receive mainstream education. At paragraph 4.10 the qualified right of parents to choose the child's school is set out in accordance with the statutory test. The qualification of that entitlement is expressly spelt out at paragraph 4.12.

> "4.12 It is reasonable to expect a Board to provide a mainstream education for most children with SEN

> who have a Statement. However, it may not be reasonable or practicable to expect all grant-aided mainstream schools to provide for every type of SEN. When making decisions about individual schools it is right to consider: what parents want; an individual school's suitability to provide for the needs of the child; and the impact the inclusion would have on the efficient education of others and on resources."

[18] Section 5 deals with the inclusion of children with special educational needs and is aimed at promoting inclusive practices in order to assist schools and Boards to make effective decisions and to encourage schools to develop a whole school acceptance of including children with those needs in the work and life of the school. Paragraph 5.4 states that schools, Boards and others should actively seek to identify and remove barriers to learning and participation.

[19] The appellant also sought to rely on case studies contained in the appendices to the Code of Practice. All of these case studies, however, relate to examples where the proposed reason for the exclusion was the efficient education of other children. These case studies, therefore, are of limited assistance in a case where the issue is the unsuitability of the school proposed by the parents.

Discussion

[20] The issue of unsuitability under the statute must be determined by reference to the special educational needs of this child. The starting point, therefore, must be to examine the Statement with a view to identifying what those needs are. Part 2 of the Statement identifies the child's learning difficulties in rather greater detail than set out at paragraph 2 above. Part 3 looks at provision. It includes the aims for the child in terms of numeracy, literacy and general educational development. It identifies the requirements for the child in a mainstream setting.

> "1. Access to placement 1 year below her chronological age.
>
> 2. One to one adult assistance throughout the school day to help the child with the objectives in Part 3 (1) (27.5 hours per week classroom assistance and 5 hours supervisory assistance).
>
> 3. Access to 3 hours Additional Teaching Support to support the child (it is anticipated this will be delivered within the school framework for inclusion).

4. The Speech and Language Therapist will monitor and evaluate the child's communication skills twice a year – at the end of the winter term and the spring term. The Therapist will give advice to staff involved with the child and outline effective strategies to aid the child's development.

5. An individual Educational Plan should establish targets across the curriculum which the child is expected to attain over a set period of time. The target should address the child's individual needs and graded to suit her pace of learning. Teaching Strategies and resources to be deployed should be specified.

6. Those involved with the child, including teaching and classroom assistant staff, should have appropriate training in respect of her educational needs and Down Syndrome.

7. Regular home/school liaison to ensure a common approach and to facilitate follow-up of educational programmes at home.

8. Access to strategies and resources which are known to suit the needs of children who have Down Syndrome.

- 9. Access, through appropriately trained staff, to a laptop computer with appropriate software to: –Support her learning difficulties;
- Help promote her social and emotional development;
- Foster her capacity to work independently;
- Allow her to develop useful keyboard and general ICT skills.

10. Access to advice and support from the Board's Service for pupils with hearing impairment.

11. Preferential seating in class or in group work, close to the source of sound."

[21] Part 3 also states how the child's educational needs should be met in general. Of particular relevance to this appeal are requirements for:

- Placement in a school where the curriculum is delivered at a pace and in a manner suitable for pupils of a similar academic ability and aptitude;
- Teaching within a small group setting so that individual tuition and guidance can be provided as required.

[22] There are a number of discrete matters in relation to materiality which arise from this review of the Statement. It was submitted on behalf of the appellant that the tribunal was not entitled to take into account class size in assessing suitability. We accept that there was no specific provision in relation to class size within the Statement but the second bullet point at paragraph 21 above indicates that the size of the setting within which teaching was to be delivered to the child was material. The evidence before the tribunal was that class size at St Columbanus College was 16 – 18 whereas at St Joseph's College class size was 20 – 25 with entry year classes at or close to the upper limit. The evidence also indicated that for resource reasons St Joseph's College was unable to reduce that class size. In our view class size was, therefore, material in relation to the second bullet point set out at paragraph 21 above.

[23] It was also contended on behalf of the appellant that mere experience of teaching Down Syndrome children was not a factor which should be taken into account. We agree that the term "experience" is not specifically identified as a requirement but paragraph 6 of the requirements for the placement of this child in a mainstream school makes it clear that appropriate training is required. We consider that it was entirely appropriate for the tribunal to look at the experience of the teachers and classroom assistants within St Joseph's College in order to identify the extent to which further training would be required to help make the school suitable.

[24] The tribunal also noted that St Joseph's College was not confident that it could meet the educational needs of this child whereas St Columbanus College "wanted" the child. In making a judgement as to whether a school is unsuitable for a particular child's special educational needs we consider that a tribunal should take into account any concerns of a chosen school about its ability to satisfy the needs of the child. It should, of course, primarily do this by examining the reasons for that concern. One of the obvious matters for concern was that St Joseph's College was having difficulty catering for children with moderate learning difficulties and this child would present additional challenges.

[25] Turning then to the arguments advanced on behalf of the appellant it was first argued that the tribunal had irrationally distinguished between the facilities and resources available in St Joseph's College and St Columbanus College. That submission reflects the fact that the appeal was pursued before the tribunal by the parties on the basis of a comparison of the competing merits of the two schools. Part of that argument rested on the proposition that differences of class size and experience in teaching children with similar special educational needs were irrelevant. For the reasons given above we do not accept that submission.

[26] In the course of the hearing the practical difficulties facing St Joseph's College were discussed. A classroom assistant would have to be employed which would mean advertising, shortlisting, interviewing and verification. None of the teachers in the school had appropriate training or experience and training would have been necessary in relation to all of those staff involved in teaching the child. The training would have had to address the pace of the child's education, the strategies to aid her development, the resources that should be made available to her and the manner in which her learning could be accommodated within the classroom environment. In addition to the practical arguments the tribunal needed to bear in mind the evidence that St Joseph's College was struggling to provide appropriate support for children with moderate learning difficulties within the school.

[27] By contrast, St Columbanus College had a classroom assistant available within the school and staff who were experienced and trained in teaching those with severe learning difficulties and Down Syndrome. The extent of training had been disputed by the appellant's mother. St Columbanus had established links with special schools in its area whereas St Joseph's College did not. Its previous success in educating children with similar severe learning difficulties was the reason for its enthusiasm to have this child placed in its school. The tribunal stated that St Columbanus College "had a dedicated department capable of delivering the provisions that the parents legitimately required". The tribunal chair corrected this to record that although there was no dedicated department the tribunal was highly impressed by the evidence given by the SENCO of St Columbanus College as to how the school provides for such children.

[28] We consider that there were plainly material differences in the experience of delivering positive educational support to children with severe learning difficulties similar to this child. One school had a proven track record of staff who had accommodated children with similar needs whereas the other had difficulty accommodating children with moderate needs. There were material differences in class size. There were significant practical issues around the training of staff which would have to be overcome before St Joseph's could even contemplate accommodating children with these needs. We reject as unsustainable in light of the Statement the submission in argument that all that was required in St Joseph's College was a classroom assistant with a general background. The tribunal was entitled to come to the conclusion that the ability of the schools to accommodate the child's needs was materially different.

[29] We can deal briefly with the argument that the tribunal erred in comparing the appropriateness of the two schools rather than concentrating on the statutory question of whether St Joseph's College was unsuitable. That submission was largely based on a sentence in the tribunal's decision that the needs of the child would be best met in St Columbanus College. The courts have often made it clear that a tribunal decision ought not to be subject to an unduly critical analysis. A more recent statement of the general principle in the context of employment tribunals can be

found at paragraph 26 of the opinion of Lord Hope in Hewage v Grampian Health Board [2012] UKSC 37.

> "It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis."

[30] The tribunal accepted the evidence of the principal of St Joseph's College, Mr McCourt, that the school was not able to cater for the needs of the child. It did not have any experience of catering for such needs, its staff had not received appropriate training and its class sizes were such that they could not achieve the environment of small group settings and individual tuition described in the Statement. Having accepted this evidence it was inevitable that the tribunal was driven to the conclusion that St Joseph's College was unsuitable subject to any argument about reasonable adjustments.

[31] It is clear that there was considerable debate before the tribunal about the adjustments that could be made by St Joseph's College. It was in the context of this argument that the appellant submitted that all that was required was a classroom assistant. As already indicated we consider that the Statement required trained teachers and classroom assistants as well as a classroom environment which would allow the child to benefit from small group settings and individual tuition. The principal issues, therefore, were the time that would be necessary for the training, whether the resources would be provided to alter the classroom set-up to accommodate the child's needs and the need to bear in mind that the child was about to start her secondary education.

[32] The appellant points out that the first contact with St Joseph's College was at the start of 2010. It is contended that the school should have made its adjustments at that stage. Since the school had not been given sight of the up to date Statement in respect of the child at that stage, it would have been impossible to start to make adjustments then. In its consultation response on 28 February 2011, having by then seen the most recent Statement, the school referred to its lack of experience and resource. It specifically raised the issue of the need for a group setting and individual tuition which could not be accommodated in the class sizes within the school. The South-Eastern Board nominated a different school on 24 March 2011. Against that background it does not seem to us that the school was unreasonable in not taking steps to accommodate this child at that time.

[33] The issues faced by the tribunal were clearly well within their expertise and the balance reached by them in terms of the assessment of the educational needs of the child against all the background facts is one that should not be lightly disturbed.

The respect which should be shown to decisions of expert tribunals was recently acknowledged by Lord Hope in Eba v Advocate General for Scotland [2011] UKSC 29 at paragraph 47. We are satisfied that their assessment that reasonable adjustments could not have been made within a timeframe suitable for this child cannot be characterised as unlawful. As set out above there were considerable barriers which needed to be overcome before St Joseph's College could be made suitable for this child.

[34] Although the argument on policy was included in the Order 53 Statement it was not pursued in the Notice of Appeal. Some reference to the policy argument was advanced at the hearing but it was not vigorously pursued. In our view there was no policy issue in this case. It rested on its own facts.

[35] The final issue concerns the claim on the basis of the Convention. Specific provisions in relation to the obligation on the state to provide education are contained in Article 2 of Protocol 1.

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The United Kingdom has lodged a derogation in respect of the second sentence but that is not relevant for these purposes. The nature of the right protected by Article 2 of Protocol 1 was considered by the House of Lords in Ali v Lord Grey School [2006] UKHL 14 and was described by Lord Bingham at paragraph 24.

> "The Strasbourg jurisprudence, summarised above in paras 11–13, makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is

> no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil (as in *Eren v Turkey (Application No 60856/00) (unreported) 7 February 2006*). The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?"

[36] Article 8 of the Convention could only arise in the positive sense of requiring the state to provide an education for this child at this school. Such a right is significantly beyond that imposed by the specific provision on education. This is a case where the state is offering the child an education at a mainstream secondary school which is ready to accommodate the needs of the child. That constitutes compliance with Article 2 at Protocol 1 and Article 8 cannot impose any additional obligation on the state in these circumstances. Mr Lavery conceded, correctly in our view, that the Convention arguments could add nothing to his arguments based on the legislative framework.

Conclusion

[37] For the reasons given we conclude that none of the arguments on appeal succeed. The appeal is dismissed.