

Neutral Citation No. [2011] NIQB 98

Ref: TRE8352

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

Coláiste Feirste's Application [2011] NIQB 98

**COLMA McKEE AS VICE CHAIRPERSON OF THE BOARD OF
GOVERNORS OF COLÁISTE FEIRSTE**

Applicant

-v-

THE DEPARTMENT OF EDUCATION NORTHERN IRELAND

Respondent

**IN THE MATTER OF AN APPLICATION BY COLÁISTE FEIRSTE FOR
JUDICIAL REVIEW OF A DECISION OF THE DEPARTMENT OF
EDUCATION RELATING TO SCHOOL TRANSPORT**

TREACY J

Introduction

[1] The applicant is Vice Chairperson of the Coláiste Feirste Board of Governors, a secondary school at Beechview Park, Falls Road, Belfast which provides education through the medium of the Irish language. The respondent is the Department of Education. Comhairle na Gaelscolaíochta ("CnaG"), a representative body for the Irish medium education sector, set up in 2000 by the respondent, filed evidence and was given leave to make submissions in support of the application.

[2] Coláiste Feirste is a full-immersion Irish-medium post-primary school. It is a grant-aided school, founded in Belfast in 1991. While there are several Irish-medium language primary schools in Northern Ireland, Coláiste Feirste is the only one of its type at secondary education level. Courses are offered up to and including A-Level and 16+ vocational courses. The applicant's

evidence is that the current maximum space allocation is for 350 pupils, with 562 currently attending as at the date of the application.

[3] The basis of the application is the contention that the respondent refuses to provide adequate transport or transport assistance for pupils and would be pupils of Coláiste Feirste living in rural areas of Northern Ireland and in the Greater Belfast area who wish to undertake their education at Coláiste Feirste through the medium of the Irish language.

Grounds of Challenge

[4] On 9 February 2011 the applicant was granted leave to apply for judicial review on the basis of an amended Order 53 statement dated 14 February 2011. Leave was granted to advance the grounds of challenge summarised below:

Ground 1 (Article 89 of the 1998 Order)

The respondent erred in law by failing to give proper weight and consideration to its obligation pursuant to Article 89 of the 1998 Order to encourage and facilitate the development of Irish-medium education.

Ground 2 (Discrimination)

The respondent is in breach of its obligations not to discriminate between different schools and different categories of pupils and to treat all schools fairly and equally.

Ground 5 and 7 (Article 52 of the 1986 Order)

The respondent failed to comply with its obligations under Article 52 of the 1986 Order to provide transport assistance to pupils attending grant aided schools.

Ground 11(d) (Article 2 of Protocol No. 1 to the Convention)

Article 2 of Protocol No. 1 to the Convention includes the right to be educated in one's language, and the respondent's transport policy impedes the exercise of this right.

Ground 11(e) (Article 14 of the Convention)

Article 14 of the Convention is engaged on the basis that the respondent discriminates against those who regard Irish as their first language as against those who do not.

[5] The central issue in this case concerns the provision of transport to what is the only IM Secondary School in Northern Ireland. Unlike other second level schools the primary schools which form the catchment area for Coláiste Feirste are widely geographically dispersed. This diversity differentiates it from other second level schools where the catchment primary

schools are usually much more proximate. This has obvious implications for the provision of transport to those who wish to attend this school. The respondents transport policy, which has existed for many years, reflects the pattern of transport needs for the established sectors in Northern Ireland.

[6] The court was furnished with extremely detailed evidence regarding the problem surrounding the issue of transport to this school. I consider it unnecessary to do more than set out the broad background to this longstanding problem.

[7] It is evident from the evidence that the issue of transport in the Irish-medium sector first arose some ten years ago, with a campaign for improved provision specifically for the post-primary sector dating back to 2003. It is also evident that the parties have engaged over a lengthy period in a thorough, considered and diplomatic manner in order to arrive at a workable solution to the applicant's concerns. Sadly, despite what appears to have been earnest attempts on the part of all parties involved, a solution has not been found. On 3 June 2010 a pre-action protocol letter was sent by solicitors for the applicant to the respondent, calling on the respondent to provide a system of transport in line with that provided to the integrated sector.

[8] There were a significant number of communications and meetings between the respondent and those making representations to it; these are recounted up to 2010 in detail which would be impractical to set out in this judgment. However there are certain points to note. It is clear that consideration was given by department officials to a range of alternatives and suggestions as to transport routes, means and funding. In a departmental memo of 24 September 2008 to the Minister it was stated that the provision of a separate vehicle to go directly to Coláiste Feirste for the seven children involved was not cost effective but, more significantly, *if granted would set a precedent that would invite similar requests from all sectors*. It was this point that effectively prevented further assistance being granted.

[9] Matters in dispute appeared to crystallise in July and August 2010, culminating with the decision of the Minister not to provide dedicated transport for pupils from Downpatrick to Coláiste Feirste, as communicated at a meeting on 18 August 2010 attended by two parents.

[10] This decision was communicated in a series of letters dated 27 and 30 September 2010 from the Minister to various interested parties stating that while the Minister had striven to find a solution that would meet the wishes of the parents, she had concluded that the situation could not be resolved without unreasonable public expenditure and therefore the request for dedicated public transport could not be met.

Relevant legislation

[11] Article 89 of Education (Northern Ireland) Order 1998, as amended (the “1998 Order”), concerns Irish-medium education. It states:

“Irish-medium education

89. – (1) It shall be the duty of the Department to encourage and facilitate the development of Irish-medium education.

(2) The Department may, subject to such conditions as it thinks fit, pay grants to any body appearing to the Department to have as an objective the encouragement or promotion of Irish-medium education.

(3) The approval of the Department to a proposal under Article 14 of the 1986 Order to establish a new Irish speaking voluntary school may be granted upon such terms and conditions as the Department may determine.

(4) In this Article “Irish-medium education” means education provided in an Irish speaking school.

(5) Article 3(2) of the Education (Northern Ireland) Order 2006 applies for the purposes of this Article as it applies for the purposes of Part II of that Order.”

[12] The applicant and CnaG note the commitment under the Good Friday Agreement from which the above statutory duty arose:

“Rights Safeguards and Equality of Opportunity Economic, Social and Cultural Issues

4. In the context of active consideration currently being given to the UK signing the Council of Europe Charter for Regional or Minority Languages, the British Government will in particular in relation to the Irish language, where appropriate and where people so desire it:

- take resolute action to promote the language;**
- facilitate and encourage the use of the language in speech and writing in public and private life where there is appropriate demand;**
- seek to remove, where possible, restrictions which would discourage or work against the maintenance or development of the language;**

- make provision for liaising with the Irish language community, representing their views to public authorities and investigating complaints;
- place a statutory duty on the Department of Education to encourage and facilitate Irish medium education in line with current provision for integrated education;
- explore urgently with the relevant British authorities, and in co-operation with the Irish broadcasting authorities, the scope for achieving more widespread availability of Teilifis na Gaeilge in Northern Ireland;
- seek more effective ways to encourage and provide financial support for Irish language film and television production in Northern Ireland; and
- encourage the parties to secure agreement that this commitment will be sustained by a new Assembly in a way which takes account of the desires and sensitivities of the community.”

[13] Article 52 of the Education and Libraries (Northern Ireland) Order 1986, as amended (the “1986 Order”), deals with transport. It states:

“Provision of transport for, and payment of travelling expenses of, certain pupils

52.—(1) A board shall make such arrangements for the provision of transport and otherwise as it considers necessary or as the Department may direct for the purpose of facilitating—

(a) the attendance of pupils at grant-aided schools; and

(b) the attendance of relevant pupils at institutions of further education;

and any transport provided under such arrangements shall be provided free of charge.

(2) Arrangements made by a board under paragraph (1) (other than arrangements made in pursuance of a direction of the Department) shall be subject to the approval of the Department.

(3) A board may, in accordance with arrangements approved by the Department, provide transport for, or pay the whole or part of the reasonable travelling expenses of—

(a) pupils attending grant-aided schools; and

(b) relevant pupils attending institutions of further education,

for whom the board is not required to make provision under arrangements made under paragraph (1).

(4) In paragraphs (1) and (3) “relevant pupils” means pupils of a class or description specified by the Department for the purposes of this Article.

(5) Any arrangements under paragraph (3) shall include provision—

(a) for the board to make charges (payable by the parents of the pupils concerned) in respect of transport provided under that paragraph; and

(b) as to the cases in which, and the extent to which, such charges are to be remitted by the board.

(6) With a view to assisting in the prevention of accidents, a board may carry into effect such measures as may be set out in a scheme framed by the board and approved by the Department.”

[14] Article 44 of the 1986 Order addresses the wish of parents. It states:

“44. In the exercise and performance of all powers and duties conferred or imposed on them by the Education Orders, the Department and boards shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of *unreasonable* public expenditure, pupils shall be educated in accordance with the wishes of their parents.”

[15] It is also useful to set out extracts from the Department of Education’s Circular 1996/41 dated 31 October 1996 and updated on 18 September 2009, which is relevant to transport policy.

“Note (i) To determine those pupils who should receive transport assistance, boards/ESA should have regard to “walking distance” as defined in paragraph 3(6) of Schedule 13 to the 1986 Order, i.e. 2 miles in relation to a pupil under 11 years of age and 3 miles for older pupils ...

TRANSPORT ARRANGEMENTS

3.1 Transport assistance should not normally be provided for any pupil who lives within statutory walking distance of the school or institution of further education attended. A board/ESA may however, consider whether there

are circumstances sufficiently exceptional to set aside normal circumstances (see paragraph 8). ... A board /ESA has no obligation to assist with travel for the whole of a journey, provided that the remainder of the journey does not exceed the statutory walking distance and the board/ESA is satisfied, having regard to the length and time of the total journey, that the remainder of the journey is not excessive.

...

SCHOOLS

3.2" Where there is a suitable school or schools within statutory walking distance from a pupil's home and a pupil attends a school outside statutory walking distance, transport assistance will be provided only where the pupil has been unable to gain a place in any suitable school within statutory walking distance.

3.3 Where there is no suitable school within statutory walking distance from a pupil's home boards/ESA may provide transport assistance to any suitable school, provided that a suitable board/ESA or public transport service to or in the vicinity of that school is already available. A board/ESA will not be expected to introduce new bus routes or services for individuals or small groups of pupils where the cost of such transport would result in unreasonable public expenditure.

3.4 A suitable school is a grant-aided school in any of the following categories: - ...Irish-medium...

...

3.5 As at present, applications may be made for a place in a school in more than one category in each school sector, and for schools in both the secondary and grammar sectors. Following the closure date for such applications by parents, each application will be treated individually for the purposes of assessing transport entitlement and a suitable school will be the category of school in which the pupil is finally placed. To be eligible for transport assistance to a school outside statutory walking distance, application must first of all be made to all schools in the same category that are within statutory walking distance before a preference is expressed for the more distance school. To qualify for assistance to the more

distance school applicant must be able to show that they were unable to gain a place in such schools in the same category within statutory walking distance of their home."

...

MEANS OF ASSISTANCE

5.1 Transport assistance for eligible pupils can be provided by a variety of means including the issue of sessional tickets (commonly referred to as "bus passes") for public transport, the operation of board/ESA vehicles, the hire of buses or taxis and the payment of bicycle or car allowances. In determining the most suitable method of assisting pupils, boards/ESA should have regard to the interests of efficiency and economy as set out in Article 44 of the Education and Libraries (NI) Order 1986. Cost, availability and convenience, both in the short and in the long term, should be taken into consideration when determining the means of assistance.

5.2 In determining whether a transport service is suitable boards/ESA should also take into account such factors as the age of the pupil, whether it would entail an unduly early start or late ending to the pupil's period of absence from home, the duration of the journey and distance to and from the pupil's home or connection point.

5.3 Pupils should be able to travel in safety and reasonable comfort. ...

5.4 Where a board/ESA has been constrained in its response, that is, where it cannot provide a service that meets the aims of paragraph 5.2 and/or paragraph 5.3 within the context of paragraph 5.1, then Boards/ESA may offer parents an allowance in lieu of transport and in such cases responsibility for the journey then rests with the parent.

...

EXCEPTIONAL CIRCUMSTANCES

8 The application of the eligibility rules relating to distance may not always be appropriate and it is for the board /ESA to consider any case which is thought to be outside the provisions on the preceding paragraphs. Such cases considered by Boards/ESA should be by their very nature exceptional.

...

IRISH MEDIUM EDUCATION

12 **Article 89(1) of the Education (Northern Ireland) Order 1998 confers upon the Department a duty to encourage and facilitate the development of Irish-medium education. In response to this duty, the boards/ESA, with the approval of the Department shall make arrangements under paragraph 5.4 to provide an allowance for Irish-medium pupils in lieu of transport services to enable such pupils to attend Irish medium schools where it would not be reasonably practicable to provide assistance in accordance with paragraph 5.1”**

The parties’ submissions

Ground 1 (Article 89 of the 1998 Order)

[16] The applicant submits that the respondent failed to give proper weight and consideration to its obligation under Article 89. The applicant cites authority for the contention that Article 89 must be construed in light of the Good Friday Agreement and other conventions (*Re McMillen [2008] 21*, para. 16). Further, the obligation is not only to take positive steps to encourage Irish-medium education but also to remove obstacles. It is argued that parents and pupils start at a disadvantage because of a comparatively limited number of Irish-medium schools. The applicant submits that the question to be determined is whether additional transport facilities would encourage and facilitate the development of Irish-medium education. Transport facilities should be specially tailored in this case: it is not sufficient to apply a general transport policy aimed at children who have a comparatively wide choice of educational establishments in the areas in which they live.

[17] The applicant notes that the respondent’s principal reason for declining to accommodate the transport demands are economic, consistent with “the avoidance of unreasonable public expenditure” pursuant to Article 44 of the 1998 Order. The applicant submits that resources in this case are irrelevant bearing in mind the statutory duties and relatively small costs in the context of the education budget. The applicant cites authorities for limited resources not always being relevant in the context of statutory duties (*R v East Sussex County Council Ex Parte Tandy 1998 AC 714* and *Re (Noorkoiv) v Secretary of State for the Home Department EWCA Civ 770, [2002] 1 WLR 3284*).

[18] The respondent’s position is that a number of steps, outlined in its affidavit evidence, provide concrete evidence of the appropriate discharge of the Article 89 duty. These include, *inter alia*, the establishment of CnaG and Iontaobhas na Gaelscolaiochta; amendment to the transport policy in 2001 to permit payment of up to twice the sessional rate; review of Irish-medium

education in 2008; and carrying out a latent demand survey in 2010. The applicant, on the other hand, asserts that while these steps may have been taken, progress is not impressive when compared with other sectors and non-English medium schools on the Republic of Ireland and Wales.

[19] The respondent further submits that the applicant has misconstrued the nature of the Article 89 obligation: it is aspirational, exhorting the respondent to endeavour to encourage and facilitate Irish-medium education; it imposes no specific obligation and does not purport to amend Article 52 of the 1986 Order, the two provisions having previously been held to peacefully co-exist (Re Martin [2000] NIQB 9).

[20] CnaG has also made submissions on the nature of Article 89: Article 44 of the 1986 Order must be read in conjunction with Article 89. In that context and the context of the Good Friday Agreement, it would not be 'unreasonable public expenditure', as termed in Article 44, to devise a more specific policy aimed at the Irish-medium post primary sector; the notion of what is unreasonable expenditure must be read in light of the Article 89.

[21] Further, CnaG say that Article 52 of the 1986 Order must be read in light of Article 89, and that the conclusion in Re Martin does not undermine this. In effect, the development of an education sector and genuine parental choice cannot be divorced from the means by which students will get to the schools in that sector.

[22] Further, CnaG say that Article 89 is not merely aspirational: it gives statutory expression to the Belfast Agreement. Given that the statutory duty underpinning integrated education is drafted in similar terms to Article 89, finding that Article 89 is merely aspirational would have implications for the integrated sector. In short, CnaG believes that Article 89 requires the respondent to take specific facilitatory action in respect of Irish-medium education. The lack of a corresponding obligation in respect of English-medium schools implies that the respondent must act to facilitate and encourage the Irish-medium sector in ways that it does not for the English-medium sector. The developing nature of the sector implies longer than normal journey times, which of itself requires "encouragement and facilitation". CnaG make submissions around cost of providing transport which it says the respondent has not taken into account, including comparison with costs for Special Educational Needs pupils. CnaG says that it is reasonable to invest in improving access to Irish-medium schools, particularly where this involves developing key routes which could become viable within a few years because, for example, of the first cohorts of students reaching transfer stage from Irish-medium primary schools over the coming years. CnaG's view is that forward planning for transport from areas where there are Irish-medium primary school would avoid costly non-strategic development of the post-primary Irish-medium sector.

[23] In CnaG's view, the problem is that it is easier to maintain transport routes that have developed over time, rather than re-configure them to cater for new and developing education providers. It queries the reasoning behind the respondent's explanation as to why Translink could not vary routes and it submits that there are Eastern Library Board buses providing transport to English-language medium schools to pupils who are either on or within statutory walking distance of public transport routes. CnaG makes the case that the wording at paragraph 8 of Circular 1996/41 the respondent's transport policy can be varied and that the present case falls into the category of exceptional circumstances in which it would be appropriate to effect such a variation. CnaG says that the exceptionality element is found in statutory terms in Article 52(3) of the 1986 Order.

Ground 2 (Discrimination)

[24] The applicant submits that the respondent is in breach of its obligations not to discriminate between different schools and different categories and to treat all schools fairly and equally. The particulars around this ground are cited by Colma McKee in her affidavit of 23 December 2010 at paragraphs 9 to 11. Briefly, she alludes to the Downpatrick pupils of Coláiste Feirste having four hour round trips. In contrast, dedicated bus routes serving three integrated colleges in the Belfast area are highlighted. Secondly, she refers to schools that Coláiste Feirste compete with which are, like Coláiste Feirste, on main bus routes; however those schools have either dedicated buses from areas in respect of which Coláiste Feirste has been refused dedicated buses, or else shuttle buses from transport hubs.

[25] The respondent's position is there is no evidential or statutory basis for the contention that there has been unlawful discrimination in respect of transport for Irish-medium schools. If anything, the provision of an enhanced transport allowance is an instance of more favourable treatment for Irish-medium pupils.

[26] This ground is addressed at paragraphs 115-122 of the affidavit of Mr. McMullan. As I have already outlined, he goes to some lengths to explain the travel arrangements provided to all pupils and to demonstrate that the pupils from Coláiste Feirste are not only subject to the same provision, but in fact in certain cases do better (because of the enhanced parental allowance). [He rejects the assertion that pupils in other sectors have vastly better travel assistance and states that transport policy is not based on a sectoral approach but on transporting individual pupils or groups of pupils by the most effective method of travel. Only where numbers are sufficient will a dedicated bus route be provided; alternatively there are sessional ticket bus passes for those close to Translink routes; free seats for those close to Board bus or private operator routes; and finally, parental allowances. Pupils from

other schools facing similar long journeys who cannot access a dedicated route are treated in the same way, and where they receive the parental allowance it is at an enhanced rate.]

[27] Mr. McMullan also notes that a high percentage of Coláiste Feirste pupils live within three miles of the school and are therefore not eligible for transport assistance. The remainder either have access to Metro bus routes, as other school sectors do, or are dispersed across various other routes in insufficient numbers to merit dedicated services. As regards the Downpatrick area, his evidence is that nine pupils are insufficient to warrant a dedicated bus, the pupils have passes that can be used in a flexible manner, and that their morning journey time is 1 hr 20 to 1 hr 40, with the afternoon journey time being shorter, and not the round trip of 4-5 hours suggested by the applicant.

Ground 5 and 7 (Article 52 of the 1986 Order)

[28] The applicant submits that the respondent failed to comply with its obligations under Article 52 of the 1986 Order to provide transport assistance to pupils attending grant aided schools which, it is argued, would have required any provision to be adequate to meet the reasonable requirements of any pupil. Alternatively, the applicant says that if these obligations are not mandatory, the respondent has a general discretion under Article 52 of the 1986 Order to provide transport assistance. Article 52 confers wide powers on the respondent and the respondent erred in subjecting the exercise of its powers to a value for money test. Instead, the respondent should have given effect to the purpose of Article 89. "Unreasonable" in Article 44 should have been construed in this light.

[29] The respondent's case is that this is a distortion of the obligations arising from Article 52, which is expressed in the terms of a discretion rather than a duty. In other words, Article 52 does not set out mandatory obligations, neither express nor implied.

[30] In light of the applicant's failure to secure leave to challenge the decision on rationality grounds, the respondent submits that the only question is whether it considered the Article 52 discretion. The respondent refutes the suggestion that the discretion provided pursuant to Article 52 has not been exercised at all. The respondent argues that Ministerial submissions and the letter provided on 30 April 2010 demonstrate that the exercise of discretionary powers was the subject of anxious scrutiny and that the iterative consultation process cannot be impugned in public law terms.

[31] Referring also to Circular 1996/41, as amended, the respondent submits that the statutory framework is pupil-centred, and that transport needs are not analysed in terms of requirements of a particular school.

Locus standi pursuant to the Human Rights Act

[32] As regards Grounds 11(d) and (e) the applicant must first establish that it has standing to make the arguments it advances. Section 7 of the Human Rights Act requires the applicant to have been a victim of the unlawful act under challenge. The applicant submits that even if “the applicants” are not victims pursuant to Section 7 of the Human Rights Act, they have locus standi in judicial review proceedings under Section 3 of the Human Rights Act which provides for an interpretative duty where statutory interpretation is relevant.

[33] Alternatively, the applicant submits that parents can be victims within the meaning of Section 7 of the Human Rights Act. The applicant cites authority for the proposition that a victim can be someone indirectly affected such as a close relative (Re Committee for Administration of Justice and O’Brien [2005] NIQB 25) and that a parent is sufficiently a victim for complaining of a breach of child’s rights (Re (Holub) v Secretary of State for the Home Department 2001 1 WLR 1359). From this flows the argument that members of the Board of Governors could similarly be victims within the meaning of Section 7 given that their role makes them, in effect, in loco parentis.

[34] The respondent refers to Re Northern Ireland Commissioner for Children and Young People [2009] NICA for an examination of the jurisprudence: firstly, Article 34 of the Convention does not provide for an actio popularis or public interest challenge. Secondly, a law may violate rights of an individual if the individual is directly affected by the law in the absence of specific measures of implementation; while this introduces a degree of flexibility to the concept of victimhood, the claimant must still show at least the potential for *his* rights to be affected by the impugned law. It is submitted that a restrictive approach was recently endorsed in JR1 [2011] NIQB 5.

[35] The respondent’s position is that the applicant is not a victim; she does not identify herself as a parent or prospective parent of a child at the school; there is not interference with her rights and she is not a victim as termed by Section 7. Further, the relevant domestic statutory framework is in terms of obligations owed to individual pupils.

Ground 11(d) (Article 2 of Protocol No. 1 to the Convention)

[36] On the assumption that there is locus standi, the applicant argues that the respondent has breached Article 2 of the First Protocol. The applicant cites Belgian Linguistic Case (No 2) Series A No 6 1968 252 as authority that while there is no direct right to be educated in the language of one’s choice, where different language groups are catered for, discrimination is forbidden under Article 14 of the Convention.

[37] The respondent refutes the argument that there has been a breach of Article 2 of Protocol No. 1, citing authorities for the dilute nature of the right – requiring it to be seen in the context of the domestic education system as a whole (*A v Head Teacher and Governors of Lord Grey School* [2006] 2 WLR 690) – and for the contention that there is no Convention right to education of a particular kind or quality other than that prevailing in the state (*JR 17 [2010] UKSC 27*). On this basis, the respondent submits that there has been no denial of access to the basic minimum educational facilities of the state: education has been provided to those who require it and Irish medium education is available to those parents who seek to avail of it; Article 2 of Protocol No. 1 does not impose a positive obligation to provide transport to ensure that a particular educational sector is, or becomes, sustainable.

Ground 11(e) (Article 14 of the Convention)

[38] The applicant submits that, because the case is clearly within the ambit of Article 2 of the First Protocol, Article 14 is engaged. The applicant submits that there are two distinct classes: parents who do wish, and parents who do not wish, their children to be educated through Irish.

[39] The respondent notes that arguments advanced on the basis of Article 14 cannot succeed unless the applicant’s submissions on Article 2 of Protocol No. 1 are successful. If they are, the respondent submits that its evidence demonstrates that there has been no differential treatment between the Irish medium and other sectors: the statutory framework is applied in a neutral manner.

Discussion

[40] I turn first to the Convention based arguments and the respondent’s submission that the applicant is not a victim within the meaning of Section 7 of the Human Rights Act 1998 and consequently has no standing to maintain this aspect of the judicial review. The applicant does not identify herself as a parent or prospective parent of a child at the school and there is no interference with her rights. Applying the principles summarised *In Re CAJ* [2005] NIQB 25 and *Re NICCY* [2009] I consider there is considerable force in the submission that the applicant cannot be regarded as a victim. However I have come to a conclusion with reference to the applicant’s primary submission grounded on Art89 which makes it unnecessary for me to reach a concluded view on this issue or indeed whether, had victim status been established, the transport policy could be impugned as being in breach of A2P1 whether read alone or in conjunction with Art14.

[41] The applicant also complained in Ground 2 of discrimination but I am not persuaded in light of the material adduced that this ground has been made out.

[42] My conclusion on the remaining grounds requires consideration of the nature of the duty imposed by Art 89 of the 1998 Order and the impact, if any, on the further duties enshrined in Art 44 and Art 52 of the 1986 Order.

[43] Art 89 is the statutory embodiment of the clear commitment enshrined in the Belfast/Good Friday Agreement to place a statutory duty on the respondent to encourage and facilitate Irish medium education in line with the current provision for integrated education.

[44] I do not accept the respondents contention that this duty is merely aspirational. The imposition of the statutory duty has and is intended to have practical consequences and legislative significance. Thus it does not follow that the proper discharge of this duty, for example in the field of transport, would set a precedent in respect of other education sectors to whom this statutory duty is *not* owed. As noted at para 8 the establishment of a (costly) precedent appears to have been decisive in the past in the respondents negative response. However the respondent does *not* have a corresponding duty in relation to the traditional established educational sector. Accordingly it may facilitate and encourage the IM post primary sector in ways that it need not for other sectors by taking positive steps or removing obstacles which inhibit the statutory objective. This does not appear to have been fully appreciated by the respondent. Accordingly I consider that the respondent has failed to give proper weight and consideration to its obligation under Art 89 to encourage and facilitate the development of IM education. Ground 1 is made out and the respondent will therefore need to give further consideration to the transport issue in the post primary Irish medium education sector in light of the courts ruling.

[45] The respondent also contended that Art 89 has no relevance to or impact upon Art 52 which it was asserted constituted a complete statutory scheme for the administration of school transport. I reject this submission. In my view the provision of transport facilities to schools in any sector is critical to the development of that sector and the provision of genuine parental choice. As CnaG put it in their written argument it is not possible to divorce the development of schools from the means by which students are going to get to them. It is *open* to the respondent to exercise its powers under Art 52 and to amend the transport policy in the discharge of its duty under Art 89.

[46] The application for judicial review is successful and the respondent must now to the extent required by this judgment reconsider the matter.

