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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY N (A MINOR)
BY C HIS FATHER AND NEXT FRIEND FOR JUDICIAL REVIEW

GILLEN J

Introduction

[1] I have anonymised the name of the applicant and his father in this judgment in order to protect the identity of the child. In this matter C, the father and next friend of N a minor, initially applied by way of judicial review for an order of certiorari to quash a decision of the South Eastern Education and Library Board ("the Board") not to proceed with a statutory assessment of the applicant child on the basis of a report received by Mr Frank Fee, Educational Psychologist. He further sought a declaration that the decision was unlawful, ultra vires and of no force, for an order that the matter be re-considered and determined by the Board, and for an Order of mandamus compelling the Board to conduct a statutory assessment of the child and to make such provision as was necessary for the special educational needs of him.

[2] The application was made on 13 August 2004 and I granted leave for judicial review on 18 August 2004. On 17 September 2004, the applicant sought leave both to amend the relief sought and grounds upon which it should be granted. The applicant, now in addition to the outstanding relief, claimed an order of certiorari to quash the decision of the Board not to proceed within an reasonable time with a stage 3 referral of the child on the basis of the report provided by Mr Fee and for an order of mandamus to compel the Board to comply with a request for consultation with an educational psychologist dated 3 November 2003 and to provide such assistance as was required in respect of the special educational needs of the child.

[3] At a hearing before me on 20 September 2004, the application to amend was on the consent of both parties and I orally acceded to the application. However the following day, and before the order had been made up granting the amendment, Ms Gibson who was instructed by the Board in this matter, appeared before me indicating that the consent had been given by way of an oversight and that the Board had substantial grounds for resisting the amendment at this stage. I indicated that I was prepared to hear the argument from both sides again.

Background

[4] The child who is the subject of this application is believed by his father to suffer from dyslexia. The principal of his primary school had forwarded to the Board a request for a consultation with an educational psychologist. The Education (Northern Ireland) Order 1996 ("the 1996 Order") provides a statutory framework for special educational needs. This has been supplemented by the provisions of the Education (Special Educational Needs) Regulations (Northern Ireland) 1997 (SR 1997 No.327) ("the 1997 Regulations") and the Education (Special Educational Needs) (Amendment) Regulations (Northern Ireland) 1998 (SR 1998 No 217) ("the 1998 Regulations"). In an affidavit from the respondent made by Sidney Robert Irvine, educational psychologist, he avers that the Department of Education issued a code of practice on the identification and assessment of the special educational needs ("the Code") under Article 4 of the 1996 Order which has been operative from 1 September 1998. Under Article 4(2) of the 1996 Order the Board is under a duty to have regard to the provisions of the Code. The first 3 stages are school based, calling as necessary on external specialists. It may be helpful to set out the stages at this juncture;

> "Stage 1; teachers identify and register a child's special educational needs and, consulting the school's SEN co-ordinator, take initial action.
>
> Stage 2; the SEN co-ordinator takes lead responsibility for collecting and recording information and for co-ordinating the child's education provision, working with the child's teachers.
>
> Stage 3; teachers and the SEN co-ordinator are supported by specialists from outside the school."

[5] Mr Irvine avers at paragraph 5 of his affidavit that this child has given his school concerns regarding his literacy and that the school has taken action at stages 1 and 2. He goes on to relate that in accordance with the code of practice the school made a stage 3 referral and requested a consultation with

a Board educational psychologist. The referral was received by the Board on 5 November 2003 and following consideration by the Board's panel on 10 November 2003, the referral was entered on the waiting list for assessment by a Board's educational psychologist on 14 November 2003. A crucial factor at this stage is to record that the stage 3 referral is not part of the statutory assessment procedure.

[6] Mr Irvine goes on to record that when the Board receives a stage 3 referral from the school, a request will be considered by a panel and a decision taken whether or not to accept the referral. If accepted, the referral is automatically added to the Board's waiting list. The referral made by the school in respect of this child was accepted by the panel and the referral added to the waiting list. Mr Irvine goes on to state that there is a waiting list for each educational psychologist.

[7] In the affidavit grounding the application made by C of 12 August 2004, he deposes that subsequent to the request by the principal of the school for a consultation with the educational psychologist, he was informed there would be a waiting time of "some months" given the large number of referrals received. He further avers that subsequently he was advised by Mr Irvine's office that assessment would not take place for at least 18 months. In view of that indication, C took the step of engaging Mr Frank Fee, educational psychologist, and obtained a report on the child dated 6 April 2004 which concluded, inter alia, that N "has a severe specific reading disability (dyslexia) and needs intensive, skilled remedial help if he is to reach the level of basic literacy skills which his general level of ability would warrant." The Board in response indicated that it still would not be in a position to assess N for some time. In essence, the Board case is that a private report will not be permitted to confer an advantage in having the child assessed or to enable him to access Board support services such as specific learning difficulties support ahead of other children who have been referred before him.

[8] In the original application, the ground upon which the applicant sought the relief claimed was essentially that the Board had failed to consider whether Regulation 5(5) of the 1997 Regulations allowed the Board to dispense with a requirement of obtaining psychologist advice other than that provided by Mr Fee. It was asserted that the Board was in breach of the duty under Article 4(2) of the 1996 Order to have regard to the provisions of the code of practice on the identification and assessment of educational needs and in particular the requirement that children with special educational needs should be identified as early as possible and assessed as quickly as was consistent with thoroughness in the exercise of the Board's statutory functions.

[9] It is now the case of the applicant that following Mr Irvine's affidavit, the position of the Board has been clarified and it is now clear that it was not

a statutory assessment of the child which was proposed but rather a stage 3 referral. Hence it is inappropriate to judicially review a statutory assessment procedure which has never been invoked in this instance.

The Application

[10] In light of the circumstances that now prevail, the applicant seeks to make the amendment to which I have already referred. Order 53 r.6(2) of the Rules of the Supreme Court (Northern Ireland) 1980 provides;

> "2. The court may on the hearing of the motion direct or allow the applicant to amend his statement, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used by him."

Section 18(2)(d) of the Judicature (Northern Ireland) Act 1978 provides;

> "…that the court may direct or grant leave for, the application to be amended to specify different or additional grounds of relief."

Hence Mr Sayers, who appears on behalf of the applicant, seeks leave to amend the Order 53 Statement in the manner that I have already set out.

[11] I pause to observe that I have had the benefit of careful and cogent skeleton arguments prepared by both Mr Sayers and Ms Gibson which have persuasively articulated the gravamen of their arguments.

The Board objection to the proposed amendment

[12] Ms Gibson's argument can be summarised as follows;

> (1) In the context of the leave already granted in this case on 18 August 2004 the applicant has essentially made a totally unsuccessful challenge to the Board. She submits that the original relief sought was specifically directed towards the carrying out of a statutory assessment and the grounds relied on were framed in the context of the breach of time limits and other requirements of the 1997 Regulations. Counsel goes on to assert that the applicant's parents were made aware in correspondence that the applicant's name had been placed on a waiting list for assessment, that there was a likely timescale, and that accordingly the present amendment amounts to a wholly separate claim which amounts to a deletion of the original claim and substitution of a different one.

(2) Counsel drew my attention to the following authorities;

(a) R v Barnsley Metropolitan Borough Council ex parte Hook 1976 1 WLR 1052. That case involved a market trader challenging a decision by a local council to ban him from trading in the local market. Upon appeal from a divisional court which had refused to judicially review the decision of the local authority, the court received additional evidence on two matters – the presence of the market manager at the council decision and the excessive penalty imposed upon him – which had not been mentioned on the grounds on which the applicant had originally applied for Certiorari. At p.1058 Lord Denning M.R. said;

> "Then Mr Howard, on behalf of the corporation, said that these 2 matters which I have mentioned – the presence of the market manager and the excessive penalty – were not mentioned in the grounds on which Mr Hook applied for certiorari to the Divisional Court. That is correct. But I think he should still be able to raise them. It must be remembered that, in application for certiorari the applicant knows very little of what has happened behind the scenes. He only knows that a decision has been taken which is adverse to him and he complains of it. His statement of grounds…should not be treated as rigidly as a pleading in an ordinary civil action. If the Divisional Court gives leave (as it did here) the practice is for the respondent to put on affidavit the full facts as known to them. The matter is then considered at large upon the affidavits. If there then appear to be other grounds on which certiorari may be granted, the court can inquire into them without being bound by the grounds stated in the original statement. The Divisional Court will always look into the substance of the matter".

Ms Gibson seeks to distinguish this case from the instant case by submitting that the grounds of change still related to the decision as challenged in the Order 53 Statement namely to ban the applicant from trading in the market and to revoke his right to a stall.

(b) R v Portsmouth City Council, ex parte Faludy [1999] ELR 115. In that case a 15 year old student sought to judicially review a local authority's decision not to carry out a formal statutory assessment of his special educational needs or to provide assistance towards them when he had become a student at Peter

House College, Cambridge, to read theology. The applicant sought to extend the challenge to seek also the funding by the local authority of the applicant's 8 or 9 weeks a year attendance at a school during his Cambridge career. This matter was raised for the first time during the hearing before the Court of Appeal and was not a point that was considered by the court below. Simon Brown LJ said at p.3;

> "This is not a point that was considered by the court below…. It is a point that must, if it is to be taken, be taken properly and at the outset of a challenge, and not by way of amendment to an application for leave to appeal with the appeal to follow, an application forced, as this one is, into the court's list at short notice during a busy time…We do not even know what Alexander's continuing fees may be at Milton Abbey for the much reduced period of attendance proposed; one does not know whether such fees will be met, fully or in part, by the American charity. It is wholly unsatisfactory that this court during a short hearing should be required for the first time to address the point, and we decline to do so."

I observe that this case was on its facts wholly different from the present matter being taken at a much later stage in the proceedings than is now being contemplated and moreover appears to have been inadequately prepared or explored before being put before the court. I do not find that case a useful guide in this instance.

(c) The authority that Ms Gibson principally relied on was that of Mohebullah v Secretary of State for the Home Department [2004] EWHC 1935 (Admin). That was a case that arose out of an application for judicial review of a refusal to grant asylum to an Afghanistan national. On 24 January 2001 the Secretary of State had rejected the claimant's asylum claim. On 11 November 2001 he had appealed that decision to an adjudicator but that appeal was substantially out of time and was rejected. On 6 January 2003 leave to appeal the adjudicator's decision was refused by the Immigration Appeal Tribunal. Between 28 January and 5 October 2003 the claimant's representative has made a number of further representations to the Secretary of State in relation to asylum and human rights matters. On 17 October 2003 the Secretary of State considered those representations and issued a letter rejecting the claim. On 20 October 2003 an application for

> judicial review was filed on the basis that the adjudicator's refusal of the claimant's appeal was wrong and, second, that the Secretary of State had failed to respond to the various representations. In fact the Secretary of State had responded to the representations but for some unexplained reason the Treasury solicitor was unaware of this. Accordingly when the matter came before the court at first instance, the judge granted permission for the proceedings on the basis of the Secretary's of State's failure to respond. On 16 December 2003 it came to the Treasury solicitor's attention that in fact a response had been made and the applicant was invited to withdraw the judicial review application. On 17 February 2004 further representations were made on the claimant's behalf. On 17 March 2004 the Secretary of State issued a fresh decision concluding that the new representations did not amount to a fresh claim. In July 2004 the claimant sought to rely on the additional grounds that had emerged arising out the decision of 17 March 2004.

Refusing the application to amend and asserting that the challenge of the decision of March 2004 constituted a need for fresh proceedings to be issued and permission to be sought on the merits in relation to the new grounds, Gibbs J said;

> "In considering whether the application to amend should be granted or refused, I have considered the justice of the case. In particular, I have considered whether or not the claimant would be put at an unjust and unfair disadvantage by being shut out in relation to any genuine claim that the amended grounds might reveal. But the fact of the matter is that any amendment in this case would in substance constitute the deletion of the original claim and the substitution of a claim which would challenge the letter of 17 March…17 March 2004 is now the only decision which can be challenged. Not only that, but, as already stated, the basis on which the previous permission to grant judicial review was given has disappeared entirely, and it is quite clear that if the letter of 17 October 2003 had been available it is most improbable that Sir Richard Tucker would, in fact, have granted that permission at all".

[13] Ms Gibson argues that this case is on all fours with the instant case.

[14] Ms Gibson made two further submissions which she argued would arise if I determined against her on the above argument. First, she submits that the applicant has been aware from a reply dated 21 April 2004 from the Board that provision would not be made on the basis of a private report although same would be considered at the time of assessment being undertaken. Moreover she argues that it has been clear from receipt of the Board's letter of 3 June 2004 that a private report would not confer any advantage in having the child assessed ahead of other children who have been referred before him. She therefore submits that all these factors have been known to the applicant for more than 3 months and in view of the lateness of the proposed claims, leave to amend should not be granted.

[15] Secondly, she submits that the applicant does not enjoy an arguable case on the merits. She draws my attention to the fact that Mr Irvine has deposed that the Board has recognised this child's needs, that he is currently on the waiting list, and that the list is operated on a referral basis with each child awaiting his or her turn. She submits that there are no exceptional, fair, reasonable or proper grounds for conferring an advantage on this applicant ahead of all the other children on the list. In particular she asserts that this child cannot be preferred ahead of other children on the list merely because his parents had the financial means to commission a private report. Accordingly she argues that the explanation which the Board has given regarding the reliance on private reports is entirely reasonable.

The Applicant's Case

[16] Mr Sayers on behalf of the applicant made the following points;

(i) It is incorrect to characterise the case in which the applicant was granted leave as having ceased to exist. He argues that the application to amend is brought following clarification from Mr Irvine's affidavit of the nature of the assessment now to be referred. Far from the amendment being a challenge to a fresh decision, it is on the contrary a clarification of the original impugned failure. It is the applicant's case in essence that it is the inaction on the Board of the part when evidence of dyslexia is patently available which is being challenged.

(ii) Mr Sayers calls in aid *Mohebullah's* case as illustrating an instance where an amendment was sought impugning a wholly different decision from that decision which was the original source of complaint. He contrasts that with the present case where, he argues,

the basic failure of the Board to deal with this child is the essence of the claim. He submits that this is a clear case where it is efficient (in terms of time and cost) and proper in accordance with Order 53 r.6 for the applicant to apply for leave to amend his statement by way of additional or different grounds or relief.

(iii) He also relies on the judgment of Lord Denning MR in R v Barnsley Metropolitan Borough Council ex parte Hook (supra) to remind the court that the statement of grounds should not be treated rigidly and that the court should not be bound by grounds originally stated. It is the substance of the matter which should be debated in this instance.

Conclusion

[17] I have come to the conclusion that leave should be granted to the applicant to amend pursuant to Order 53 r.6(2). I have come to this conclusion for the following reasons;

(i) I consider that the issue in this case does, as Mr Sayers has submitted, revolve around a challenge to the alleged inaction of the Board. The court ought not in my view to be difficult or rigid in approaching such matters provided the parties are genuinely endeavouring to focus on the key legal issue which is the subject of the judicial review. I am reinforced in my conclusion by the comments of Sedley J (as he then was) in R v Immigration Appeal Tribunal, ex p Syeda Khatoon Shah [1987] Imm. Ar. 145 where he said at p.148;

> "In the area of asylum law, potentially involving as it does the right to life, the court ought not in my view to be difficult or rigid providing a sensible endeavour is being made to crystallise inserviceable form the legal issue thrown up by the evidence and findings."

That should similarly be the general approach in matters as important as this which is now before the court. In Re KD (a minor) (Access: Principles) 1988 2 FLR 139 the House of Lords was dealing with a family case involving access. In the course of his judgement, Lord Oliver of Eylmerton said at 142C;

> "Parliament has conferred upon local authorities far reaching powers to order the lives of minors for whom they are given statutory responsibilities, powers in some cases which, although reviewable by the process of judicial review, are otherwise largely unsupervised by the courts. It is of the utmost importance that such powers should be exercised not only with responsibility

> but with the sensitivity which is required by the impact which their exercise inevitably has upon the natural strong emotions of the people affected."

That is a principle which applies with equal force to Education and Library Boards who also have extensive power. In this case a father is understandably extremely concerned about the need for remedial work for his child which is within the gift of this Board. In such circumstances a court must be sensitive to the need to avoid an over-rigid approach lest in doing so a justifiable sense of smouldering injustice is engendered in the family of this child.

(ii) I approach the authorities in this matter bearing in mind the words of Lord Steyn in *Jolley v Sutton London Borough Council* [2000] PIQR part 5 p.143 when he said;

> "In this corner of the law, the results of decided cases are very fact-sensitive. Precedent is a valuable stabilising influence in our legal system. But comparing the facts of and outcomes of cases in this branch of the law is a misuse of the only proper use of precedent viz, to identify the relevant rule to apply to the facts as found".

Accordingly I have not found the facts of the authorities put before me particularly helpful. What is important is the principles therein set out. I consider that Order 53 r.6 should have a broad and purposive construction to ensure it affords protection to the rights of parties bringing applications. The legislative purpose would be diluted if too exacting a standard was imposed before allowing amendments. *Mohebullah's* case enjoined me to consider whether or not the nature of this amendment amounts to a new basis of claim. *Barnsley Metropolitan Borough Council ex parte Hook* exhorts the court not to treat such matters as rigidly as pleadings in an ordinary civil action. Applying those two principles, I have come to the conclusion that the grounds set out in the amendment do not amount to a new cause of action or an attempt to impugn a different decision from that for which leave was granted in the first instance.

(iii) The court will refuse to grant leave to claim judicial review unless satisfied there is an arguable ground for judicial review on which there is a realistic prospect of success (see *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890.) I consider that the issues raised in this case do satisfy that test. In so concluding it must be clear, however, that this is no indication whatsoever of what the ultimate determination in this case will be.

(iv) The issue of delay in this case is not so clear cut as to permit determination at this stage. Any issue of delay can, of course, be still raised at the substantive hearing.

[18] In all the circumstances therefore I have concluded that leave to amend should be granted in the terms of the summons before me.