Neutral Citation No. [2011] NIQB 78 | *Ref:* **TRE8296**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **16/9/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR 56's Application [2011] NIQB 78

AN APPLICATION BY JR56 FOR JUDICIAL REVIEW

TREACY J

[1] By this application for judicial review the applicant who is an 11 year old boy seeks to challenge the decision of the Board of Governors of St Paul's High School, Bessbrook not to admit him to the school. This decision was a result of the application of the school's admissions criteria which the applicant also challenges as unlawful.

[2] I canvassed with the parties the desirability, if the court was in the applicant's favour, of deciding the new ground upon which I granted leave by consent at the hearing on Wednesday. The new ground (see paragraph 9 of the applicant's skeleton argument) is that the Board of Governors erred in law or as to a material fact and/or has misdirected itself in considering that the criteria adopted by it was not contrary to departmental advice.

[3] Whilst I myself favoured such an approach it did not find favour with any of the parties largely because of the fear that its determination to the applicant's advantage might not resolve matters. Frankly the concern of the parties was that the rather more contentious grounds relied upon by the applicant to which most of the submissions were addressed might in any event ultimately require judicial determination. Having reflected on the matter I consider that since I have reached a clear view on the new ground that it is appropriate to promulgate it forthwith.

[4] Before I deal with the matter substantively I wish to record my appreciation to counsel for their excellent written and oral presentations and the balance they brought to proceedings which are understandably contentious. May I also preface my ruling with some further observations. Counsel for the respondent did not, indeed could not, in light of the affidavit evidence from Mr Mooney, *effectively* resist

the new ground. Since I have decided to quash the impugned decision on the new ground I should perhaps explain why I have taken the course that I have.

[5] The order 53 statement raises various grounds of challenge. The new ground being the least contentious. The fact that it is less contentious of course says nothing as to its merits. The other grounds of challenge are much more contentious.

[6] The argument that the impugned admission criteria were conspicuously unfair and discriminatory was vigorously resisted. Even more contentiously it was claimed the at the impugned criteria discriminated against the applicant on the basis of amongst other things his socio-economic status [see ground 3(d) (ii)].

[7] Although carefully framed in the skeleton argument as a claim in indirect discrimination the grounding affidavit and the order 53 statement are not so confined. Whether direct or indirect the assertion of discrimination on that basis is no doubtful hurtful to those responsible for St Paul's school not least because it is clear that social deprivation and inequality can be as much a feature of rural and urban communities and some schools serve both.

[8] There is no question in my view of St Paul's seeking to avoid responsibility to take a fair share of socially deprived children. Its intake of such children currently exceeds 30% for this school year i.e. about one third of the school population.

[9] The problem encountered by the school is that it is widely acclaimed achievements have resulted in it being significantly over-subscribed with the number of applicants far outstripping the available places. This is a measure of the school's achievements but it also gives rise to the difficulty of devising admissions criteria to fairly select who shall be offered places and who shall be not. All over-subscribed schools, of course, face similar problems and it is impossible to devise criteria with which all unsuccessful applicants and their parents are likely to be happy.

[10] Such is the problem that specialist statutory tribunals have been established supplemented, where justified, by recourse to judicial review. The court understands that the last place schools want to be is embroiled in distracting, costly, public legal proceedings which also have the capacity to be divisive. Nor can it be forgotten (and I am not for one moment suggesting it has) that at the heart of the dispute is a child and a family with educational and religious aspirations.

[11] The role of the court in such proceedings is necessarily limited but since I have come to the firm view that the applicant must succeed on the least contentious ground I thought it right to say so as soon as possible. The remaining issues as to the alleged irrationality and conspicuous unfairness of the impugned criteria are much more complex. Since I have found that the respondent's school *wrongly* thought that it had applied the departmental criteria I know not what the attitude of the school will be when they revisit the matter (and revisit they must) and reach a decision having had proper regard to the departmental guidance and as to whether or not they propose to follow it.

[12] The departmental guidance also makes it clear what is expected of governors in relation to their obligation to have regard to the guidance. It states "In practical terms this duty for a post primary school board of governors means that in drawing up admissions criteria … they should give *active and receptive* consideration to the guidance's recommendations on admissions criteria and *record* this consideration". The school governors *may* upon reconsideration and having had *proper* regard to the guidance come to the same or a different conclusion. If they decide to depart from some or all of the guidance they ought to make a record of their reconsideration and response including importantly (if it be so) any reason for departing from the guidance. *If* the governors choose to comply with the guidance in the sense of adopting and applying the relevant criteria it will not be necessary to rule on the remaining issues. No doubt in considering their approach the respondent might well be influenced by everything they have read and heard in these proceedings. If on the other hand having had proper regard to the guidance they choose not to follow it the exposure of their consideration and reasoning might be material to the court's consideration of the presently unresolved matters.

[13] Article 16(b) of the Education Order (Northern Ireland) 1997 as amended by Article 30 of the Education Order (Northern Ireland) 2006 provides as follows:

> **(1) The department may issue and from time to time revise such guidance as it thinks appropriate in respect of the arrangements for the admission of pupils to grant aided schools and the discharge by one boards of governors of grant aided schools appeal tribunals constituted in accordance with regulations under article 15(8) and the body established by regulations under article 16(a)(6) of their respective functions under this part.**
>
> **(2) The guidance may in particular set out aims, objectives and other matters in relation to the discharge of those functions.**
>
> **(3) It shall be the duty of each of the bodies mentioned in paragraph (1) and any other person exercising any function for the purposes of the discharge by such body of functions under this part to have regard to any relevant guidance for the time being in force under this article.**

[14] What does have regard in the article 16(b) context mean? Well the guidance itself contains a passage which was not challenged by either of the parties and appears to have been accepted by them as an accurate statement of what the article 16(b) duty requires and it states as follows:

> **"Boards of governors and others addressed by this guidance should understand that the duty to have regard to this guidance is a legal one. In practical terms this duty for a post primary schools board of governors means that in drawing up admissions criteria for the 2010/2011 school year they should give active and receptive consideration to the**

guidance's recommendations on admissions criteria and record this consideration."

[15] Paragraph 17 of the guidance which deals with the aims and objectives of the admissions process states:

> **"As stated in the summary at the start of this guidance and in accordance with its power in respect of this guidance the department considers the aims and objectives of the arrangements for the admissions of pupils to post primary schools to be that admissions decisions are *fair* and give each child the opportunity to reach his or her full potential. That the overall arrangements for transfer and within that the respective roles of the department, DLBs/ESA primary school and post primary schools boards of governors are clear and understood and that post primary schools boards of governors achieve robust and accurate admissions decisions."**

[16] Paragraph 18 which deals with the menu of recommended admissions criteria states that in respect of these objectives and for the admission of all children of compulsory school age the department recommends that boards of governors of post primary schools draw up their admissions criteria from the following menu of recommended criteria (all schools are obliged to have regard to these recommendations).

[17] In particular amongst those recommended criteria there is a paragraph which deals with what I may call the feeder criteria which is entitled 'Feeder/named primary school' and it states:

> **"This criterion is to be defined as "children who attend a named primary school which a Board of Governors chooses to give priority". Post-primary schools should not give a higher level of priority to one primary school than is given to a primary school of the same sector and that is geographically closer to the post-primary school. In general this criterion should be used to prioritise children attending post primary schools local primary schools. The department may intervene where it considers that this criterion may be used in a manner that disregards these specific points."**

[18] The next criterion which I call 'the Parish criteria' states as follows:

> **"This criterion to be defined as "children who reside in a named Parish". For the purpose of this**

> **criterion a Parish is a geographical area. Applicants will qualify for a Parish criterion by residing within the geographical area of the Parish and regardless of whether they are of a particular religious background."**

[19] The applicant's submitted that the effect of this guidance is to make clear what is expected of governors in setting the admissions criteria – first, that in using a feeder Parish criterion the Parish should simply be treated as a geographical area and applicants should qualify for priority simply on the basis of residing within the Parish; secondly, in using a feeder primary school criterion applicants should qualify for priority simply on the basis of attending the school and thirdly (and expressly) that post primary schools should not give a higher level of priority to one primary school than is given to a primary school of the same sector that is geographically closer to the post primary school.

[20] The applicant contended that the governors of St Pauls had in a number of respects done precisely what the guidance advises against. They submitted that there were a number of respects in which the criteria did so but that the most obvious was in bypassing one primary school to give priority to other primary schools of the same sector which are much further away.

[21] Mr Lockhart QC (for the school) accepted, as was clear, that the impugned criteria adopted by St Pauls *were* contrary to the departmental advice and specifically the feeder and Parish criteria which I have set out above. He emphasised the non binding nature of the "have regard" to duty – that much, of course, is not in dispute. The problem from which I see no escape is that at paragraph 11 of his first affidavit Mr Mooney, the principal of St Pauls, stated as follows:

> **"It is not accepted that the criteria adopted by St Pauls, Bessbrook is in any way discriminatory or contrary to departmental advice."**

[22] Subsequent to the applicant's skeleton argument which reacted to this evidential development by setting forth the proposed new ground Mr Mooney swore a second affidavit, paragraph 17 of which was relied upon:

> **"For clarification I wish to confirm that I personally advised the board of governors in relation to transfer 2010 as issued by the Department of Education. The board of governors had due regard to the contents of transfer 2010 and considered that it was not appropriate to prioritise admissions using the entitlement of applicants to free school meals . . ."**

And he then goes on to give the reason for that. But that passage does not rescue the identified infirmities not least because it does not bear on the school's *feeder* and *Parish* criteria which are contrary to the departmental advice.

[23] Paragraph 17 betrays an acknowledgement *only* of having departed from the guidance in respect of the free schools meal criteria (which are not currently in issue in these proceedings). Accordingly in my view the respondent did not have proper regard to the departmental guidance and erred in approaching the impugned criteria on the basis that they were not contrary to that guidance. It was not disputed if I so found that I should make a quashing order if I so found. In the circumstances the appropriate order is to quash the refusal to admit but not the impugned criteria and I so order.