

**Neutral Citation No: [2023] NIKB 130**

**Ref: ROO12347**

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

**ICOS No:**

**Delivered: 15/12/2023**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**KING'S BENCH DIVISION  
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY JR283 (A MINOR)  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF DECISIONS BY THE DEPARTMENT OF  
EDUCATION**

**Ms Sinead Kyle (instructed by Nicholas Quinn Solicitors) for the Applicant  
Mr Matthew Corkey (instructed by The Education Authority Solicitors) for the  
Respondent**

**RULING ON COSTS**

**ROONEY J**

***Introduction***

[1] The minor applicant has diagnoses of autism, attention deficit disorder and dyslexia. He has a reading age of a five-year-old and has very poor cognitive functioning. From September 2021, the applicant has been attending secondary school. Due to difficulties in regulating his emotions at school and following frequent displays of challenging and inappropriate behaviours, the applicant has been regularly placed in detention and suspended from school on multiple occasions. It has been accepted by the respondent's Autism Advice and Intervention Service that the applicant's difficulties and inability to access the school curriculum has the potential to contribute to the applicant's frustration and inappropriate behaviours. The applicant's school has now indicated that it has exhausted all avenues to try to meet his needs.

[2] In June 2022, the applicant's mother requested the Education Authority to undertake an assessment of the applicant's special educational needs. The

Education Authority Statutory Assessment and Review Service requested advice from a consultant paediatrician and an educational psychologist as part of the applicant's statutory assessment. In particular, the educational psychologist stated that the applicant was experiencing difficulties regulating his behaviour in school and that it was plausible that the applicant's behaviour regulation difficulties may be associated both with his dual diagnoses of ADHD and ASD, but also regarding his difficulties assessing the curriculum. In view of the nature, degree and complexity of the applicant's educational needs, it was considered appropriate to provide for these within a specialist educational setting.

[3] On 16 November 2022, the Education Authority issued a Proposed Statement of Special Educational Needs providing that the applicant requires the following special educational provision to meet his needs:

- (i) Differentiation of the curriculum at a pace and in a manner suitable for pupils of a similar ability and aptitude.
- (ii) Staff with the skills and experience of addressing the needs of pupils with ASD, ADHD, social and behavioural difficulties, specific learning difficulties (verbal comprehension; verbal spatial; literacy; numeracy) and communication and social interaction difficulties.
- (iii) Targeted individual education plans drawn up to meet his needs and graded to suit his pace of learning, which are regularly monitored and reviewed by the school in partnership with [the applicant's] parents.
- (iv) In view of the nature, degree and complexity of [the applicant's] educational needs, a specialist educational setting.
- (v) Advice, guidance and support on request, from the Education Authority's Advisory and Intervention Service.

[4] The Proposed Statement was accompanied by a covering letter dated 18 November 2022 enclosing forms for the applicant's mother to indicate preferences for a school placement. On 12 December 2022, the applicant's mother returned the form detailing her preferred placements for the applicant.

[5] In January 2023 and February 2023, the Education Authority contacted various schools to ascertain whether they were able and had the capacity to admit the applicant. It appears that the consultation responses from each school were not positive and that none of the proposed school placements had any capacity to admit the applicant.

[6] On several occasions, including 6, 18, 19, 24 April and 16 May 2023, the applicant's mother contacted the Education Authority to discuss her serious concerns about the applicant's circumstances and the fact that no suitable placement

had been identified to meet the applicant's special educational needs. To the utmost frustration of the applicant's mother, her calls were never returned.

[7] On 12 May 2023, the applicant's solicitor sent email correspondence to the Education Authority requesting confirmation that the parental preferences schools had been contacted and also requested copies of the consultation responses. No acknowledgement or response was received. The applicant's solicitor sent further email correspondence on 15 May 2023 requesting a response, but once again, no acknowledgement or response was received. A further email was sent on 22 May 2023 which again received no response or acknowledgement.

[8] On 13 June 2023, pre-action protocol correspondence was sent by the applicant's solicitor to the Education Authority requesting confirmation that it would provide a school placement for the applicant and finalise the applicant's statement of educational needs in view of the fact that the eight-week statutory time limit had long expired. No acknowledgement or response to the pre-action protocol correspondence was received from the Education Authority.

[9] Judicial review proceedings were issued on 24 July 2023. The Order 53 statement sought expediency. A certificate of urgency was filed in the High Court on 23 August 2023.

[10] On 24 August 2023, I issued Case Management Directions Order 1, granting the applicant leave to apply for judicial review and making an anonymity order in respect of the applicant. The parties were also directed to agree a timetable and the matter was listed for review on 6 September 2023.

### *The Relief Sought*

[11] The applicant has sought, inter alia, the following relief:

- (a) A declaration that the Education Authority continues to act unlawfully in breach of its statutory duties under Regulation 17 of the Special Educational Needs and Disability (Northern Ireland) Regulations 2005 which requires that the Education Authority shall serve a copy of the applicant's completed Statement within eight weeks beginning with the date on which the proposed Statement was served, namely within eight weeks of service on 18 November 2022.
- (b) An order of mandamus requiring the Education Authority to issue the applicant's completed Statement of Special Educational Needs and which names a suitable school placement to meet the applicant's special educational needs.
- (c) A declaration that the Education Authority continues to act in breach of its statutory duties pursuant to Article 4 of the Education (Northern Ireland)

Order 1996 by failing to have regard to para 1.7 of the Department of Education Code of Practice on the identification and assessment of special educational needs.

- (d) A declaration that the Education Authority decisions and omissions are in breach of Section 6 of the Human Rights Act 1998 insofar as they amount to disproportionate interferences with the applicant's Article 8 ECHR rights and breach Article 2 of Protocol 1 ECHR in conjunction with Article 14 ECHR rights by virtue of the lack of effective access to education for the applicant pending the issue of the completed Statement.

### *The Review Hearings*

[12] At the initial review hearing on 6 September 2023, Mr Corkey BL, counsel for the respondent advised the court that considerable efforts were being made to resolve the applicant's special educational circumstances. During a review on 11 October 2023, the respondent sought further time to liaise with the applicant's mother and to allay her concerns relating to the suitability of educational facilities at a named educational centre. At the next review on 18 October 2023, the respondent indicated that the applicant's Statement would be finalised, and that the applicant would be educated at the named educational centre. However, during the intervening period, attempts made by the applicant's mother to get a response from the respondent proved difficult. Further meetings were arranged.

[13] On 10 November 2023, the respondent confirmed that the applicant's Statement had been finalised with the applicant to attend a named educational centre. The judicial review proceedings were dismissed, subject to the issue of costs.

### *Costs: Legal principles*

[14] A summary of the relevant legal principles in relation to an award of costs in judicial review proceedings was recently considered by Scofield J in the context of a contested application in *Re Glass's Application (Costs Ruling)* [2023] NIKB 22 and also in *RG (Costs Ruling)* [2023] NIKB 48, where the applicant was partially successful. The applicable legal principles were also considered by McCloskey J in *Re YPK and Others' Application* [2018] NIQB 1.

[15] The single overarching principle is that an award of costs remains at the discretion of the court. For this reason, a consideration of the relevant legal principles by a court is essential in order to ensure the proper exercise of its discretion.

[16] In this case, the judicial review proceedings have been resolved without a full hearing. The position on costs has not been agreed. The applicant argues that, since he has been successful, he is entitled to an award of costs. The applicant also invites

the court to take into consideration the respondent's failure to respond to the pre-action protocol correspondence and its conduct after judicial review proceedings were instigated. The respondent, whilst accepting that due to "administrative failures", it had failed to respond to the pre-action correspondence, considerable efforts had been made to identify a suitable educational placement for the applicant. In the circumstances, the respondent submits that there should be no order for costs between the parties.

[17] In *Boxall and another v London Borough of Waltham Forest* [2000] All ER (D) 2445 at para [22], Scott Baker J listed the following guiding principles in a case which has been resolved or compromised:

- “(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.
- (ii) It will ordinarily be irrelevant that the claimant is legally aided.
- (iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.
- (iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.
- (v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.
- (vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.”

[18] In *RG (Costs Ruling)* [2023] NIKB 48, Scoffield J referred to the significance of the *Boxall* principles in light of the introduction of the pre-action protocol for judicial review claims. At para [19], Scoffield J stated as follows:

“The *Boxall* principles had been considered in the final report of the Jackson Review of Civil Litigation Costs in England & Wales. That review considered that the Boxall approach made “eminently good sense” at the time the case was decided but was in need of modification in light of the pre-action protocol which had been introduced for judicial review claims. It recommended that if the defendant settles a judicial review claim after issue by conceding any material part of the relief sought and the claimant had complied with the protocol, the normal order should be that the defendant pays the claimant’s costs. Assuming the issues were fairly set out in the pre-action protocol correspondence, such an approach would tip the balance in favour of an applicant where they were nonetheless required to issue proceedings and the respondent climbed down at that point.”

[19] As further stated by Scoffield J in *RG* at para [25]:

“McCloskey J cited *M v London Borough of Croydon* with approval at para [18] of his decision in *YPK*. The Boxall principles continue to be applied in this jurisdiction (see, for instance, *Re JR186’s Application* [2022] NIQB 20, at para [28], *per* Colton J); but the courts here also take into account the modifications or adjustment to the *Boxall* principles which are appropriate in light of the additional judicial consideration discussed above (see, for instance, *Re Coleman’s Application* [2022] NIQB 25, at para [12], again *per* Colton J; and *Re JR115 and JR116’s Application* [2021] NIQB 105, at paras [16]-[19], *per* Sir Declan Morgan).”

### ***Consideration of the Parties’ Submissions***

[20] Ms Kyle BL, counsel on behalf of the applicant, submits that the respondent was in breach of its statutory duties under Regulation 17 of the Special Educational Needs and Disability (NI) Regulations 2005 in that it failed to serve a copy of the applicant’s completed statement within eight weeks beginning with the date on which the Proposed Statement was served, namely within eight weeks of service of 18 November 2022. Ms Kyle further submits that after the applicant’s mother indicated their preferences for school placements, she was advised that none of the preferred schools had the capacity to admit the applicant. Thereafter, several attempts made by the applicant’s mother to contact the respondent were ignored, necessitating further email correspondence from the applicant’s solicitor to the respondent. There was no acknowledgement or responses to the said emails. Even

pre-actioned protocol correspondence dated 13 June 2023 failed to promote a response, thereby giving the applicant no option but to issue judicial review proceedings on 24 July 2023 with an accompanying certificate of urgency.

[21] As detailed above, the failure by the respondent to provide any acknowledgement or response to the contacts made by the applicant's mother and the applicant's solicitor is inexcusable. The failure to respond to the pre-action protocol correspondence is completely unacceptable. The excuses put forward by the respondent, namely due to "administrative failures", are totally rejected. Although the respondent has apologised to the applicant and to the court, without the benefit of a fulsome explanation as to the failure to respond, such apologies carry little weight.

[22] Accordingly, in the exercise of my discretion, I will make an order that the respondent pays the applicant's costs up until the date when the court granted the applicant leave to issue judicial review proceedings, namely 24 August 2023.

[23] The next question is to determine whether, applying the relevant guidelines, I should exercise my discretion and make an award of full costs against the respondent. In this regard, Ms Kyle argues that the respondent has failed to offer any explanation for its failure to act in accordance with its statutory duties, whether by filing affidavit evidence or otherwise. It is further argued that the respondent failed to act in accordance with the court's directions to file such affidavit evidence and that in all the circumstances, the respondent's recalcitrant conduct must be reflected in an order for costs.

[24] It must be acknowledged that this is not a case in which the respondent has failed to carry out any enquiries after the proposed Statement of Special Educational Needs for the applicant was issued on 16 November 2022. It is clear from the submissions made by the respondent that at least six schools were contacted by the respondent, but unfortunately due to the complex needs of the applicant, it was not possible to identify a suitable placement. Thereafter, after leave was granted to issue judicial review proceedings, it is plain that the respondent engaged in proactive and determined efforts to identify and achieve a suitable placement for the applicant. Although the court directed affidavit evidence, permission was granted by the court to extend the period for delivery of the said affidavit evidence in order to ensure that a full compendium of the efforts made by the respondent were comprehensively set out in the affidavit.

[25] At the initial review hearing on 6 September 2023, Mr Corkey, counsel on behalf of the respondent, indicated that every effort was being made to settle this matter. He indicated that a bespoke placement was potentially available at a named educational centre. Accordingly, I encouraged the parties to engage in settlement discussions in an effort to resolve the judicial review proceedings without the requirement for a full hearing. In this regard, I was conscious of the *Boxall* principles, in particular, *principle (iii)*, namely that the overriding objective is to do

justice between the parties without incurring unnecessary court time and consequently additional cost. *Boxall principle (vi)* also provided that a court should take care to ensure that it does not discourage parties from settling judicial review proceedings.

[26] The efforts made by the respondent to obtain a bespoke placement for the applicant were successful without the need for a full hearing. As stated above, the practice of encouraging parties to settle or resolve judicial review proceedings must be encouraged. Accordingly, in the circumstances of this case, in the exercise of my discretion, the respondents should not be penalised in costs after the date when leave was issued due to the respondent's expeditious efforts to find a suitable placement for the applicant.

### *Decision*

[27] In summary, for the reasons given above, I will make an order that the respondent pays the applicant's costs up until the date when the court granted leave to the applicant to issue judicial review proceedings, namely 24 August 2023. There will be no further order for costs between the parties. I will of course make an order that the applicant's costs after the date when leave was granted shall be taxed as a legally assisted person.