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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY E D BY HIS FATHER AND NEXT FRIEND D D FOR JUDICIAL REVIEW

KERR J

[1] This is an application by a young boy (whom I shall refer to as 'E' so that his anonymity may be preserved) for judicial review of decisions taken in relation to his education by the Belfast Education and Library Board and the principal and board of governors of Glenveagh special school, Belfast.

[2] E was born on 6 February 1991. He has been diagnosed as autistic. He attended Oakwood school and assessment centre from September 1994 until September 1999. A statement of his special educational needs was made on 14 March 2000 pursuant to article 16 of the Education (Northern Ireland) Order 1996.

[3] The special educational needs statement specified that E's educational needs and objectives "should be met in a small group setting with programmes suitable to his needs and abilities in an environment where staff are experienced in the teaching of children with severe learning difficulties". Glenveagh was specified as the school where he should be placed.

[4] According to teachers at Glenveagh a number of difficulties were experienced with E's behaviour after he began attending the school in September 1999. They claim that these problems have got steadily worse and were particularly bad at the beginning of 2002. In March 2002 E began to receive education at his home. There is a dispute between E's father (who I shall call 'D') and the educational authorities as to whether this was by agreement.

[5] On 24 May 2002 a meeting took place at Glenveagh which was attended by D, Mrs Gillian Boyd, the principal of the school, other staff members, Dr Stephen Gallagher (who describes himself as "consultant adviser to Parents Educated as Autism Therapists (PEAT)"), Colin McClelland, a clinical psychologist, social workers and representatives of the Board. A plan for the re-integration of E into school was organised. After this meeting E was taught in school on a number of days in May and June. Members of staff of Glenveagh also taught E at home.

[6] An amended statement of the applicant's special educational needs was issued by Belfast Education & Library Board on 14 November 1992. His father has appealed against this statement and this has the effect of suspending its implementation. The original statement therefore remains in force until the appeal against the latest statement has been heard.

[7] A great number of affidavits have been filed in this case. The contents of many of these are preoccupied with particular disputes between the applicant's father and the school as to the manner in which E is being educated. Conflicting accounts of incidents of E's behaviour also predominate in the affidavit evidence. It is not necessary to refer to these in any detail because the net issue in the case has been identified by Mr Michael Lavery QC (who appeared for the applicant) as being the lawfulness of the school's decision that E should be taught in a manner other than that specified in the statement of special educational needs. The school, with the approval of the Board, has decided that the applicant cannot be taught in a small group setting because of his propensity to attack other children and his teachers. D objects to this, contending that the school and the Board are legally obliged to adhere to the terms of the statement.

[8] Statements of special educational needs are provided for in article 16 (1) of the Education (Northern Ireland) Order 1996, which states: -

> "If, in the light of an assessment under Article 15 of any child's educational needs and of any representations made by the child's parent, it is necessary for the board to determine the special educational provision which any learning difficulty he may have calls for, the board shall make and maintain a statement of his special educational needs."

Paragraph 3 of the article imposes requirements as to the contents of the statement: -

> "(3) In particular, the statement shall-

> (a) give details of the board's assessment of the child's special educational needs, and
>
> (b) specify the special educational provision to be made for the purpose of meeting those needs …"

Under paragraph 5 where a board maintains a statement, it shall arrange that the special educational provision indicated in the statement be made for the child unless the child's parent has made suitable arrangements.

[9] Mr Lavery argued that the school and the Board were obliged to comply with the terms of the statement unless it was practically impossible to do so. He accepted that they could not be compelled to adhere to those terms if other children's lives would thereby be put at risk but unless such circumstances existed (proof of which lay with the school and the Board) the mandatory duty contained in the legislation must be fulfilled.

[10] For the respondents Miss Gibson accepted that the requirement to comply with the terms of the statement was mandatory but she submitted that the school and the Board had a discretion to depart from the terms of the statement where it was necessary to safeguard the interests of the teaching staff or other children. A decision to do so could only be challenged on traditional judicial review grounds. In effect, Miss Gibson argued, this meant that in the present case, unless the applicant could show that the school and the Board had acted irrationally, their decision not to adhere strictly to the requirements of the statement was beyond challenge.

[11] In deciding whether a provision is mandatory or directory the court must examine its purpose and its relationship with the scheme, subject matter and objective of the statute in which it appears – see *Coney v Choyce*, [1975] 1 WLR 422; *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service* [1978] AC 655; *R v Registrar General, ex p Smith* [1991] 2 QB 393. The court must also attempt to assess the importance attached to the provision by Parliament. Indeed, as Carswell LCJ pointed out in *Re Robinson's application* [2002] NI 206, 214b, "the paramount objective is to ascertain the intention of the legislature in enacting the provision under consideration."

[12] The word 'shall' is prima facie mandatory, but may often be construed as merely directory depending on the context in which it appears. If the effect of adopting a mandatory construction would be substantial public inconvenience, public policy requires that it should not be adopted – see, for instance, *R v Mayor of Rochester* (1857) 7 E & B 910 and *Simpson v Attorney General* [1955] NZLR 271.

[13] A statutory provision that requires a public authority such as the Board to perform a particular function may have mandatory and directory aspects. In Wade & Forsyth *Administrative Law* (8th edn, 2000) p 228 the authors state: -

> "… the same condition may be both mandatory and directory: mandatory as to substantial compliance, but directory as to precise compliance …"

[14] I consider that the duty imposed by article 16 (5) of the Order does not require of the Board literal compliance with the provisions of the statement of special educational needs throughout its currency. It cannot have been the intention of the legislature that every aspect of the statement be strictly adhered to if, for instance, it became clear that to enforce those provisions would be against the interests of the child or would pose a risk to other children. In the nature of things the educational requirements of a child such as the applicant may change in the course of the period covered by a statement. It could not be right that the prescribed regime must be adhered to irrespective of the damage that this might do to the child or other classmates or teachers.

[15] The intention of the legislature in enacting article 16 (5) was, in my opinion, to require the relevant authority to provide the educational facilities stipulated in the statement *where it is practicable to do so*. It cannot have been in the contemplation of Parliament that the Board and the school should be powerless to modify the educational arrangements for the applicant where a change in his circumstances made it unsuitable to continue those arrangements. To impose such a literal requirement would lead, in my opinion, to substantial public inconvenience.

[16] In my judgment, article 16 (5) requires of the Board and the school substantial compliance with the terms of the statement. They may not ignore those requirements and they are bound to fulfil them unless it is either impractical to do so or the full implementation of the terms of the statement would put staff or other pupils at risk. The provisions of the statement must therefore in general be scrupulously observed but the school is not bound to follow those terms slavishly where it is plainly impracticable to do so.

[17] The task of the court in examining the reasons proffered by the school and the Board for failing to observe the specific requirements of the statement is rather more intrusive than Miss Gibson suggested. The review has two aspects: firstly to inquire into whether the conditions that the authorities claim prompted the departure from the statement in fact existed and secondly to decide whether the judgment made by them should be upheld.

[18] On the first of these aspects the evidence presented by the respondents as to the circumstances that led to the school's decision to remove E from the "group setting" is overwhelming. The sheer volume of material relating to incidents of E's aggression permit no conclusion other than that this young boy, because of his unfortunate disability, is frequently and unpredictably violent.

[19] His father believes that E's aggression has been misinterpreted and exaggerated by members of staff at Glenveagh. I cannot accept that this is the case. Not only do contemporaneous records bear testimony to the accuracy of the accounts given by staff members, but Mr McClelland (who is independent of any dispute between the applicant and the staff) also witnessed two incidents in which the applicant was violently aggressive towards his father and a teacher. I am satisfied therefore that the incidents which have prompted the decision to remove E from the classroom setting in fact occurred.

[20] As to the second aspect of the court's review of the decision to depart from the terms of the statement *viz* whether the judgment that this was required should be upheld, Mr Lavery submitted that it was necessary that the court be satisfied that this was the correct course. It was not enough, he argued, that the court conduct a *Wednesbury* (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) type review of the decision. The respondents must establish "beyond peradventure" that this was the only possible course to take.

[21] The decision whether E should be allowed to remain in the class with other students must be informed by the professional expertise of the teachers who are intimately involved with him and with the other children with whom he would come in contact. An area of discretionary judgment must be allowed the teachers in this matter. One must recognise that they are in a much better position to make that judgment than is the court. It is of course true that a decision not to comply strictly with the terms of the statement must be examined critically but it would be quite wrong for the court to substitute its view of the matter for that of the professionally qualified experts.

[22] Ultimately the level of intensity of review must depend on the nature of the interest involved and the type of decision that requires to be taken. As Lord Steyn said in *R v Secretary of State for the Home Department ex parte Daly* [2001] UKHL 26, "context in everything". This pithy statement credited in *Persey and others v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 Admin as being "the most quoted dictum in all of administrative law" emphasises the need to have regard to the particular circumstances in which the decision under challenge was made. In this case the need to provide the applicant with the best possible education; the

requirement that in general the terms of the statement should be strictly fulfilled; the protection of other children and the teachers; and the overall interests of the school all contribute to the context in which this particular decision had to be made.

[23] I am satisfied that the teachers entertained genuine and reasonable fears that if E were allowed to remain in a classroom setting there was a real risk that he would harm other children. It is true that none of the other children has suffered any serious injury so far but that must be in no small measure due to the actions of the teachers. From Mr McClelland's account alone of what he witnessed when the applicant attacked his teacher and his father, no conclusion could be reached other than that the children who were with him might be at risk if E remained in the classroom.

[24] I am therefore satisfied that the decision taken by the school and endorsed by the Board to remove E from the classroom setting was a proper and reasonable one. The application for judicial review must therefore be dismissed.