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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

<i>Delivered:</i>	08/05/00
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

**IN THE MATTER OF AN APPLICATION BY GRAINNE MARTIN FOR JUDICIAL
REVIEW**

KERR J

Introduction

This is an application by Grainne Martin, the mother of Sorcha Martin, for judicial review of a decision made by the North Eastern Education and Library Board and the Department of Education for Northern Ireland that they do not have power to permit Sorcha to travel to her school on a bus provided for the transport of children to another school nearby.

Background

Sorcha is now six years old. She attends the Bunscoil Dhal Riada in Dunloy. In the Bunscoil children are taught through the medium of the Irish language. The school is approximately one mile from the Martin home. Every morning a bus which transports children to another school, St Joseph's, passes Mrs Martin's house. It travels past the Bunscoil on its way to St Joseph's. Mrs

Martin made inquiries about having Sorchá use the bus but was informed that school transport could only be provided for children attending grant aided schools. The Bunscoil is not such a school and it has been determined, therefore, that Sorchá is not eligible.

Mrs Martin is obliged to walk with Sorchá to the Bunscoil each morning, therefore, and to collect her every afternoon. Sorchá is too young to travel on public transport unaccompanied and Mrs Martin (who is a single parent) does not have a car. This trip to and from Sorchá's school is particularly difficult for Mrs Martin because her other two younger children, aged two and one respectively, must accompany her on both round trips as they cannot be left at home. Also, the road along which they must walk is a particularly busy one.

The decision

The decision that Sorchá could not use the bus was prompted by the respondents' interpretation of Article 52 of the Education and Libraries (Northern Ireland) Order 1986, as substituted by Article 23 of the Education (Northern Ireland) Order 1997. This provides :-

"Provision of transport for, and payment of travelling expenses of, certain pupils

52 - (1) A board shall make such arrangements for the provision of transport and otherwise as it considers necessary or as the Department [of Education] may direct for the purpose of facilitating -

(a) the attendance of pupils at grant-aided schools; and

(b) the attendance of relevant pupils at institutions of further education;

and transport provided under such arrangements shall be provided free of charge.

(2) Arrangements made by a board under paragraph (1) (other than arrangements made in pursuance of a direction of the Department) shall be subject to the approval of the Department.

(3) A board may, in accordance with arrangements approved by the Department, provide transport for, or pay for the whole or part of the reasonable travelling expenses of -

(a) pupils attending grant-aided schools; and

(b) relevant pupils attending institutions of further education,

for whom the board is not required to make provision under arrangements under paragraph (1)

(4) In paragraphs (1) and (3) "relevant pupils" means pupils of a class or description specified by the Department for the purposes of this Article.

(5) Any arrangements under paragraph (3) shall include provision -

(a) for the board to make charges (payable by the parents of the pupils concerned) in respect of transport provided under that paragraph; and

(b) as to the cases in which, and the extent to which, such charges are to be remitted by the board.

(6) With a view to assisting in the prevention of accidents, a board may carry into effect such measures as may be set out in a scheme framed by the board and approved by the Department."

Inquiries about the effect of this provision have been made of both the Board and the Department of Education by representatives of the Bunscoil on behalf of parents. These included a letter dated 12 February 1998 from Mrs M A Gaston to Mr W R Armstrong of the Department. In her letter, Mrs Gaston referred to a telephone conversation in which, according to Mrs Gaston, Mr Armstrong had suggested that NEE&LB would have a discretion to allow a child attending an independent school to travel on school transport if there were seats available, subject to the payment of "a concessionary fare". Mr Armstrong replied on 19 February 1998. The material part of his letter is as follows :-

" As I explained during our recent telephone conversation, the provision of transport assistance provided by education and library boards is governed by Article 52 of the Education and Libraries (NI) Order 1986 (as amended). This requires boards, with the approval of the Department, to make such arrangements as they consider necessary to facilitate the attendance of pupils at **grant-aided** schools and certain pupils at institutions of further education.

Independent schools operate outside the grant-aided sector and receive no financial assistance from the Department or education and library boards. Parents of pupils attending such schools should be aware that they will be required to contribute

towards the cost of their children's education, including making the necessary arrangements for home to school transport.

You have mentioned in your letter the issue of concessionary travel. The consideration of concessionary travel assistance rests with the education and library boards and you should contact the Transport Officer, North-Eastern Education and Library Board, ... to ascertain whether the board can facilitate the child concerned."

Mrs Gaston then wrote to Mr William Henry, the transport officer of NEE&LB, about concessionary fares but was informed, in a letter from him dated 19 March 1998, that the board could not undertake responsibility for providing transport for children attending the Bunscoil until "such time as it is granted maintained status".

Mrs Gaston, after contacting the Ombudsman, then turned her attention to the Chief Executive of NEE&LB, Mr G Topping writing to him for assistance on 24 March 1998, pointing out that the bus to the grant-aided St Joseph's passed the child's home and that she had ascertained that there was spare capacity on the bus. Mr D Cargo, the Chief Administrative Officer, replied on 30 March 1998. He said :-

" At present the North Eastern Board does not have any mechanism for applying charges for pupils receiving concessionary travel, which incidentally, is usually limited to children attending their nearest grant-aided school. There are no plans at the moment to change the Board's policy to implement charges for concessionary travel, because of the operational problems involved, and the financial cost of administration which is likely to exceed the income from such a scheme."

Clearly, therefore, Mr Cargo believed that the Board had *power* to allow pupils at non grant-aided schools to use transport provided by the Board under the 1986 Order. The only reasons given for not implementing such a scheme were logistical.

Mrs Gaston then renewed her contact with the Ombudsman. She was informed that, for the Commissioner for Complaints to undertake an investigation, it was necessary for the person affected to make a complaint and Mrs Martin duly wrote to the Ombudsman on 4 September 1998. On 9 September 1998 Mr Bobby Doherty, a director in the office of the Ombudsman wrote to Mrs Martin, giving his opinion that the Board did not have authority to assist pupils attending schools

which do not have grant maintained status. Further correspondence from Mr Doherty to the applicant's solicitor reiterated his view that the Board did not have the power to assist pupils who attended a school which was not grant-aided.

On 11 February 1999 Ms E Scott of the Bunscoil wrote to the Chief Executive of the Board, Mr Topping, referring to a meeting which had been held between officers of the Board and representatives of the Bunscoil. Ms Scott asserted that Article 52 of the Order merely imposed a "bare statutory minimum requirement" and that there was nothing to prevent the Board from acting to provide school transport to non grant-aided pupils on an extra-statutory basis. At the meeting the Board's officers had, apparently, said that they would require to take the Department's advice on the matter and Ms Scott inquired as to the outcome of the Board's discussions with the Department.

On the same date, *i.e.* 11 February 1999, Mr Henry, the Board's transport officer, had written to Mr Armstrong of the Department and he replied on 22 February 1999. In his letter to Mr Henry, Mr Armstrong said :-

" As you know Article 52 of the Education and Libraries (NI) Order 1986 requires Education and Library Boards, with the approval of the Department, to make such arrangements as they consider necessary to facilitate the attendance of pupils at grant-aided schools. This is not, as Scott [presumably a reference to Ms Scott] maintains, a matter for interpretation but one of fact and it would not be for the Board to extend the provision to include non-grant-aided schools. That is a matter for the legislature. As the provision of transport assistance for pupils has, since the 1944 and 1947 Acts, excluded both here and on the mainland those enrolled at non-grant-maintained establishments it is unlikely that Parliament would extend that provision now.

As to the issue of concessionary travel on Board vehicles and as indicated in my response to Mrs Gaston and as particularised in paragraph 7 of the Transport Circular itself 'it is for the Board to determine which pupils should be given such concessions'. The Department has asked the Association of Chief Administrative Officers to look at the policy for concessionary seats, and the question of charging. I realise this raises a number of difficult issues but it is one that the Boards will have to grasp especially if a decision to charge for post-16 transport is taken."

Mr Armstrong appeared in this letter, therefore, to have accepted that it would be open to the Board to institute an extra statutory scheme for concessionary travel on vehicles provided by the Board for

non grant-aided pupils. Mr R D Harper, now the Chief Administrative Officer of the Board, wrote accordingly to Ms Scott and enclosed a copy of Mr Armstrong's letter.

The applicant's solicitor wrote to the Department of Education on 24 March 1999 challenging the Department's interpretation of Article 52. Mr Armstrong replied on 13 April 1999, defending the Department's position on Article 52. In relation to concessionary travel, he said this :-

" It is axiomatic that it is in the interests of all that children attend schools at which they are enrolled. When it comes to the question of those children who are ineligible under the arrangements, the Department has indicated to boards that where a board supplies its own transport and seats are available after the requirements of all eligible pupils have been met it may offer seats to ineligible pupils on a concessionary basis. It is for the board to determine which pupils should be given such concessions and that issue is currently being addressed by the Association of Chief Administrative Officers."

Again, therefore, Mr Armstrong accepted that the Boards could decide to provide ineligible pupils (*i.e.* ineligible under the legislation) with concessionary fares and that it *was for the Board to decide* which pupils might benefit from such a scheme. It is clearly implicit in this letter that pupils at the Bunscoil might be included.

On 22 June 1999, Tara Caul, a solicitor with the Children's Law Centre, wrote to Mr Nigel Hamilton, the Permanent Secretary of the Department of Education, on behalf of the applicant. She made further representations about the interpretation of Article 52. Mr Hamilton replied on 19 July 1999. In this letter he said that "the issue of concessionary seats on transport provided by Education and Library Boards is a matter for the Boards to decide". Ms Caul replied to Mr Hamilton's letter on 28 July 1999; she asked him to confirm that children at Bunscoil Dhal Riada "would at least be eligible for consideration for concessionary travel". In his response of 17 August 1999 Mr Hamilton signalled for the first time that pupils at the Bunscoil would not be eligible even for concessionary seats. The material part of the letter is as follows :-

" The provision of concessionary seats by education and library boards is governed by Article 52(3) of the Education and Libraries (NI) Order 1986 as substituted by Article 23 of the Education (NI) Order 1997. Article 52(3) enables boards, with the

approval of the department, to provide transport for, or pay the whole or part of the reasonable travelling expenses of pupils attending grant-aided schools for whom the board is not required to make provision under Article 52(1). Article 52(5) provides for boards to make charges for such transport and for the remission of charges in certain circumstances.

Article 52(3) therefore enables a board to provide transport where it is not considered necessary to facilitate the attendance of pupils at grant-aided schools, for example, on a concessionary basis to pupils who live within statutory walking distance of the school attended and where there are seats available on board transport. It does not, however, confer a duty on, or power for, the board to provide transport to an independent school. In these circumstances the North Eastern Board could not provide concessionary assistance for pupils to attend Bunscoil Dhal Riada.

I am sorry if my letter of 19 July did not make this entirely clear, but I trust that this will clarify the position for you."

This letter appears to me to represent a retreat from the Department's previously stated position. Both in Mr Armstrong's letter of 13 April 1999 and Mr Hamilton's of 19 July 1999 the clear impression is created that pupils at the Bunscoil might benefit from the concessionary scheme which was under consideration by the Association of Chief Administrative Officers.

On 21 April 1999 the applicant's solicitor had written to Mr Armstrong in response to the letter of 13 April. This letter re-visited the interpretation of Article 52 and did not directly address the question of concessionary fares. It does not appear to have received a reply until Mr Armstrong wrote on 26 August 1999. The material part of that letter is as follows :-

"... Article 52 of the Education and Libraries (NI) Order 1986, as substituted by Article 23 of the Education (NI) Order 1997, governs the provision of transport for and payment of travelling expenses to pupils. Article 52(1) confines that assistance to pupils attending grant-aided schools or institutions of further education. The provision of concessionary seats by education and library boards is governed by Article 52(3) which enables boards, with the approval of the Department, to provide transport for, or pay the whole or part of the reasonable travelling expenses of pupils attending grant-aided schools for whom the board is not required to make provision under Article 52(1). Article 52(5) provides for boards to make charges for such transport and for the remission of charges in certain circumstances.

Article 52(3) therefore enables a board to provide transport for pupils at grant-aided schools where it is not considered necessary, for example, on a concessionary basis to pupils who live within statutory walking distance of the school attended and where there are seats available on board transport. It does not, however, confer a

duty on, or power for, the board to provide transport to an independent school. The North Eastern Board could not therefore provide concessionary assistance for pupils to attend Bunscoil Dhal Riada."

Again, this appears to me to be a retreat from Mr Armstrong's previously stated position, particularly in the letter of 13 April 1999. In any event, there can now be no doubt that both the Department and the Board have now firmly espoused the position that, under the legislation, it is impossible for the Board to offer Sorchá a seat on the bus which passes both her home and her school every day, even on a concessionary basis. Mark Browne, head of the School Funding and Administration Division of the Department of Education and Samuel McDowell, the transport officer of the Board have so deposed in affidavits filed on behalf of the respondents.

The applicant's case

For the applicant, Mr Treacy argued that the Board had the power to allow Sorchá to travel on the bus because what was sought for her was access to transport which had already been provided, rather than the provision of transport for her, a non grant-aided pupil. Secondly, he argued that Article 52 must be interpreted in a manner which made it consistent with such provisions as Article 89 of the Education Act (Northern Ireland) Order 1988 (which imposes a duty on education authorities to encourage and facilitate the development of education through Irish) and Article 44 of the 1986 Order (which requires the Department and education and library boards to have regard to the wishes of their parents in relation to the education of children).

Mr Treacy further argued that it would be manifestly and unacceptably absurd if another of Mrs Martin's children were to attend St Joseph's and thereby become entitled to use the school bus while Sorchá was denied access to it. He referred to Bennion on Statutory Interpretation Third Edition, Section 265 which states :-

"It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator

intended to observe this principle. The court should therefore strive to avoid a construction which leads to injustice."

He also referred to the speech of Lord Reid in *Coutts & Co v IRC* [1953] AC 267, 281 where he said :-

"In general, if it is alleged that a statutory provision brings about a result which is so startling one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results."

Mr Treacy suggested that it would be undeniably unjust and plainly inequitable that SORCHA should be refused a place on a bus which passed her door every morning and on which spare seats were available.

The respondents' case

For the respondents Mr McCloskey submitted that the scheme of the 1986 Order was that transport arrangements for educational purposes were to be provided by education and library boards either on direction from the Department or with its approval. Travelling expenses incurred to attend grant-aided schools or colleges of further education were to be paid by the boards, again with the approval of the Department. He accepted that under Article 52(2) of the 1986 Order, as originally enacted, the boards had a discretion to allocate vacant places in school transport vehicles but suggested that this discretion had been removed by the substituted Article 52. In any event, he claimed, the discretion could not have been exercised in favour of SORCHA as she did not come within the definition of "pupil" contained in the 1986 Order.

He suggested that allowing SORCHA access to the bus inevitably involved providing her with transport and, in this context, referred to the judgment of Lord Hewart CJ in *Spillers v Cardiff Borough Assessment Committee* [1931] 2 KB 21, 43 where he said :-

"It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and in exactly. Upon those who assert that that rule has been broken the burden lies heavily. And

they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred."

Mr McCloskey also argued that Article 52 (as substituted) prescribed a comprehensive code for the provision of free school transport or, alternatively, the payment of pupils' travelling expenses. It prescribed exhaustively the powers and duties of the two educational agencies *viz* the Department and the boards. The intention of Parliament was clear that the provision of free transport or alternatively the payment of school travelling expenses should be confined to pupils who attended grant-aided schools or colleges of further education.

Who is a 'pupil'?

Article 2 (2) of the 1986 Order defines 'pupil' as "a person of any age for whom education is provided under this Order". Article 5 describes the stages and purposes of the statutory system of education. Article 6 imposes on boards of education the duty to secure the provision of primary and secondary education in their areas. It is clear that an independent school such as the Bunscoil does not come within these provisions. The applicant did not seek to argue otherwise. It follows that anyone who attends an independent school such as the Bunscoil is not a pupil within the meaning of Article 2 (2) of the Order since they are not being provided with education under the 1986 Order.

May a child who is not a pupil use school transport?

The terms of Article 52 (as substituted) are, in my opinion, unmistakable in confining the mandatory *provision* of school transport by boards to pupils who attend grant-aided schools or colleges of further education -(Article 52 (1)). Equally, the discretionary *provision* of school transport for those for whom the board is not required to provide transport under Article 52 (1) is restricted to the same categories of pupil. Neither the boards nor the Department may *provide* transport for students who do not fall within either category, therefore.

In this respect, the new Article 52 is - at least theoretically - more restrictive than its predecessor. As originally enacted, a board had a discretion to allocate places to pupils which it could select

where there were vacant places on transport provided under Article 52(1). Even under this provision, however, Sorchá would not qualify since she is not a pupil for the purposes of the Order.

Attractive though Mr Treacy's argument was as a means of overcoming the difficulty which Mrs Martin faces, I cannot accept that to allow Sorchá access to the bus would be other than to provide her with transport and this is clearly forbidden by the Order. I have concluded, therefore, that the Board and the Department do not have power to allow her to use the bus. I accept the argument of the respondents that Article 52 is designed to provide a comprehensive code for the provision of free or subsidised school transport. The Board does not have powers beyond those conferred by the Order although it is clear that both Mr Armstrong and Mr Hamilton believed at one stage that the Board had a residual discretion to allocate spare places on school transport to pupils at independent schools. I am satisfied that, on its correct interpretation, the Order does not permit this.

Absurd result?

Although the construction which I consider must be placed on the legislation may appear to be unjust to Sorchá, it does not follow that the effect of this interpretation must be regarded as anomalous. The particular circumstances of her case may make it appear so but the conscious decision of the legislature to confine the availability of free or subsidised transport facilities to pupils who attended grant-aided schools is not illogical. In any event, what has been described as the "anomalies argument" has a very limited - indeed, exceptional - place in the jurisprudence of statutory interpretation. In *Stock v Jones* [1978] 1 All ER 948, 955 Lord Scarman said of this argument :-

" Counsel for the appellants sought to give the words a meaning other than their plain meaning by drawing attention to what he called the anomalies which would result from giving effect to the words used by Parliament. If the words used be plain this is, I think, an illegitimate method of statutory interpretation unless it can be demonstrated that the anomalies are such that they produce an absurdity which Parliament could not have intended, or destroy the remedy established by Parliament to deal with the mischief which the Act is designed to combat."

A similar approach was taken by Lord Diplock in *Wentworth Securities v Jones* [1980] AC 74, 105/6.

I cannot accept that Parliament must be taken not to have intended that the availability of free or subsidised transport should be confined to those who were attending either grant-aided schools or colleges of further education. I do not consider that the 1986 Order should be given an interpretation other than that which follows its plain and natural meaning. As I have held, that meaning is that the provision of free or subsidised school transport may only be provided to those pupils who have been specified in the Order.

Article 89 of the 1998 Order and Article 44 of the 1986 Order

It was accepted by Mr Treacy that Article 52 of the 1986 Order was not revoked or repealed by Article 89 of the 1998 Order. I think that this was a prudent concession. As Mr McCloskey put it, having regard to the statutory antecedents of Article 52, it is beyond argument that if Parliament, in enacting Article 89 of the 1998 Order, had intended to modify Article 52, it would have done so in unambiguous statutory language. The failure to do so cannot be regarded as inadvertent and it is perfectly possible for Article 89 of the 1998 Order to co-exist peacefully with Article 52.

Article 44 of the 1986 Order enjoins the Department and the boards to "have regard to the general principle that, so far as is compatible with the provision of efficient and training and the avoidance of unreasonable public expenditure, pupils shall be educated in accordance with the wishes of their parents". This duty arises in the context of "the exercise and performance of all powers and duties conferred or imposed [on the Department and the boards]" *under the 1986 Order*. Neither the Department nor the Board was exercising powers or performing duties under the Order in relation to the denial of school transport to Sorcha.

Conclusions

The applicant has failed to establish that her daughter is entitled to be provided with school transport or that the Department or the Board has power to allow her access to the transport

provided to other children in the area. Her application for judicial review must be dismissed, therefore. It appears to me, however, that the effect of the legislation may well be in breach of the applicant's rights under the European Convention on Human Rights and Fundamental Freedoms. The applicant may not have recourse to these in the domestic courts as a means by which to challenge the validity of the legislation before the coming into force of the Human Rights Act 1998. The Department may consider it prudent, however, to examine this aspect of the matter in advance of the incorporation of the Convention.

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