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(subject to editorial corrections)

IN THE MATTER OF AN APPLICATION BY DD AND IN THE MATTER OF THE PROVISION OF LEGAL AID FUNDING FOR AN APPEAL TO A SPECIAL EDUCATIONAL NEEDS TRIBUNAL

MORGAN J

[1] The applicant in this case is DD who is the father of ED, an autistic boy who was born in February 1991. Throughout this judgment I shall seek to preserve the child's anonymity. On 12 March 2003 the Belfast Education and Library Board (the Board) made an amended statement of special educational needs (statement) in respect of ED and his father appealed to the Special Educational Needs Tribunal (the Tribunal). On 30 June 2003 his father instituted judicial review proceedings in respect of the absence of legal aid in respect of the appeal. This application is concerned with the continued refusal of that funding.

[2] The applicant was represented by Mr Treacy QC with Mr Hutton BL, the Lord Chancellor was represented by Mr Maguire BL and the Board was represented by Mr McCloskey QC with Ms Gibson BL. I am grateful to all parties for their helpful written and oral submissions.

[3] ED is significantly affected by his autistic disability. He was diagnosed at an early age and in September 1994 he attended Oakwood School and Assessment Centre. In September 1999 he moved to Glenveagh School. Initially the applicant was pleased with the child's progress. He became concerned about incidents which he considered were attributable to lack of supervision in October 2000 and February and June 2001. In August 2001 he entered into correspondence with the school seeking the application of Applied Behavioural Analysis principles for ED. On 21 January 2002 a solicitor's letter of claim was sent to the school in respect of the incidents claiming a lack of supervision. The applicant claims that the approach of the school changed thereafter. Prior to this there had been a good home-school link by way of diary entries. Thereafter there was a paucity of communication dealing only with the most basic matters.

[4] On 5 March 2002 a complaint was made that ED was treated roughly while at the school. A subsequent investigation concluded that there were no grounds for pursuing the complaint but a meeting was convened attended by

the applicant and the principal and vice-principal of the school. The principal indicated that the school did not intend to teach ED at the school in a small group setting. The school contended that this decision was forced on them because of ED's challenging behaviour. The applicant instituted judicial review proceedings in respect of that decision which were dismissed by Mr Justice Kerr on 19 May 2003.

[5] On 12 March 2003 the Board made an amended statement. The applicant contacted the Tribunal and on 14 March 2003 was sent the Tribunal's booklet on how to appeal. At page 3 of the booklet the applicant was advised as to how he might get help to appeal as follows:

> "Where can I get help to appeal?
>
> Parent groups or voluntary organisations which help people with special needs will usually be able to give you any help you may need. You may also be able to get legal aid so you can have a meeting with a solicitor to ask for advice about how to prepare your case. In this case you would need to apply for 'Green Form' Legal Aid. Any solicitor can tell you if you can get this, and your local Citizens Advice Bureau can give you the names of solicitors who run the 'Green Form' scheme and who may be experienced in educational matters. You will find the address and phone number of the Citizens Advice Bureau and those of local solicitors in the phone book and Yellow Pages. The Tribunal's staff (the Secretariat) will be happy to explain procedures to you, or to clarify how the appeal form should be filled in."

At page 8 of the booklet the applicant was advised that neither he nor the Board should need a legal representative as the hearing would be straightforward and the Tribunal would not use legal jargon. He was further advised that if he did bring a legal representative legal aid would not be available.

[6] On 30 June 2003 he instituted judicial review proceedings. He contended that the appeal was likely to be particularly complex for the following reasons:

(a) There was a background of allegation and counter allegation between himself and the school and Board documented in voluminous documentation;
(b) The applicant contends that the Board have acted in bad faith;

(c) The hearing will rely heavily on expert evidence and opinion about ABA;
(d) The expert evidence will depend upon the complex factual history;
(e) The area is regulated by a complex statutory code;
(f) There are many established precedents in the case law.
(g) The prospect of the appeal is overwhelming for the applicant who is not a highly educated man and in any event is likely to be emotionally involved.

[7] In an affidavit in reply filed on 31 October 2003 Paul Andrews explained that the only funded provision then available for the applicant was by way of advice and assistance under the Green Form scheme. Having regard to the limited public funds available he explained that it was the view of successive administrations that for Tribunals such as this it was not appropriate to provide assistance by way of representation because the procedures were straightforward and simple enough for people to represent themselves. He pointed out, however, that the position would change on 2 November 2003 when article 12(8) of the Access to Justice (Northern Ireland) Order 2003 came in to force as a result of which the Lord Chancellor would have power to direct that funding should be provided in specific cases. He drew attention to Annual Reports of the Tribunal in which it highlighted that hearings should be informal although structured and further stated that it was the firm aim of the Tribunal that parents should not be in any way disadvantaged if they do not have a representative. In their replying affidavit the Board stated that it had a policy of not instructing a legal representative where the parent is not legally represented and questioned the extent to which the Tribunal would or could get involved in the determination of issues of bad faith.

[8] On 7 January 2004 the applicant requested that the Lord Chancellor make a direction under article 12(8) of the 2003 Order in his case. The Lord Chancellor had published guidance in November 2003 indicating that it would be extremely unusual for him to authorise funding for representation outside the provisions of the Legal Aid, Advice and Assistance (NI) Order 1981. He set out the process for the determination of any such applications at paragraphs 10 and 11 of the Guidance:

> "10. Before requesting an authorisation to fund legal advice, assistance and representation for an individual case under section l2(8) (b) for proceedings other than inquests. I consider that the Commission must first be satisfied in each case that:
>
> (a) the proceedings are:

(i) not of the description mentioned in Part 1 of Schedule I to the 1981 Order;

(ii) not in respect of which criminal legal aid may be given under Part III of the 1981 Order;

(iii) not in respect of which assistance by way of representation may be approved under article 5 of the 1981 Order; and

(iv) not otherwise covered in a direction under Article 12(8)(a) of the Access to Justice (NI) Order.

(b) the client is financially eligible for civil legal aid, unless otherwise provided for in a Direction.

(c) the following criteria should be satisfied (although certain criteria may not be relevant in certain types of case);

(i) Alternative Funding The applicant has produced evidence to demonstrate clearly that no alternative means of funding is available. The application may be refused if alternative funding is available to the client (through insurance or otherwise) or if there are other persons or bodies, including those who might benefit from the proceedings, who can reasonably be expected to bring or fund the case.

(ii) Alternatives to Litigation An application may be refused if there are complaint systems, ombudsman schemes or forms of alternative dispute resolution which should be tried before litigation is pursued.

(iii) Other Levels of Service An application may be refused if it appears premature or if it appears more appropriate for the client to be assisted under the advice

and assistance or assistance by way of representation scheme.

(iv) The Need for Representation An application may be refused if it appears unreasonable to fund representation, for example in the light of the existence of other proceedings or the interests of other parties in the proceedings to which the application relates.

(v) Prospects of Success Funding will be refused if the prospects of success are

- unclear

- borderline and the case does not appear to have a significant wider public interest or to be of overwhelming importance to the client or

- poor

(vi) Cost Benefit Public Interest Cases If the claim has a significant wider public interest, funding may be refused unless the likely benefits of the proceedings to the applicant and others justify the likely costs, having regard to the prospects of success and all other circumstances.

11. Where the Commission is so satisfied I would be prepared to consider authorising funding under section 12(8)(b) where any of the following apply:

(a) there is a significant wider public interest in the resolution of the case and funded representation will contribute to it. In this context '*Wider Public Interest*' means the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally

flow from proceedings of the type in question).

(b) the case is of overwhelming importance to the client. In this context '*Overwhelming importance to the client*' means a case which has exceptional importance to the client, beyond the monetary value (if any) of the claim, because the case concerns the life, liberty or physical safety of the client or his or her family, or a roof over their heads.

(c) there is convincing evidence that there are other exceptional circumstances such that, without public funding for representation, it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings."

[9] In conjunction with the Lord Chancellor's Guidance the Legal Services Commission published its Guidance as to how the criteria would be interpreted:

> "23. The Commission will apply the criteria set out in the Lord Chancellor's Guidance. In so doing the Commission will interpret the criteria in the following context.
>
> <u>Significant Wider Public Interest</u>
>
> 24. Public interest carries with it a sense that large numbers people must be affected. As a general guideline even where the benefits to others are substantial, it would be unusual to regard case as having a significant wider public interest if fewer than 100 people would benefit from its outcome, although there is no limit or minimum on the number of people who must benefit before a significant wider public interest can be established. This will vary greatly according to the nature of the benefits. If the benefits are general quality of life considerations, such as noise nuisance for example, the number of

persons affected must be very substantial before a significant wider public interest can be established

25. It may be particularly difficult to quantify the public interest in a case which seeks to establish a new legal precedent or issue of law. In such cases the people who will benefit will be future clients who are unlikely to be easily identifiable at the time the public interest case is pursued. In such cases it may be necessary to estimate how many such cases will come forward each year and to estimate for how long the legal precedent is likely to continue to have an effect.

26. In deciding whether a case which raises a new point of law has a significant wider public interest, it is necessary to consider how likely it is that the court will change or clarify the law in deciding the case. The mere fact that an area of law is unclear, so that it is possible that the court may clarify the law, is not enough to establish a significant wider public interest. It is more likely that there will be a significant wider public interest if a case directly raises a specific point of law which the court will have to resolve one way or another.

27. Note that in deciding whether a case has a significant wider public interest it is only necessary to show that the case can produce real benefits for individuals other than the client. The following examples, some of which are drawn from the current legal aid scheme, illustrate this point. In sense cases the benefits may be directly quantifiable, while in others the benefits are indirect or intangible.

(a) protection of life or other basic human rights - for example a challenge to a Government immigration policy concerning a class of asylum seekers, who allege that they face persecution if not allowed to remain in the country;

(b) direct financial benefit - for example where a challenge to welfare benefit entitlements leads to the Government thereafter making higher payments to a whole class of claimant;

(c) potential financial benefit - this is usually the situation for most test cases or group actions, such as those, which establish liability of a manufacturer for harm, caused by a dangerous product. It is also true of test cases to establish an important legal issue. Success in such litigation will not usually guarantee compensation for those outside the litigation, who may still need to bring their own claims and prove their own issues on liability, causation and quantum;

(d) causes concerning intangible benefits such as health, safety and qualify of life - for example judicial review cases concerning education policy or healthcare provision.

28. It is sometimes said that a case has a wider public interest if it raises 'an important issue of law'. This of itself does not form part of the definition of 'wider public interest'. However one of the ways in which a case might produce real benefits for individuals other than the client (and so come within the definition) is by establishing a new legal precedent. which allows claims of a similar type to be pursued in the future. If so, it would count as having a 'wider public interest' for our purposes. It is not appropriate at this stage to consider competing public interests or any disbenefit which the case may bring to other persons.

Overwhelming importance to the Client

29. Overwhelming importance is an exceptional consideration: it will only apply in a small minority of cases. Although the individual circumstances of the client will be taken into account. the test of whether a case has overwhelming importance must be approached objectively i.e. whether a reasonable client would regard the case as of overwhelming importance. The approach should be confined to those cases which have the most profound impact on a client, examples being proceedings arising from infant death or a death in custody (see Direction issued under Article 12(8)(a)). Such a case may well include a money remedy but from a client's point of view, the case would be about establishing liability for the death.

30. A case should not be regarded as of overwhelming importance to the client merely because of the subject matter of the wrong originally complained off. Illustrations under the current legal aid scheme of the four types of cases which come within the definition of overwhelming importance to the client concern.

(a) life, certain asylum cases, infant death or death in custody come within the definition;

(b) liberty, detained clients claiming habeas corpus come within the definition;

(c) physical safety;

(d) or a roof over one's head, a possession action in which the client is at real risk of losing their home would come within the definition (whether or not the client has a right to be rehoused by the appropriate housing authority), as would a judicial review seeking to order the appropriate authority to house a homeless person. However, the great majority of housing disrepair claims (which generally concern the home rather than the issue of whether the client has a home at all) do not. The test is whether the home is itself in issue in the proceedings. Proceedings the outcome of which would leave the client in financial difficulties, so that the home may then be at risk, do not constitute overwhelming importance to the client for the purposes of this guidance.

Prospects of Success

31. The Commission will interpret the concept of prospects of success in a flexible manner consistent with the variety of different circumstances which pertain in individual cases. This concept will not be applied to funding for inquests. It can be defined as, 'the likelihood of the client obtaining a successful outcome.'

32. What is meant by a successful outcome depends on the nature of the case. It considers the substance of the case from the vantage point of a

reasonable applicant and seeks to establish what the applicant is realistically seeking to achieve from the proceedings.

Categories of Prospects of Success

33. When the prospects of success of a case is being evaluated each case must be put into one of the following six categories:

(a) Very Good - 80% chance or more of obtaining a successful outcome;

(b) Good - 60-80%;

(c) Moderate - 50-60%;

(d) Borderline - this applies where the prospects of success are not poor, but because there are difficult disputes of fact, law, or expert evidence, it is not possible to say the prospects of success are better than 50%:

(e) Poor - prospects of success are clearly less than 50% so that the claim is likely to fail;

(f) Unclear - the case cannot be put into any of the above categories because further investigation is needed."

[10] On 5 May 2004 the applicant was advised that his application had been unsuccessful. On 7 May 2004 his solicitors sought a review of the decision together with the reasons for it. On 19 May 2004 the LSC wrote to the applicants solicitors advising that it had recommended limited funding but that the Minister's decision was to refuse for the following reasons:

"1. Alternative Funding: The applicant, ED has not produced evidence to demonstrate clearly that no alternative source of funding is available. It is considered that under Article 15 of the Commissioner for Children and Young People (Northern Ireland) Order 2003, funding may be available to the applicant from the Commissioner for Children and Young People.

2. Other levels of service: It appears more appropriate for the applicant to be assisted under the Green Form Advice and Assistance Scheme. Such funding is available to obtain a report from an educational expert.

3. Prospects of success: The prospects of success are unclear. In the absence of expert evidence, the applicant's assertion that the prospects of success are 75% is not accepted.

4. Significant wider public interest: There is no evidence of a significant wider public interest in the case being funded, in that the appeal to the Special Education Needs Tribunal has the potential to produce real benefits for individuals other than the applicant and his son. It is noted that, in the second affidavit which the applicant filed in the judicial review proceedings sworn on 9 January 2004, he states (at para. 8) that he believes his case is not a test case.

5. Overwhelming importance to the client: None of the elements involved under this criterion (as defined in para. 11(b) of the Lord Chancellor's Guidance together with paras. 29 and 30 of the Commission's Guidance) is present in the circumstances of the applicant's case.

6. The need for representation/unfairness in the proceedings: There is no convincing evidence such that, without public finding for representation, it would be practically impossible for the applicant to bring the proceedings, or that the lack of public funding would lead to obvious unfairness in the proceedings. It is noted that the procedures of the Special Educational Needs Tribunal are informal in nature, legal jargon is not used and an adversarial approach is discouraged. It is also noted that, in the affidavit filed by the Belfast Education and Library Board in the judicial review proceedings on 8 January 2004. it states (at para. 15) that if the applicant is not legally-represented for the appeal before the Tribunal they also will not he legally-represented."

[11] The review application was refused by the Minister in a letter communicated on 21 October 2004. In the course of the affidavits it has become apparent that the LSC made a submission supporting the application on 19 March 2004. This was indeed the first such application under the new arrangements. Upon receipt of the application advice was obtained on behalf of the Lord Chancellor from Mr Cullen of NICS. He was responsible for conducting the defence of the judicial review launched on 30 June 2003 against the Lord Chancellor. He dealt with the criteria in paragraphs 7,8 and 9 of his opinion:

> "7. However, in my view, this application does not satisfy the following 'primary' criteria for exceptional grant funding in non-inquest cases which are listed at paragraph 10(c) of the Lord Chancellor's Guidance:
>
> (i) Alternative Funding – the papers lodged with this application, and also those filed on behalf of ED in the judicial review case, assert that no funding is available to him for the SENT appeal hearing from either the Children's Law Centre nor the Independent Panel for Special Educational Advice. However, it seems to me that such funding may be available from the Commissioner for Children and Young People. Under Article 15 of the Commissioner for Children and Young People (Northern Ireland) Order 2003, the Commissioner can grant assistance in relation to legal proceedings involving law or practice concerning the rights or welfare of children or young persons. The test for the grant of such funding appeals similar to that under which, for example, the Equality Commission and Northern Ireland Human Rights Commission fund various types of legal proceedings from time to time. That is, the Commissioner may grant assistance if he is satisfied the case raises a question of principle, it would be unreasonable to expect the child/young person to deal with the case without assistance or there are other special circumstances which make it appropriate for him to provide assistance.
>
> (ii) Other Levels of Service - in any event, from the papers, I consider that this application is premature and that it would be more appropriate for ED to be assisted (at least initially) by way of the Green Form Advice and Assistance Scheme. Such funding should, in my view, be used to obtain a report from a

suitably-qualified educational expert. (I note that this is referred to in para. 19 of the LSC submission.)

(iii) Prospects of Success — The LSC submission records, at para. 14. that the applicant's solicitor has assessed the prospect of success at 75%. However, no expert evidence has been submitted. In the absence of same. I do not understand the basis on which this assertion (or indeed any such evaluation) can be made.

8. If the above criteria were satisfied in this case, funding could be considered if one of the 'secondary' criteria set out at paragraph 11 of the Lord Chancellors Guidance were established. These criteria (which are elaborated at paras. 23-30 of the LSC Guidance) are as follows:

(i) Significant wider public interest — bearing in mind the subject-matter of the proceedings in question here, potentially, it might be possible to argue that they would produce real benefits for individuals other than DD. However, in this regard, I note that in the second affidavit which ED has filed in the judicial review proceedings, he states (at para. 8) that he believes his case is not a test case. (At the same time, I appreciate that this factor, if upheld, may militate against his applying successfully for funding from the Commissioner for Children and Young People.)

(ii) Overwhelming importance to the client — this is a very narrow ground on which funding may be authorized. None of the elements involved (life, liberty or physical safety of the client/his family, or a roof over their heads) is present in the circumstances of this case.

(iii) The practical impossibility for the client to bring the proceedings/obvious unfairness in the proceedings — this factor is elaborated at para. 12 of the Lord Chancellor's Guidance. It was the central basis on which the High Court considered the judicial review challenge in the case of Lynch. I will consider it further in paragraphs 9 and 10 below.

9. The Lord Chancellor's Guidance states, at paragraph 11(c), that he would be prepared to consider authorizing funding where 'there is convincing evidence that there are … exceptional circumstances such that, without public funding for representation, it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings.' This test is drawn from the jurisprudence of the ECHR at Strasbourg. A comparison between the central elements involved in Lynch and ED's case is, I think, useful:

(i) Mrs Lynch had brought two defamation cases in the High Court, in which the defendants (a national newspaper and an established current affairs magazine) were represented by solicitors together with senior and junior counsel. Due to their nature, the proceedings were liable to involve (at the election of either party) trial with a jury. Defamation is a complex area of law. Nonetheless. Kerr J (as he then was) stated he was satisfied that 'although [Mrs Lynch would] have difficulty in preparing and presenting her case, [this was] not a practically impossible task.' (It should also be noted that the applicant lodged, but then withdrew, an appeal against this decision.)

(ii) It seems clear from all the materials available in respect of appeal proceedings before the SENT Tribunal that they are designed to operate on an informal basis. The three members of the Tribunal hearing any particular case comprises a legally-qualified chairman and two lay members, who are usually from an educational or social services background. They seek to avoid formality in the conduct of appeals, and discourage an adversarial approach. From the papers filed in the judicial review case, there appears to be some dispute as to how often, in practice, the appellant parent and the relevant Education & Library Board are each legally represented. However, in the context of the present case, having been granted leave to intervene in the judicial review, the Belfast Education & Library Board have stated categorically that, if ED is not to be legally-represented at the appeal. then they will

> reciprocate. (See para. 15 of the affidavit sworn by Anne Patience, in the BELB). It would appear from para. 13 of the LSC submission that this fact has not come to Mr Ferguson's attention."

[12] In the course of these proceedings the statement in respect of ED was further amended and appealed and the applicant has now decided that he wants the Board to fund a home based ABA scheme. On 20 October 2004 he requested funding under the Green Form scheme for the retention of an expert on his behalf to prepare a report to support his position. By the time of the hearing no material in respect of the application for funding for the report of the expert was available. Inevitably the basis upon which the judicial review application was made has evolved and the latest amendments to the Order 53 Statement were filed on 4 April 2005.

[13] At the hearing Mr Treacy QC examined first the responsibilities of the LSC and the Lord Chancellor under paragraphs 10 and 11 of the Guidance. He contended that the matters at paragraph 10 were exclusively for the LSC to determine. The Lord Chancellor could not exercise a right of appeal over those matters. At best he could invite the LSC to reconsider. Since in this case the Lord Chancellor had differed from the LSC in the view he had taken of the paragraph 10 matters his decision could not stand.

[14] Secondly he contended that the decision making was vitiated by procedural unfairness. He submitted that the applicant was entitled to be provided with material both adverse and helpful to him. In this case he had requested at the review stage the LSC submission and the NICS submission. Neither had been referred to prior to the first decision of 5 May 2004 and neither was provided prior to the review decision in October 2004. The legal advice which was hostile to the applicant's position was not disclosed until revealed in these proceedings.

[15] Thirdly he criticised the approach to individual criteria as being too narrow and rigid. In particular he submitted that the restriction of the notion of overwhelming importance to the examples set forth in the LSC Guidance was a fettering of discretion in respect of the application of the criterion and that the test of practical impossibility in relation to the applicant bringing the proceedings was a standard which was at variance with the European jurisprudence.

[15] Fourthly Mr Treacy relied on the observations of the members of the House of Lords in Runa Begum [2003] UKHL 5 to submit that the test for the establishment of a civil right had now moved to the point where the determination of whether the applicant's child should be entitled to provision which would impose a legally enforceable duty on the state constituted the determination of such a right.

[16] For the respondent Mr Maguire BL accepted that the LSC had a discretion to exercise under paragraph 10 of the Lord Chancellor's Guidance. It acted as a filter but could not act so as to deprive the Lord Chancellor of the right and the obligation to consider any factors relevant to the issue of whether the application should be granted.

[17] Secondly he contended that the submission that favourable material had to be disclosed was contrary to the decision of Kerr J in McCallion's Application [2001] NI 401. In any event he submitted that one had to look to the scheme as a whole in order to determine the question of procedural fairness and here there were adequate safeguards for the applicant.

[18] Thirdly he pointed to the statutory context which demonstrated the exceptional character of such grants of assistance. Against that background it was hardly surprising that the application would face a testing examination if it were to succeed.

[19] Fourthly he submitted that the decision in Runa Begum did not disturb the clear line of European and domestic jurisprudence which demonstrated that the determination by the state of the extent of educational provision did not give rise to the determination of a civil right. Even if he were wrong on that point he submitted that the state enjoyed a very wide area of discretionary judgment in this area.

[20] For the Board Mr McCloskey QC dealt with the statutory background and it is to those provisions that I now turn. Article 16 of the Education (Northern Ireland) Order 1996 imposes the duty on a Board to make and maintain a statement in respect of a child who has been assessed as requiring special educational provision. By virtue of article 18 the parent of the child may appeal to the Tribunal. On the appeal the powers of the Tribunal are wide and it can dismiss the appeal, order the Board to amend the statement or order the Board to cease to maintain the statement. The procedures of the Tribunal are governed by the Special Educational Needs Tribunals Regulations (Northern Ireland) 1997. Regulation 28(2) imposes a duty on the Tribunal to conduct the hearing in the manner it considers most suitable to the clarification of the issues and so as to seek to avoid formality. Regulation 29 restricts the parties to 2 witnesses unless permission has been obtained in advance but reserves a power to the Tribunal to require the personal attendance of any maker of any written statement. Such a provision is characteristic of the inquisitorial jurisdiction which the documentation from the Tribunal suggests is conducted by it.

[21] I now turn to the terms of the Lord Chancellor's Guidance and the debate over the relationship between paragraphs 10 and 11. The starting point is the statutory context which places the duty to determine the decision in the

hands of the Lord Chancellor. The Guidance is concerned with the administration of the scheme and undoubtedly establishes a filter mechanism in paragraph 10. Where the LSC is not satisfied in respect of paragraph 10 matters the guidance suggests that the application will proceed no further. Where the LSC is so satisfied the engagement of one of the paragraph 11 matters is, under the guidance, a condition precedent to the consideration of funding. There is in my view no obligation under the Guidance imposed on the Lord Chancellor to refrain from consideration of any matter relevant to his consideration of the application for funding. It is hardly surprising that this is so since such an approach would be a fetter on the exercise of the statutory power. It is, however, important to recognise that the Guidance is what it says and that any application of it which treats it as though it were a statute is likely to fall foul of the requirement to consider each case on its merits. Accordingly I find that it was appropriate for the Lord Chancellor to consider all relevant matters in the determination of the application. I also consider that the submission to the Minister of 28 April 2004 invited the Minister to consider the application in the context of the issue of the government's support for children with special needs and on the review the Minister was invited to look at the issue in the round. Neither submission supports the view that there was any mechanistic application of the criteria.

[22] On this issue the applicant relied on Ex Parte M [1994] 2 FLR 1006. That was a case concerned with the obligation under s 21 of the National Assistance Act 1948 to provide residential accommodation for an adult suffering from Down's Syndrome. An independent panel was established to examine the facts. It made findings as to the nature of the applicant's medical condition. That finding was rejected by the Social Services Committee of the council. Mr Justice Henry held that the Committee could have declined to accept the view of the panel but having regard to the detailed fact finding process it was incumbent upon the Committee to demonstrate convincing reasons for that departure. No such procedure by way of fact finding arose in this case and in my view it is of no assistance to the applicant.

[23] I next turn to the issue of procedural unfairness. The leading case is ex parte Doody [1994] 1 AC 531. The underlying principle is that a person affected usually cannot make worthwhile representations without knowing what factors may weigh against him (see Lord Mustill at 560G). In some cases that extends to an obligation to disclose information that may be helpful to the applicant. Such cases include in particular the prison classification cases (see ex parte Lord [2003] EWHC 2073(Admin)). But that is not always the position (see ex parte McCallion [2001} NI 401). In each case it is necessary to examine the decision making process to determine whether the underlying principle has been honoured. In this case the Guidance documents set out in substantial detail the issues which will influence any determination. The decision maker is committed to providing reasons for the decision by virtue of paragraph 47 of the LSC Guidance. Although the applicant did not see the

submission of the LSC before the first decision that submission was favourable to him and did not contain any information outside his own comprehension. Since this was a newly operated provision there is no question of some particular expertise in respect of the criteria. So far as the review was concerned the applicant had been informed at that stage that the LSC had supported his application and was at liberty to utilise that as he saw fit. In my view the circumstances of this procedure are quite different from the prison classification cases where reports on events and their interpretations are received by the decision makers. Similarly in McCallion the unlawfulness arose from the failure to disclose the information in respect of the activities of the deceased of which the applicant was unaware. There was no obligation to disclose the Ministerial submission prior to the making of the decision. I consider, therefore, that the case on procedural unfairness has not been made out.

[24] The question of the nature of a civil right within the meaning of article 6 of the Convention has given rise to considerable academic and judicial debate. There is a considerable body of authority in favour of the view that the determination of the extent to which a child is entitled to resource in respect of education is a public rather that a civil matter. In particular the case of Simpson v UK (Application no. 14688/89) dealt with the provision of specialist services for a dyslexic child. The Commission concluded that the right not to be denied elementary education fell squarely within the domain of public law. That approach has been followed in cases such as H v Kent County Council and The Special Educational Needs Tribunal [2000] ELR 660. The House of Lords reviewed the issue in Runa Begum [2003] UKHL 5. All of their lordships struggled to find a principle underlying the approach to this question but the nature of the right and the extent to which there is a measure of discretion are all relevant matters. The right under article 16 of the 1996 Order requires the Board to determine the special educational provision which any learning difficulty the child may have calls for. On any view that leaves a huge area of discretion to the decision maker as to how such provision may be delivered and the extent to which and the manner in which the resources of the state should be used to achieve it. It would in my view go considerably beyond the existing law for such a right to be considered a civil right within the meaning of article 6 of the Convention and I cannot so find.

[25] I have considered the criticisms of the approach to the individual criteria. One of the striking features of this application is that the request for Green Form funding for the retention of an expert in respect of the applicant's case was only made the day before the review determination by the Minister was communicated to the applicant. In those circumstances the reference to other levels of service and the comments on the prospect of success are points well made. In its correspondence of 19 May 2004 the LSC directed the applicant to the Children's Commissioner as a possible source of funding. He can intervene where the case raises a question of principle or where there are

other special circumstances which make it appropriate for him to do so. In response to this the applicant's solicitors sent a letter of 24 May 2004 asking what funding is provided by the Commissioner for parents taking cases before the Tribunal. A reminder was sent on 17 September 2004. There is no evidence of any attempt to advise the Commissioner of any feature of this case which might merit consideration by him nor is there any indication in the correspondence of the fact that he was suggested as a possible source of funding by the LSC. I do not consider that the criticism levelled by the applicant of this possible provision is in those circumstances justified. The applicant has never considered that his is a test case. That is not determinative of whether his case has a wider public interest but it imposes an obligation to explain why the case has such public interest if it is not a test case. So far as overwhelming importance to the client is concerned I accept that for every parent decisions about education are likely to be considered critical. That is particularly so where the child may have difficulty attaining the personal resources to cope with life in the longer term. But in my view no criticism can be made of an approach which differentiates disputes over the form of educational provision from those affecting life, liberty and a roof over one's head.

[26] Finally I have considered the test of practical impossibility. I consider that there is considerable force in the submissions of Mr Treacy on this point. Both parties contend that the test derives from the decision of Kerr J, as he was, in Lynch's Application [2002] NIQB 35. Mr Treacy submits that the test should not be different in substance from that described in Airey v Ireland (7 October 1979) where the court asked whether the applicant would be able to present her case properly and satisfactorily. I consider that there is a considerable overlap between these terms. If an applicant is unable to present his case properly and satisfactorily the right of access to the court under the statute becomes theoretical and the statutory purpose cannot be fulfilled. In that sense, therefore, the right of access becomes practically impossible. In this case one has to bear in mind that the Tribunal is a specialist Tribunal dealing with education matters. The papers disclose that it has already considered appeals in this area where expert evidence has been called and tested. Its procedures are designed to ensure that as much relevant documentation is before the members as possible and the membership is comprised of a range of talents to deal with the issues. I cannot rule out the possibility that an appeal to the Tribunal might have such an array of features that this test would demonstrably be satisfied but in this case where for the purposes of this application the expert evidence has not yet been obtained to support the applicant's position and the relevant issues accordingly not yet clarified I do not consider that there was any unlawful consideration of the criterion.

[27] For those reasons I dismiss this application.