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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR115 AND JR116
FOR COSTS IN JUDICIAL REVIEW

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Mr Sayers QC with Mr Toal and Mr McQuitty (instructed by Phoenix Law and Finucane Toner Solicitors) for the applicants
Mr McLaughlin QC and Mr Philip McAteer (instructed by the Departmental Solicitor) for the Department of Education

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Sir Declan Morgan

[1] These applications concerned the timing of entrance assessments provided by the Association for Quality Education ("AQE") and Post-primary Transfer Consortium ("PPTC") ("the providers") in the 2020/21 school year, following the closure of schools from March 2020 as a result of the Covid-19 pandemic. In the events which have occurred the parties have agreed the terms of an order dismissing the claims but both applicants seek their costs against the Department of Education ("the Department").

Background

[2] By the end of January 2020 an agreement had been reached about the timings of the entrance assessments for those children transferring to post-primary education in the school year beginning in August 2021. PPTC agreed that their assessment should take place on 14 November 2020 with a supplementary assessment on 5 December 2020. AQE fixed 7, 21 and 28 November 2020 for their assessments.

[3] As a result of the closure of schools on 20 March 2000 caused by the pandemic concern was expressed that the proposed dates would not provide adequate time for the children to prepare for the assessments. Both providers met with the Minister of Education to discuss the possibility of delaying the assessments.

[4] Subsequently PPTC indicated on 7 April 2020 that if it remained the case that transfer forms had to be submitted to the Education Authority (EA) around early February 2021 they could delay their assessments until 5 and 19 December 2020 and later confirmed that results would be available by 30 January 2021.

[5] AQE enquired on 10 April 2020 about a change in the date of the submission of transfer forms and indicated that a minimum of seven weeks from the date of the last AQE assessment was required to enable parents to receive results. In a subsequent letter it was proposed that the assessment should take place on 9, 16 and 23 January 2021 with results provided on 13 March 2021. AQE requested that the EA should shorten its administrative procedure.

[6] The Department and the EA discussed possibilities for shortening the transfer process including the exclusion of a right of appeal. In a meeting with the Minister AQE acknowledged the practical difficulties but indicated that they intended to provide tests on 21, 28 November and 12 December 2020 as the school transfer application deadline could not accommodate tests in January.

[7] On 7 May 2020 the Minister issued a press statement indicating the new dates for assessment which the providers had fixed. In effect this amounted to a 3 week delay. The press statement indicated that the Department had been working with the EA to explore what time savings could be made. On 13 and 14 May 2020 both applicants issued pre-action correspondence to the providers and the EA complaining that the delay was insufficient. No pre-action correspondence was sent to the Department.

[8] The subject proceedings were issued on 2 June 2020 by JR 115 and on 5 June 2020 by JR 116. In each case the EA were joined as proposed respondents. The EA's position at the leave hearing was that it was not a decision-maker in respect of timetabling decisions as the timetable was set by the Department. Leave was granted on 16 June 2020. The Department was joined as a respondent in each case on 18 and 19 June 2020. In each case the focus was upon the maintenance by the respondents of the date by which applications for new school places must be received.

[9] On 7 August 2020 the Department invited the providers and the EA to a roundtable meeting to discuss what could be done. That took place on 12 August 2020. The EA indicated that if the providers conducted their assessments in January 2021 final notification to schools would issue around 19 June which would cause issues with appeals and young people not having a school place by September. The very most the EA could squeeze out of the current process was three weeks. The agreed outcome of the meeting was that it was not possible to shorten the admissions process sufficiently to accommodate moving transfer dates to January 2021.

[10] On 13 August 2020 the Minister was briefed that he had power to direct the EA to open and therefore conclude the post-primary admissions process later than usual. The Minister indicated that he was content if EA wanted to further scope any practicalities in respect of time changes.

[11] On 18 August 2020 PPTC indicated that if there was a change to the EA transfer process timetable it would in principle be prepared to change the timing of its assessment and supplementary assessment in order to provide more time for children to avail of in classroom teaching in advance of the assessment. AQE indicated that it would be able to achieve a five week turnaround between the holding of its main assessment and the provision of results as contrasted with the eight weeks in the existing timetable and the normal 10/11 weeks in other years.

[12] It was suggested that AQE hold its assessments on 9, 16 and 23 January 2021 and PPTC hold its main assessment on 30 January 2021 with a results date for both exam bodies of 6 March 2021. The EA indicated to the Department that if there was a results date of 6 March it hoped and anticipated that the placement processes could be completed by 19 June 2021 but changes and resources in respect of the appeals process would be needed.

[13] The Minister indicated on 19 August 2020 that he was minded to delay the post-primary admissions process subject to equality screening and confirmation was given to the court on 2 September 2020 that he intended to do so. The test providers confirmed their intention to agree to move the test dates to January 2021 and on 8 October 2020 the Department issued statutory admissions guidelines and the transfer timetable which led to the proceedings being dismissed.

[14] Although the Department abolished the 11+ in 2002 it did not prohibit academic selection. In the absence of the 11+ PPTC and AQE were established to provide a mechanism for those schools that wished to continue to rely on academic selection in the admissions process. The providers are private entities not subject to statutory regulation. The EA is an executive agency which is responsible for the conduct of the transfer process but is subject to direction by the Department issued under Article 101 of the Education and Libraries (Northern Ireland) Order 1986 ("the 1986 Order"). The Minister's guideline issued on 8 October 2020 was an exercise of that power.

The relevant legal principles

[15] The general principles in the award of costs in judicial review proceedings were reviewed by McCloskey J in *YPK's Application* [2018] NIQB 1. The starting point was the set of principles set out by Scott Parker J in *R (Boxall) v Waltham Forest LBC* [2001] 4 CCLR at [22]:

> "22. Having considered the authorities, the principles I deduced to be applicable are as follows:

(i) the court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.

(ii) it will ordinarily be irrelevant that the Claimant is legally aided;

(iii) the overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost;

(iv) at each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

(v) in the absence of a good reason to make any other order the fall back is to make no order as to costs.

(vi) the court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."

[16] These principles were further considered by the English Court of Appeal in *R (Bahta) v Secretary Of State for the Home Department* [2011] EWCA Civ 895. These were cases in which permission to work had been refused but eventually were subsequently conceded. The court considered the *Boxall* principles in light of the introduction of the Civil Procedure Rules and the importance attached to the Pre-Action Protocol within those Rules.

[17] Where a public authority failed to address the Pre-Action Protocol and subsequently conceded the claim the applicant could expect to be awarded costs although the procedure was not inflexible. Where, however, relief is granted the defendant bears the burden of justifying a departure from the general rule that the unsuccessful party will be ordered to pay the costs. The court also recognised that the circumstances of each case required analysis and injustice was to be avoided but that proportionality required limits on the degree of analysis which was appropriate.

[18] This approach was further considered by the English Court of Appeal in *M v London Borough of Croydon* [2012] EWCA Civ 595. The court indicated that where a claimant has been wholly successful whether following a contested hearing or via settlement it was hard to see why the claimant should not recover all his costs, unless there was some good reason to the contrary. Where there is only partial success as a result of a mechanism of consensual resolution there was often much to be said for concluding that there should be no order as to costs and in cases where a compromise did not actually reflect the claimant's claims the court was often unable to gauge whether there was a successful party in any respect and there was an even more powerful argument for the default position that there should be no order as to costs.

Consideration

[19] I agree with McCloskey J that the relevant legal principles set out in the foregoing cases should broadly be applied in this jurisdiction. The pre-action protocol process is designed to give respondents an opportunity to consider their position in advance of litigation. The respondent is expected to address pre-action correspondence with reasonable expedition. Failure to do so will invariably lead to an order for costs against the respondent where the circumstances have not changed and the claim is subsequently conceded.

[20] The general position is that a successful applicant should be entitled to his costs unless there is some good reason to the contrary. Where there is a dispute the court should conduct a proportionate enquiry. The first question in this case is what constituted success. There were two objectives of the proceedings initiated by the applicants. The first was to ensure that the assessments set by the providers were conducted in January 2021.

[21] The second was to ensure that the results of those assessments were available to parents prior to the date set for transfer applications so as to ensure that parents could make a viable application to schools using academic selection as an admission criterion. The outcome of the direction given by the Minister under the 1986 Order was that the second objective was achieved and the first objective was enabled. I consider, therefore, that the approach I should take is that the applicants should succeed in their application for costs unless there is some good reason to the contrary.

[22] Turning to the relevant circumstances the first is that there was no pre-action protocol letter to the Department. The Department was joined to the proceedings after leave had been granted. The Department had not issued any direction prior to that issued on 8 October 2020 and I do not consider that the statement by the Department welcoming the three week extension agreed by the providers constituted a reviewable decision. What was at issue in respect of the Department,

therefore, was the failure to direct a specific date for receipt of transfer applications which would have achieved the objectives of the applicants.

[23] Secondly, although the Department had the power to give directions to the EA as a result of the 1986 Order it was not in a position to give directions to the providers. The providers were private organisations who entered into private contractual arrangements with those who decided to avail of the assessments they provided. As is apparent from paragraphs [4] and [5] above, prior to the issue of proceedings both providers indicated that they required seven weeks from the last assessment before they could distribute marks. The EA considered that such a period made it impractical to run the assessments in January 2021. In my view there is nothing to suggest that the EA's assessment was wrong in light of that timescale.

[24] Once joined the Minister did not sit on his hands. He initiated discussions with the stakeholders in August 2020. It was only on 18 August 2020 that the providers indicated that they could distribute the assessment marks within five weeks from the date of the latest examination. The Minister indicated the following day that he was minded to approve the issue of a direction to facilitate assessments during January 2021 and the court was informed timeously.

[25] In my view the resolution of these proceedings depended upon the change of position of the providers on 18 August 2020 and a corresponding flexibility on the part of the EA. Any attempt by the Minister to give directions on the transfer timetable prior to that date could have resulted in the inability of those schools wishing to do so to rely upon academic selection or a chaotic school transfer process. There was in my view good reason for the Minister at that time to explore further the possibilities with the providers and the EA before issuing a Direction and I consider, therefore, that this is a case where there is good reason not to order costs against the Department.

Conclusion

[26] For the reasons given I make no order as to costs.