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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY K D FOR JUDICIAL REVIEW

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] On 2 September 2005 Girvan J gave an *ex tempore* judgment in an application for judicial review by K D, the mother of a young girl called E D. Mrs D had challenged a decision of a schools admissions tribunal given on 6 July 2005. The tribunal had dismissed an appeal against the refusal of the board of governors of St Dominic's High School to admit E to the school. Girvan J held that the tribunal's decision was legally wrong and he purported to remit the matter to the tribunal for further decision. There is a lively dispute between the parties as to the effect of the judgment given at that time and we shall return to say something of that presently. The Belfast Education and Library Board appeals, by a Notice of Appeal dated 10 October 2005, from Girvan J's decision of 2 September.

[2] The matter was considered by a differently constituted tribunal on 8 September 2005. This comprised the two original members and a different chairman. It also dismissed the appeal. Mrs D again challenged the decision. Girvan J heard the application on 16 September. He reserved his decision and delivered a written judgment on 21 September 2005. He dismissed the second application for judicial review. Mrs D appeals that decision on foot of a Notice of Appeal dated 29 September 2005.

Factual background

[3] E D had attended St Oliver Plunkett Primary School and entered the primary 7 class in 2004. In that year she undertook the transfer test. On 5

February 2005 she was informed that she had obtained a grade C2 in the test. Her older sister, N, attended St Dominic's and it was E's earnest wish and that of her parents that she should also go to that school. Every child who undertakes the transfer test is the subject of a transfer form in which the parents' preference of school is specified. In E's case the form was completed on 10 February 2005 and signed by her mother and the school principal, Mr Headley. St Dominic's High School was stated to be the preferred school with St Genevieve's being second preference.

[4] The transfer form contains a section (Section C) in which parents' reasons for each preference are to be given. This section in E's case contained the following: -

> "E is my youngest child. E's sister, N D, year 8F currently attends St Dominic's. I know that E will do just as well at St Dominic's as her sister N and will develop greatly in all aspects of her school work."

[5] Section D of the form is to be completed by the school principal and relates to a claim for special circumstances which are to be taken into account by the board of governors of the school to which the parents wish their child to be admitted. The form, under the rubric '**Claim for Special Circumstances**', states: -

> "Please attach completed Form SC1 or equivalent and related documentary evidence (list these) of a medical or other nature.

[6] The form then asks for the principal's comments and the words, 'See attached letters' were entered here. The letters attached were from the principal and from Mrs D. The letter from the principal stated: -

> "I write in support of the application of E D … E is a pupil who has demonstrated above average ability in all aspects of her school work. This has been a consistent pattern in all her years with us at St Oliver Plunkett.
>
> It is my considered opinion that the grade attained in Transfer is not a true reflection of her ability or general class performance throughout her career in primary school. Indeed the pattern of performance and scoring in practice papers prior to the actual Transfer tests would have led us to expect a grade one or two levels higher, possibly a B1 or B2, than that she in fact achieved. It is my view that E could have

> attained such a grade and is a child who can cope well with a placement in a grammar school environment.
>
> E recently (October 2004) completed NFER tests in English and Mathematics and scored as follows:
>
> NFER Progress in English 10 Standardised Score 113
> NFER Mathematics 10 Standardised Score 119
>
> I would ask that you give serious consideration to this information in your assessment of this application."

[7] Mrs D's letter contained the following passages: -

> "Our contention is that there were special circumstances which affected E's performance in the transfer test. As the time of the test drew near E became increasingly nervous and agitated; the standard of her work deteriorated significantly. We appreciated the transfer test imposes stress on any participant and the child will invariably be nervous, however, in E's particular circumstances her nervousness was well outside the normal parameters.
>
> In retrospect it was obvious E could not have done herself justice and that her paper would not have reflected her academic ability. E remained extremely anxious right up until she received her results and was greatly distressed with her grade.
>
> We understand from your clearly defined criteria that it is the sole responsibility of the parents of prospective pupils to ensure the transfer documents contain all the information required by St Dominic's to apply the admission criteria to the application of that prospective pupil. We appreciate that where special circumstances exist it is incumbent on the parents to produce documentary evidence to establish and make apparent that the child would have been graded at a higher level than she achieved.
>
> We hope our submission will meet your exacting requirements. …"

[8] The criteria referred to in Mrs D's letter were the admissions criteria provided by St Dominic's High School for the guidance of parents about the way in which pupils for the incoming school year would be chosen. These criteria contained a section dealing with special circumstances to be taken into account by the board of governors where a claim is made that the child's performance in the transfer test has been affected by medical or other difficulties. It is in the following terms: -

> "**SPECIAL CIRCUMSTANCES**
>
> Grammar schools must admit pupils strictly in the order of the Transfer Grade which they obtain, subject only to the consideration of medical or other problems which may have affected performance in the Transfer Test(s) and which are supported by documentary evidence of a medical or other appropriate nature. These 'medical or other problems' are commonly referred to as "special circumstances".
>
> - **DETAILS OF MEDICAL OR OTHER PROBLEMS:**
>
> Where it is claimed that a pupil's performance in the Transfer Tests has been affected by a medical or other problem, independent evidence of its existence **must** be provided to the school. Where the problem is a medical one of slight duration which affected the pupil only at the time of the Transfer tests the school will require the production of evidence that the pupil was examined by a medical practitioner in relation to the illness.
>
> Where the problem is of a non medical nature the parents should set out in the Transfer Form precise details of the problem and append any appropriate evidence to corroborate its existence.
>
> - **EDUCATIONAL EVIDENCE:**
>
> Sufficient objective comparative documentary evidence must be provided by the parents and the primary school to accompany the Transfer Form to enable the school to reach a decision.
>
> The following information **<u>must</u>** be provided: -

1. The number of pupils in her P7 class and the number taking the tests
2. **<u>All the pupil's school test results in English, Mathematics, Science and Technology (*i.e.* internal school tests and standardised tests) from the beginning of the Key Stage 2 period (*i.e.* P5)</u>** compared to the results for the same tests of all the other members of her P7 class and the transfer grades of the other members of her class. In the case of small schools, or schools where very few pupils take the Transfer tests, it will be appropriate to include the same comparative information in relation to pupils who have taken the transfer Tests in the previous year(s). A sample form (SC1) for this purpose is set out on pages 13/14. Only the pupil claiming Special Circumstances should be identified. All other pupils in the comparative picture should be anonymous.

> The primary school's principal's comments on the pupil's academic achievements in comparison with the other members of her P7 class who received the same or a higher grade in the Transfer Tests are also requested.
>
> It is emphasised that **the onus is on the parents** to ensure that the above information is provided by the primary school. Failure to provide such information may result in the school being unable to consider the application for Special Circumstances."

[9] The form SC1 is referred to in the admissions criteria and the transfer form. It is a document which sets out the information described in paragraph 2 of the Educational Evidence section of the Special Circumstances part of the admissions criteria. It is to be noted that both the transfer form and the admissions criteria emphasise that this form is indispensable where a claim for special circumstances consideration is made. Unaccountably, the form was not enclosed with the materials sent to the board of governors.

[10] In an affidavit sworn by Mrs D in support of the first application for judicial review she averred that E had been the subject of bullying at her primary school. She asserted that this had caused her anxiety which in turn had led to her underperformance in the transfer test. Mrs D accepted that she had not provided information about this to the board of governors of St

Dominic's and explained this by saying that she did not want E to be branded as a victim of bullying in her new school.

[11] Mrs D also referred in that affidavit to a report from an educational psychologist, Patrick McGuckin. E performed an educational test using a document on the special testing of pupils who have not been able to undertake the transfer test. The result of this test indicated that E was in the high intelligence category, *i.e.* the most able 15% of her age group. On the basis of this test result she would be awarded an A grade. Her high level of academic ability was confirmed, Mr McGuckin said, by her performance in literacy and numeracy tests. He considered that she was well capable of meeting the academic demands of a grammar school. He found that E was lacking in self confidence and administered a test known as the 'culture-free self-esteem inventory' which confirmed that her general self esteem was very low. He suggested that this was probably due to persistent bullying and would explain why she had not performed to the level of her abilities in the transfer test.

[12] Mr McGuckin's report was obtained after the board of governors had reached their decision on E's application to the school. The document from the school communicating this decision stated: -

> "The board of governors examined all information attached to (*sic*) E D. E D did not provide documentary evidence to support the problem of nervousness which was identified. No SC1 form was supplied. E's grade remained at C2. No pupils with grade C2 were admitted."

[13] On 27 May 2005 the Belfast Education and Library Board wrote to Mrs D informing her that E had been offered a place at St Genevieve's High School. Mrs D appealed that decision to a special appeal tribunal. In preparation for that appeal her solicitors wrote to Mr Headley asking for information about the number of pupils in E's P7 class and for the material necessary to fulfil the requirements of paragraph 2 of the Educational Evidence section of the admissions criteria. Mr Headley replied on 24 June informing the solicitors that there were 29 pupils in the class. A document containing some of the information necessary to complete a SC1 form was also produced.

[14] Mr MacRitchie of the appellant's solicitors appeared on behalf of Mrs D at the appeal hearing on 6 July. He submitted to the tribunal that they should receive further material that had not been provided to the board of governors *viz* the SC1 form, reports of bullying suffered by E at primary school and Mr McGuckin's report. The tribunal did not make a determination of that issue during the hearing of the appeal but indicated that they would take legal advice on the matter. Later on the same day the written decision of the tribunal was issued. It was to the following effect: -

> "When making their decision St Dominic's had no specific information regarding special circumstances re bullying, also no objective academic information was available.
>
> The school was correct in the decision they made *i.e.* no grade C2s were admitted so E could not be admitted.
>
> The tribunal would refer to McManus 2003 (See Mr Justice Weatherup's judgment)."

The first judicial review application

[15] The first judicial review application was heard by Girvan J as a matter of urgency on 2 September 2005 and he gave judgment on that day. He held that the jurisprudence in this area established clearly that the task for the tribunal was to consider, on the basis of the material that was before the board of governors, whether the school had applied the admissions criteria correctly. He referred to the provision in the criteria that imposes on the parents the onus of ensuring that all relevant material, including the SC1 form, is provided to the school. In an informal transcript of his judgment (which was not accepted as accurate by Mr McCloskey QC, who appeared for the Board and the tribunal) Girvan J is recorded as saying this about the duty cast on the parents: -

> "Now this immediately throws up a practical problem because the SC1 document is a document prepared by the principal of the primary school. It is a document that only the principal of the primary school can prepare because it's all related to records and data in relation to pupils at the school. That is all information that would not be available to the parent and indeed it would not be appropriate for them to have access to the information in order to provide a document like a SC1."

[16] Girvan J concluded that the application of the criteria would result in unfairness if the principal of the school did not notify the parent of his failure to send the SC1 form to the board of governors and the parent remained ignorant of its omission from the papers that had been sent with the transfer form. In order to avoid this unjust result he concluded that it was necessary to imply a further 'criterion' into the admissions criteria. He said:-

> "… one must construe the criteria in such a way to imply that if the circumstances are such that it is clear that an SC1 was intended to be put before the school as far as the parent is concerned and that document has not come from the principal of the primary school that that point will be brought to the attention of at least the parent to ensure that the parent can chase up the relevant form from the principal of the school. If there were not implied such proviso or provision into this criterion, the criterion would work injustice and unfairness".

[17] In light of his conclusion that it was necessary to imply this 'criterion' Girvan J decided that the board of governors had not in fact applied the criteria (as amplified by the further 'criterion'). He then deliberated on what effect this had on the decision of the tribunal. He referred to article 15 (5) of the Education (Northern Ireland) Order 1987, which provides that where the tribunal decides that the board of governors has not applied the admissions criteria properly it shall allow the appeal and order that the child be admitted to the school. This provision is subject to article 15 (6) which states that if the tribunal considers that, had the criteria been correctly applied, the child would have been refused admission to the school, the tribunal shall dismiss the appeal. The learned judge then said: -

> "35. … the court is left unclear as to what the outcome would have been had the criteria been properly applied and since it is unclear what the result would have been the court cannot be satisfied that the child would have been refused admission if the criteria had been applied and therefore it would follow logically that the statutory obligation to allow the appeal would come into play and the result is that the appeal should have been allowed.
>
> 36. The consequence of that is that the decision of the Tribunal upholding the school's decision cannot stand and I'll hear argument on the form of the order in light of the judgment that has been given."

[18] The transcript then records the following exchange between the judge and Mr Treacy QC, counsel for Mrs D: -

> "Mr Treacy: I suggest that the matter be remitted to the tribunal with a direction to allow the appeal.

> Girvan J: Yes, I think that has to be the way forward. I cannot overrule their judgment so I think that it has to go back to the tribunal so I direct that the matter be remitted to the tribunal to reach its decision in light of the court ruling.
>
> I cannot overrule the Tribunal's judgment so I direct the matter be remitted to the Tribunal to reach its decision in light of the court ruling".

[19] It is not entirely clear whether the judge made an order of certiorari at that stage, although in his later judgment he appears to suggest that such was his intention. We observe in passing that an order of certiorari should not normally be made where it is intended that the matter be remitted to the deciding authority. Section 21 of the Judicature (Northern Ireland) Act 1978 is relevant in this context: -

> "**21 Power to remit matter or reverse or vary decision**
>
> Without prejudice to section 18(5), where on an application for judicial review—
>
> (a) the relief sought is an order of certiorari; and
>
> (b) the High Court is satisfied that there are grounds for quashing the decision in issue,
>
> the court may, *instead of quashing the decision*, remit the matter to the lower deciding authority concerned, with a direction to reconsider it and reach a decision in accordance with the ruling of the court or may reverse or vary the decision of the lower deciding authority."

The second appeal hearing

[20] Whether or not an order of certiorari was made, the matter was listed before the second tribunal on 8 September 2005. Before the tribunal sat it was given legal advice by the chief legal adviser of the Education and Library Boards, Michael Brown. This gave rise to some controversy on the hearing of the appeal before this court but, for reasons that will appear presently, that is not an area that we need to enter. The tribunal concluded that the appeal should be dismissed. A letter from the tribunal clerk to the appellant's solicitors, dated 8 September 2005, set out the reasons for the decision, as follows: -

> "The school require documentary evidence to support claims for special circumstances. While the claim for special circumstances was made on the transfer form, no independent evidence of its existence was provided to the Board of Governors which would support the claim. The tribunal therefore did not consider it appropriate to look at any information relating to the academic performance of a medical or other problem."

[21] On 9 September 2005, a more detailed document entitled "Decision of the Tribunal" was provided in which the tribunal expanded on its reasoning. We reproduce paragraphs 7 and 8 of that document: -

> "7. The Tribunal concluded, firstly, that in the light of the construction of the St. Dominic's special circumstances admissions criterion given in the judgment of the High Court, and having regard to the Tribunal's obligation to reach a decision in accordance with that judgment, St. Dominic's Board of governors had not correctly applied the second main limb of the criterion viz the 'Educational Evidence' provisions. However, Tribunal members noted that this is not the only limb of the criterion. Its other main limb consists of the provisions under the heading 'Details of Medical or Other Problems'. The requirements of this part of the criterion had not been observed on behalf of the pupil in the special circumstances application to St. Dominic's Board of governors. The Tribunal noted that this requirement is couched in mandatory terms, to the effect that where it is claimed that a pupil's performance in the Transfer Tests has been affected by a medical or other problem '…independent evidence of its existence must be provided to the school'. In this instance, the case made on behalf of the pupil (per her mother's letter dated 8th February 2005) was that the pupil's test performance had been adversely affected by 'nervousness' which was allegedly 'well outside the normal parameters'. However, there had been a failure to submit any independent evidence whatever of the existence of this asserted problem.
>
> 8. Accordingly, the Tribunal had to address Article 15(6) of the 1997 Order, which provides:

> > 'If in the case mentioned in paragraph (5) (a), it appears to the Tribunal that had the criteria…been correctly applied, the child would have been refused admission to the school, the Tribunal shall dismiss the appeal.'
>
> The Tribunal was prepared to assume that if the special circumstances criterion had been correctly applied by St Dominic's Board of governors in the sense determined in the judgment of the High Court, there would have been full compliance with its 'Educational Evidence' provisions. However, it would not have been open to the Board of governors to consider in isolation the information which would have been thus provided. Rather, it would have been necessary for the Board of governors to decide whether, having regard to all of the requirements and provisions of the special circumstances criterion, the pupil's special circumstances claim had been made out. The Tribunal's firm conclusion was that the Board of governors, in the absence of the information required by the first limb of the criterion, would not have acceded to the special circumstances application and would, therefore, have refused the child admission to the school."

The second judicial review application

[22] At the hearing of the second judicial review application it quickly emerged that there was what Mr McCloskey QC (who appeared for the respondents) described as a "fundamental disagreement" between the parties as to the effect of the judgment given by Girvan J on 2 September. On the one hand the appellant contended that the judge had directed that the tribunal should allow the appeal; on the other, the respondent submitted that the effect of the judgment was that the tribunal should consider whether to allow the appeal after considering article 15 (6). It appears that the judge, at one point in the course of exchanges with counsel, favoured the argument of the appellant on this issue for he is recorded as having said, "… there was supposed to be a court order drawn up and directed to tribunal with a direction to allow the appeal." In his written judgment, however, he stated that he had made it clear in his ruling that the court could not "overrule the tribunal's judgment" and that it was for the tribunal to apply article 15 of the 1997 Order. He said this at paragraph [7]: -

> "…when one reads on in the transcript I made clear that I could not usurp the function of the Tribunal and it was for the Tribunal to make the judgment required of it under the provisions of Article 15. The constitutionally constituted decision-maker was the Tribunal which was bound to reconsider the matter in the light of the court ruling. The first decision was quashed because the Tribunal had failed to correctly apply the criterion relating to educational evidence. It was for the Tribunal then to carry out its article 15 obligation in the light of the ruling. The view expressed by the court that it seemed logically to follow that the appeal should be allowed since it was unclear what the outcome would have been had the criterion been properly applied could not be described as part of the *ratio decidendi* of the case since that point did not arise for determination in the application and was not fully argued. As I have stated it was the statutory obligation of the Tribunal to decide the appeal in accordance with Article 15(5) and (6) and not the function of the court to direct the Tribunal as to how it should decide the matter once it was remitted to it. My remarks, accordingly, were not binding on the Tribunal as part of the ruling to which the Tribunal was bound to have regard. In the light of the reasoning of the Tribunal my *obiter* view was, in fact, erroneous."

The relevant statutory provisions

[23] Article 15 of the 1997 Order deals with appeals against certain admission decisions. In so far as is relevant it provides: -

> "(4) An appeal under this Article may be brought only on the ground that the criteria drawn up under Article 16(1) by the Board of Governors of a school—
>
> (a) were not applied; or
>
> (b) were not correctly applied,
>
> in deciding to refuse the child admission to the school.
>
> (5) On the hearing of an appeal under this article—

> (a) if it appears to the appeal tribunal that the criteria were not applied, or were not correctly applied, in deciding to refuse the child admission to the school, the tribunal shall, subject to paragraph (6), allow the appeal and direct the Board of Governors of the school to admit the child to the school;
>
> (b) in any other case,
>
> the tribunal shall dismiss the appeal.
>
> (6) If, in the case mentioned in paragraph (5)(a), it appears to the tribunal that had the criteria been applied, or (as the case may be) been correctly applied, the child would have been refused admission to the school, the tribunal shall dismiss the appeal".

[24] Article 16 of the 1997 Order deals with admission criteria as follows: -

> "(1) Subject to the following provisions of this Article the Board of Governors of each grant-aided school shall draw up, and may from time to time amend, the criteria to be applied in selecting children for admission to the school under Article 13 or (in the case of a grammar school) Article 14".

The appeal

[25] For the appellant Mr Treacy QC submitted that the tribunal was wrong to conclude that the lack of documentary evidence to support the problem of E's nervousness was determinative of the question whether special circumstances existed. On the proper application of the criteria, as they had been found by Girvan J, it was at least possible that the Board of governors would have come to a different conclusion had they seen the SC1 form. On that basis the tribunal ought to have allowed the appeal. It should not have applied article 15 (6) of the Order. It could not have been satisfied that the Board of governors would have refused E admission if it had seen the SC1 form. This form, taken in conjunction with the letters from Mr Headley and Mrs D, was powerful corroboration of the appellant's claim that her daughter had underperformed as a result of abnormal nervousness and that it was clear that E demonstrated above average ability.

[26] Mr Treacy contended that the tribunal should have been informed of the full import of Girvan J's judgment. Mr Brown should not have briefed the tribunal as he had done, particularly in the absence of the appellant's legal representatives. This, he said, was in contravention of Belfast Education and Library Board – School Admissions Appeal Tribunals - Notes of Guidance which provides: -

> "The tribunal may request the presence, at a hearing, of a representative of the Joint Legal Service of the education and library boards.
>
> If the tribunal seeks the opinion of the Joint Legal Service, then the chairman will ask the two sides to hear that opinion and make comment on it".

[27] If the tribunal had been informed of the full extent of the judgment of Girvan J, it was inconceivable, Mr Treacy said, that it would have dismissed the appeal. It was clear, he claimed, that when he gave his earlier judgment, the judge intended that the appeal should be allowed. He had concluded, Mr Treacy suggested, that the submission of the SC1 form was bound to have raised at least the possibility of the board of governors taking a different view of the claim for special circumstances. On this basis the tribunal had no option but to allow the appeal; article 15 (6) had no application.

[28] Mr Treacy questioned the provenance of the amplified reasons given for the tribunal's decision. He pointed out that these had been prepared after the chairman had gone on holiday and, although they had been ratified by him on his return, the preparation of these reasons by the legal representatives of the tribunal compromised the independence that should have characterised its deliberations. On that account alone, he argued, the decision of the tribunal should be quashed.

[29] On the question of which party should be the respondent to the appellant's applications for judicial review and this appeal, Mr Treacy argued that the Board was not entitled to appear or be represented since it was not directly affected by the proceedings as required by Order 53 rule 5 (3) of the Rules of the Supreme Court (Northern Ireland) 1980. Moreover it was clear that the intention of the legislation governing the establishment and procedures of School Admissions Appeal Tribunals was that such tribunals should be independent of the boards. Mr Treacy also submitted that the tribunal was not an appropriate party since the proper party to contest an application for judicial review of its decision was the opposing party in the proceedings before the tribunal whose decision is challenged (*i.e.* the school).

[30] Finally, Mr Treacy submitted that the Board was precluded from pursuing an appeal against Girvan J's first judgment. The right of appeal had been lost or waived by the subsequent actions of the appellant. The tribunal did not sit to hear the remitted appeal until 8 September, almost one week after Girvan J's decision. During that time correspondence was exchanged between the solicitors in which it was confirmed that the Board was awaiting senior counsel's advice about the possibility of an appeal. Despite this the Board allowed the tribunal to proceed to determine the second appeal and gave no indication of an intention to appeal when Mrs D's appeal was first mentioned before this court. In this context Mr Treacy referred to Valentine *Civil Proceedings – the Supreme Court* at para 20.39:-

> "A party may lose his right of appeal or his right to appeal on a particular ground by conduct which renders it inequitable, for example….acting on and accepting the benefit of the lower court's ruling or judgment; accepting the practice of the lower court without reserve…"

[31] Mr McCloskey QC, on behalf of the Board, submitted that the primary question on both appeals was whether the judge was right to imply text into the special circumstances criterion. It was argued that the judge erred in importing principles and doctrines of statutory interpretation into a field where they did not belong. This offended the principles outlined by this court in *Re Farren's application* [1990] 6 NIJB 72.

[32] On the question of the effect of Girvan J's first judgment, Mr McCloskey said that on its proper interpretation, this did no more than remit the matter to the tribunal for it to decide whether article 15 (6) applied. In any event, as a matter of law, it was not open to the judge to bind the tribunal or fetter its discretion in making this decision. The question whether the board of governors would have dismissed the appeal if it had applied the criteria properly was one for the tribunal and not for the court. The tribunal had properly recognised that form SC1 was relevant only to the educational evidence part of the special circumstances provisions. It could not have constituted independent evidence of a medical or other problem. It was relevant only to the issue of whether there had been an underperformance by E, not the reason for that underperformance.

[33] In relation to the argument that Mr Brown's having given advice to the tribunal amounted to procedural impropriety, Mr McCloskey suggested that the appellant's advisers were aware that he intended to provide this advice. There was no restriction on the appellant's legal representatives making submissions as to the legal effect of Girvan J's judgment. The guidance document on which the appellant relied was a non-statutory, administrative measure and did not prescribe the unalterable means of proceeding. Mr Brown had given legal advice to the tribunal (as he was entitled to) and this attracted legal professional privilege. There was nothing unfair about Mr Brown having given advice as he did, Mr McCloskey said.

Conclusions

[34] We shall deal first with the argument that the Board is debarred from pursuing an appeal against the first judgment of Girvan J. The issue is whether it would be inequitable to allow the appeal to proceed. It is true that the Board did not signify its intention to appeal until after the second tribunal hearing but, for understandable reasons, this took place much sooner than reconsideration of most quashed decisions would occur. We do not consider that it was unreasonable for the Board to await the outcome of the second tribunal hearing before deciding to pursue an appeal against the first decision. On the basis of the Board's understanding of Girvan J's first judgment it had reason to believe that the second appeal to the tribunal would not succeed. If the decision of that tribunal had been accepted by Mrs D, an appeal to this court would not have been necessary. In these circumstances we do not consider that this was a case of "acting on and accepting the benefit of the lower court's ruling or judgment [or of] accepting the practice of the lower court without reserve." We have concluded therefore that the Board should not be precluded from pursuing its appeal against the first decision of Girvan J.

[35] We must then turn to consider whether the learned judge was right to imply into the admissions criteria a requirement that, where form SC1 was not included with the transfer form, the board of governors of the school should alert the parent to its omission. In the first place it does not appear to us that this can properly be described as a criterion. It is an obligation imposed on the board of governors to deal with a failure on the part of the primary school to comply with the clearly stated requirements of the transfer procedure where special circumstances are claimed. Girvan J considered that it was necessary to imply this requirement in order to make the admissions criteria workable but we cannot agree with that conclusion. The criteria are workable if the parent ensures that the school principal encloses all relevant material with the transfer form. We recognise that this requires parents to be proactive. We also acknowledge that the primary duty to ensure that this information is provided falls on the primary school concerned but to oblige parents to check with the school that the SC1 and other information relevant to a special circumstances claim have been transmitted is not an impracticable requirement.

[36] Quite apart from these considerations, however, we are of the opinion that to imply text into the special circumstances criteria would offend the principles set out in the *Farren* case. The special circumstances criteria must be read literally, in a non-technical fashion and must not contain hidden qualifications or implied terms. At pages 103/4 of that judgment Kelly LJ said: -

> "How are the criteria drawn up by the grammar schools to be construed? They should be construed, in

> my opinion, in a non-legalistic way. Their words should be given an ordinary and non-technical meaning. Their literal content, if clear, should precisely determine who will be admitted and who will not. It would be incorrect to add to them by way of gloss considerations in determining admission which are not expressly stated in or are implicit in their literal content…
>
> It is the letter of the criteria which is published and communicated to the parents and not the spirit. It is the literal content of the criteria which the parents of applicant pupils absorb and on which they assess the chances of their children and pin their hopes…
>
> I consider that the criteria are to be applied according to their wording…"

[37] If this approach is followed, we do not consider that there is any warrant to introduce an obligation on the board of governors that adds significantly to the literal content of the criteria themselves. The proposed 'criterion' is not something that would occur to parents reading the criteria. On the contrary, the emphasis in the criteria is on the duty imposed directly on parents to ensure that the requirements of the special circumstances have been fulfilled. It is therefore unsurprising that the suggestion that there be an extra 'criterion' to cater for an omission on that part of the primary school did not feature in the submissions made on behalf of Mrs D at the first judicial review application. One can understand why, in light of the failure of the primary school principal to send the essential material to the board of governors, the judge felt that Mrs D should not be penalised. But that situation could not be rescued, we believe, by requiring the board of governors to act on the principal's failure in a manner that was quite extraneous to the admissions criteria.

[38] This conclusion disposes of both appeals. The first tribunal was right to dismiss the appeal against the board of governors' decision. There was no basis on which it could be said that the board of governors had failed to apply the published criteria properly. We must therefore allow the Board's appeal against the first decision of Girvan J and dismiss the application for judicial review. In light of this, the appeal against the second judgment must fail but, in the hope that it may provide some guidance for the future, we intend to say a little about some of the other arguments presented.

[39] The SC1 form will normally be relevant only to the educational evidence element of the special circumstances section of the admissions criteria. But we do not rule out the possibility that in a particular case it may also have some bearing on the first element *viz* the existence of a problem giving rise to the underperformance of the candidate. It is unlikely that this alone will be sufficient to establish this but the form may supplement other evidence in establishing not only the outcome of the problem but also its existence.

[40] The practice of giving legal advice to tribunals must be undertaken with great care, particularly when there has been a judicial review challenge in which the legal representatives of the Education and Library boards have been involved. As we have said, it is unnecessary for us to comment on the particular controversy in the present case about the advice that Mr Brown gave but we consider that, as a matter of good practice, where tribunals have received advice from solicitors that might bear on how they approach the disposal of the appeal, the gist of that advice should generally be communicated to the parties to the appeal so that they may make any necessary submissions on it.

[41] It will generally be undesirable that a statement of reasons for dismissing an appeal be drafted by the legal representatives of the Board or tribunal. This carries the risk of the tribunal adopting as the basis for its decision matters that may not have directly influenced its conclusion. The preparation of a statement of reasons should normally be carried out by the tribunal itself, although it may, of course, where it is necessary to do so, take legal advice before undertaking this task. In the event that it is necessary to take legal advice, however, the tribunal should endeavour to ensure that other parties have the opportunity to comment on this.