

Neutral Citation No: [2024] NIKB 115

Ref: HUM12685

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

Delivered: 20/12/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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**KING’S BENCH DIVISION
(JUDICIAL REVIEW)**
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**IN THE MATTER OF AN APPLICATION BY JR329 (A MINOR)
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE EXCEPTIONAL
CIRCUMSTANCES BODY**
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**Stephen Toal KC & Sean Devine (instructed by Brentnall Legal) for the Applicant
Aidan Sands KC & Laura Curran (instructed by Napier Solicitors) for the proposed
Respondent**
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HUMPHREYS J

This judgment has been anonymised to protect the identity of the child to whom the proceedings relate. Nothing can be published which will identify the child or any of the schools concerned.

Introduction

[1] This is an application for leave to apply for judicial review of a decision of the Exceptional Circumstances Body (‘ECB’) taken on 24 September 2024 whereby it refused the application of the mother of the applicant, JR329, for a direction that she be admitted to a particular school (‘the school’). It proceeded on an expedited basis by way of a rolled-up hearing.

[2] In May 2024, following the results of the SEAG test, the applicant was informed that she had not been successful in securing admission to any of her preferred schools.

[3] The applicant’s mother lodged an application to the ECB on 29 July 2024 on the basis that, by reason of exceptional circumstances, the applicant must attend the school.

[4] An oral hearing took place before the ECB Panel of Timothy Mayes, chair, Wilbert McKee and Karen Keers on 23 August 2024. The applicant's parents were present and gave evidence. They were represented by solicitor and counsel. The principal of the school also attended and gave evidence.

The evidence before the panel

[5] The panel was furnished with the following:

- (i) A report dated 29 September 2023 from Dr Caoimhe Murton, chartered psychologist;
- (ii) A report of Dr Aidan Devine, clinical psychologist, dated 30 June 2024;
- (iii) The applicant's GP notes and records;
- (iv) A letter dated 2 September 2024 detailing incidents relating to the applicant's father;
- (v) The ECB application form.

[6] The applicant was referred to Dr Murton following difficulties in reading and spelling at primary school. She met the applicant on 13 September 2023, at the start of her primary seven year. Dr Murton observed that she was a friendly child who enjoyed sport and had a good group of friends. A number of tests were carried out which led the clinician to conclude she has a specific learning disorder with impairment in word reading and spelling. The diagnosis was one of dyslexia.

[7] Dr Devine did not examine or meet the applicant but states his belief that she is suffering from significant anxiety by June 2024, characterised by hypervigilance, hyper arousal, nightmares and separation anxiety. He states that being educated in the same school as her sister would represent a major protective factor for the applicant. Without this, he expressed concern that her anxiety could become overwhelming.

[8] The GP notes and records contain a request from the applicant's mother dated 30 January 2024, seeking a special circumstances letter in relation to the SEAG process. This is a school based procedure, quite separate from the issue of exceptional circumstances. It states that the applicant has been suffering from stress, anxiety and sleepwalking. The resulting GP letter references social withdrawal and a continual desire to be with her mother. There is also a letter from a consultant paediatrician, Dr Callaghan, who is a family friend, dated 12 February 2024, which talks of the level of anxiety pertaining to the SEAG examination.

[9] The details relating to threats and incidents record that the last noted threat was in June 2021.

[10] The summary of exceptional circumstances provided by the applicant's parents stated that the extent of psychological distress caused to the applicant was such that she had become totally dependent on her support network and, in particular, her elder sister. She had become, in their words, "her de facto and unregistered carer". Being educated alongside her sister would allow the applicant to feel protected in a safe environment and in a school which already provides support to her siblings.

[11] On 27 August the panel sought further information, namely:

- (i) Confirmation in writing as to the applicant's diagnosis of dyslexia;
- (ii) A copy of an updated PSNI threat assessment in relation to the child.

[12] On 3 September further information was received from the applicant's father, including a letter from the NI Dyslexia Centre confirming Dr Murton had made the diagnosis. Further detail relating to the threats against the father was also provided. On 16 September more documents were sent to the panel, including a schedule of agreed facts pertaining to separate and unrelated judicial review proceedings.

[13] The panel met again on 24 September to consider all the material. It was unanimous in its decision that the application be refused.

The legal framework

[14] The ECB was created by Article 29 of the Education (Northern Ireland) Order 2006, which inserted a new Article 16A to the Education (Northern Ireland) Order 1997 ('the 1997 Order'), and which provides:

"(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;
- (b) in any other case, the body shall dismiss the application."

[15] It will be evident that the role of the ECB in the school admissions process is a limited one and the outcome of an application to it either entails a direction to admit to a specified school or the dismissal of the application.

[16] Under Article 16A(3), the Board of Governors of the specified school must admit the child where it is directed by the ECB to do so. Pupils admitted to a school by this route are treated as supernumerary and funded accordingly.

[17] The School Admissions (Exceptional Circumstances) Regulations (Northern Ireland) 2010 ('the 2010 Regulations') were made under Article 16A and these define "exceptional circumstances" as follows:

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

[18] Regulation 5 gives certain examples of circumstances which the Panel may regard as exceptional:

- "(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."

[19] Regulation 6 identifies three circumstances which the ECB does not have discretion to regard as exceptional circumstances requiring admission to the specified 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 related wholly or mainly to the availability of transport to that school."

[20] In *Re School X's Application* [2016] NIQB 87, Colton J succinctly summarised the task of a panel appointed:

"[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.”

[21] The guidance provided to ECB panels stresses that evidence must be adduced to substantiate any claim of exceptional circumstances. In particular, evidence should be objective and factual and is likely to be provided by suitably qualified professionals or experts.

The panel decision

[22] On 25 September 2024 the panel wrote to the applicant’s mother informing her that the application had been unsuccessful. The reasons given were as follows:

“This is a mother’s application on behalf of her daughter to ECB. Counsel appeared on the mother’s behalf. The child had been assessed by an educational psychologist on 13/08/23. The personal assessment noted that the child was friendly, chatty, polite and articulate. Various pieces of evidence were presented in relation to the child’s mental health and wellbeing. However, it was unclear if the child was personally known to or interviewed by the professionals involved.

It was also submitted to the panel that there was a late diagnosis of dyslexia. The main thrust of the application was that the child had gone into a “downward spiral” due to her father being allegedly targeted by what were termed “nefarious individuals” as a consequence of the father’s occupation. The panel considered the evidence in this regard somewhat confusing. There was a distinct lack of objective evidence. There was no evidence whatsoever in respect of a defined and specific threat relating to the child, the subject of this application.

On the basis of the evidence submitted on behalf of the child the panel concluded that the case does not meet the threshold of exceptionality and Test 1 is not met.

The overwhelming thrust of the evidence was based around the chosen role of the father and his security concerns. As a consequence, the panel concluded that the circumstances were not personal to the child and Test 2 is not met.

The test of exceptionality not having been met it has not been proven that there are features about the specified school that make it necessary for the child to attend that school. The secretariat brief clearly shows other schools that may be suitable for the child. Test 3 is not met and the application is unsuccessful.”

The grounds of challenge

[23] The single ground of challenge which was pursued by the applicant was illegality in relation to the ECB panel’s decision on test 1 and test 2.

[24] In relation to test 1, it was alleged the panel had erred in law by holding that a threat must be made personally to a child in order for it to constitute exceptional circumstances. The allegation arises as a result of one sentence in the statement of reasons:

“There was no evidence whatsoever of a defined and specific threat relating to the child, the subject of this application”.

[25] It is trite to say that the decision of the panel must be read as a whole. Prior to identifying the lack of any specific threat against the child, the panel considered the evidence which had been presented. It noted that there was a lack of objective evidence and that which was relied upon appeared somewhat confusing.

[26] The exceptional circumstances claimed in the original application were the psychological distress suffered by the applicant as a result of threats to her father. The panel noted that it was presented with evidence arising from a personal assessment that the child was ‘friendly, chatty, polite and articulate’ (Dr Murton’s report of September 2023). The panel attached limited amount of weight to other evidence where it was “unclear if the child was personally known to or interviewed by the professionals involved.” The only entry in the applicant’s GP notes and records made no causal link between the stress and anxiety being suffered and the threats made to her father.

[27] In light of this, it was open to the panel to determine that the objective evidence on these issues was limited. It was entitled to give appropriate weight to each of the

pieces of evidence before it. The lack of any specific threat relating to the child was not the sole basis for the determination on the test 1 issue.

[28] Ultimately this was a matter of evaluative judgement for the panel. I commented in *Re JR212's Application* [2022] NIQB 58:

“The particular nature of the task being carried out by the ECB, and the specialist nature of those entrusted to apply the statutory tests, speaks to the standard of review to be applied by the courts when considering applications for judicial review.” (para [15])

[29] On matters of evaluative judgement, therefore, the court will afford the decision maker a wide margin of appreciation and only intervene where it has clearly fallen into error.

[30] There is no identified error of law in the panel's approach to the question of whether the circumstances are properly regarded as 'exceptional.' The evidence was considered, submissions received, and a determination made.

[31] The second ground of challenge is that the panel erred in law on test 2 in concluding that the circumstances were not personal to the child. The issue for the panel is to determine whether the applicant was personally affected by the threats in the manner alleged. There is obviously no requirement that such threats be made directly to the child, otherwise many wholly deserving cases would be excluded from the ECB scheme.

[32] It is inescapable that the panel has fallen into error in its assessment of what is meant by 'personal' in the statutory test set out in Article 16A (2). The words “as a consequence” in the penultimate paragraph of the reasons betray this error.

[33] The court had the benefit of the panel's transcribed notes of the hearing on 23 August. Mr Mayes records:

“The basic thrust of this case is around the perception of the father that he is under threat as a result of his work situation. In my view the circumstances are not personal to the child and Test 2 is not met.”

Mr McKee noted:

“The security issues relating to the father are specific to him and there is no evidence that they are personal to the child.”

In the words of Ms Keers:

“The security issues faced by the father are not considered personal to the child.”

[34] Each of the panel members failed to recognise that the impact of the threats against the father could be personal to the child and therefore misdirected themselves.

[35] However, in order to succeed, an applicant must demonstrate that the circumstances are exceptional and personal and that they require the admission of the child to the specified school. Each of the three tests must be answered in the affirmative. It is not enough therefore to show the circumstances are exceptional and personal if they could be accommodated or addressed in more than one school.

[36] In this application, there is no challenge to the panel’s analysis in relation to test 3. The only evidence put forward on this question was to the effect that the applicant’s sister attends the school and they enjoy a close personal relationship. As Ms Keers noted, many siblings are not schooled together, and a close bond does not make attendance at the same school essential.

[37] Again this was a matter of judgement for the panel. There is no pleaded challenge to it and the court would not, in any event, be inclined to interfere with the assessment arrived at by a panel experienced in this field.

[38] For these reasons, the identified error of law in relation to test 2, could not have led to a different outcome. It is necessary to be successful on all three limbs for a direction for admission to be issued by the ECB. In the event, the judgement of the panel on tests 1 and 3 cannot be impeached.

Conclusion

[39] Remedies in public law are discretionary and it would not be appropriate to quash the decision of the panel on the basis of the error in the application of test 2.

[40] For the reasons set out, the threshold for the grant of leave has been met but the application for judicial review is dismissed.

[41] I will hear the parties on the question of costs.