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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 JOANNE McKENNA AND CLARE BRENNAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE BOARD OF GOVERNORS OF MOUNT LOURDES GRAMMAR SCHOOL FOR GIRLS, ENNISKILLEN

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Mrs McKenna appeared as a litigant-in-person on behalf of both applicants
Mr McQuitty BL (instructed by Murphy O'Rawe, Solicitors) appeared for the first proposed respondent, Mount Lourdes Grammar School
Mr McAteer BL (instructed by the Departmental Solicitor's Office) appeared for the second proposed respondent, the Department of Education
Ms McCartan BL (instructed by the Education Authority Solicitors) appeared for the third proposed respondent, the Schools Admissions Appeal Tribunal

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SCOFFIELD J

Introduction

[1] This is an application for leave to apply for judicial review which, at its heart, challenges the legality of several admission criteria adopted by the Board of Governors ("the Board") of Mount Lourdes Grammar School for Girls in Enniskillen ("the School"). It arises from the fact that the applicants' respective daughters, Ellie and Maria, did not gain admission to the School in the 2021/22 academic year.

[2] The procedural history of the proceedings is a little complex and is summarised briefly below. At the recent leave hearing however, there were three key issues to be considered: the merits of the application; delay; and whether the proceedings would serve any useful purpose at this stage.

[3] Mrs McKenna appeared as a litigant-in-person on behalf of both applicants (assisted by a McKenzie friend, Mr Robinson). Mr McQuitty appeared for the Board

of Governors of the School, the primary proposed respondent. At a late stage of the proceedings, the applicants added the Department of Education for Northern Ireland ("the Department") and the Admissions Appeal Tribunal ("the Tribunal") to their Order 53 statement as additional proposed respondents, for whom Mr McAteer and Ms McCartan appeared respectively. I am grateful to all concerned for their succinct submissions.

Factual Background

[4] The applicants' daughters have both hoped for some time to attend Mount Lourdes Grammar School. To this end, during their primary school education, they were working towards sitting the GL test set by the Post Primary Transfer Consortium (PPTC) as an academically selective test used by, inter alia, Mount Lourdes in its admissions decisions.

[5] However, on 5 June 2020 a statement from the School was issued confirming that it would not use outcomes from the GL entrance assessment as part of its admissions criteria for the 2021/22 academic year and would temporarily amend its admissions criteria accordingly. That was because of concerns about whether the test would be capable of being held due to the Covid-19 pandemic, or whether children would be disadvantaged in sitting the test in light of school absences due to Covid lock-downs. Nonetheless, in the statement the Board advised that those who would normally apply to be admitted to the school were still encouraged to do so.

[6] The School's proposed admissions criteria were discussed by the Board of Governors at a meeting on 1 October 2020 (before the statement referred to above was issued); and then further discussed at a meeting on 3 December 2020, before being finalised.

[7] On 2 February 2021 the School's admissions criteria (discussed further below) were published; and in March of that year parents completed transfer applications on behalf of their children. The applicants each applied for admission to Mount Lourdes on behalf of their daughters. On 12 June 2021 parents were able to access the outcome of their child's application via the online portal and both of the girls with whom these proceedings are concerned received notification that their application for admission to the School had been unsuccessful.

[8] Both girls availed of the statutory appeals system and their appeals against the School's admission decisions in their cases were heard by the Tribunal on 4 August 2021. On 13 August 2021, letters were received from the Tribunal dismissing the respective appeals. The Tribunal found that the admissions criteria had been applied, and properly applied, by the School. That decision was issued on 4 August 2021. On 18 August, a letter of complaint under paragraph 10 of Schedule 9 to the Northern Ireland Act 1998 (NIA) was sent to the Department alleging breach of its obligations under section 75 of that Act. The Department replied on 13 September 2021 denying that it had acted in any way wrongly or unlawfully.

Pre-action correspondence to the School was sent on 22 September 2021 and replied to by the School's solicitors on 20 October 2021.

[9] Turning back to the School's admissions exercise, there were 126 applicants for 96 places at the School. 28 applicants were admitted under criterion 1.1 because they had another girl of the family currently enrolled in the School (or selected for admission to the school in that coming school year). There were 84 applicants who were the first girl in their family to transfer to secondary education and who therefore met criterion 1.2, at which point the School was oversubscribed and applied its criterion 1.3 as between those 84 applicants for the remaining 68 places. That involved admitting the eldest girls first. The youngest girl admitted through the application of criterion 1.3 was born on 8 April 2010.

[10] In Maria's case, she has a sister who is 10 years older than her and she was not therefore the eldest child transferred post-primary school. That was the decisive factor in the decision that she should not be admitted, although even if she had had criteria 1.3 applied to her she would not have secured admission since her birthday was 15 April 2010. At the time of her admissions appeal, she was ranked 29 on the school's waiting list. Maria is said to have been "top of her class" in primary school and a very capable pupil who would ordinarily have expected to have secured a place at Mount Lourdes if the usual academically selective criteria had been applied. She was said to be devastated at not being admitted. A letter from her primary school principal indicated that he and her class teacher also considered that she would have achieved the grade required (had the transfer test been held) to secure admission to the School; and that Maria was extremely disappointed because all of her close friends had been admitted to Mount Lourdes.

[11] In Ellie's case, she was the eldest child in the family but did not secure admission based on her age (since her birthday was 15 June 2010). Her mother is concerned that this will now potentially operate to the disadvantage of Ellie's two younger sisters who would like to attend the School but will not have an older sister already attending when they come to apply. She attended a different primary school to Maria but her primary school principal also provided a letter in support shortly after Ellie learned of the admission decision. He spoke of her in the warmest possible terms, mentioning amongst other things that Ellie had been nominated as the primary school's Head Girl. In the opinion of the principal and her class teacher, she was capable of achieving high standards in all areas of post-primary education and she was an above average pupil. Ellie's three very close friends from playschool up to Primary 7 attained admission to Mount Lourdes, since they each had sisters attending the school already. She too was devastated at the news she had not secured admission; and she was 16th on the waiting list for the School.

The Proceedings

[12] These proceedings were initially issued on 29 October 2021 in the name of the two children, Ellie and Maria. Neither was, or was purporting to be, acting by a next

friend at that time. There was an application, however, that a Mr Gordon Robinson (who had drafted the application and provided a supporting affidavit) be permitted to represent them in the proceedings and be granted a right of audience (and, essentially, a right to conduct litigation) for that purpose.

[13] The court was concerned that the application had not been properly brought under RCJ Order 80, rule 2(1), since it was made in the name of the minor applicants, each of whom is a party under a disability (in the sense of not being capable of conducting litigation on their own behalf) but *not* made through an appropriate adult acting as their next friend. Although the applicants' parents had provided supporting affidavits, they had no formal role in the proceedings at that point. Further, even if a next friend had been appointed, pursuant to Order 80, rule 2(3), they must act by a solicitor rather than in person; and no solicitor had been instructed in respect of the proceedings. The application for leave to apply for judicial review was therefore stayed pending these issues being addressed. That took some time.

[14] Mr Robinson had sought an exercise of the court's discretionary jurisdiction to confer a right of audience upon him, notwithstanding that he was not a party to the proceedings. That did not initially arise because the proceedings were stayed for the reasons set out above. In any event, I was not minded to grant the application for the following reasons:

(a) Order 80, rule 2(1) plainly envisages that a child should act by way of a next friend, who must instruct a solicitor. This is to ensure that the minor receives appropriate advice and has their interests protected – including by being represented by someone with appropriate qualifications and training, subject to relevant professional obligations and duties to the court, and with a current policy of professional indemnity insurance – given the risks (such as the risk of an adverse costs order) inherent in the bringing of proceedings. The course proposed by Mr Robinson would have circumvented these protections.

(b) Although Mr Robinson has some degree of legal qualifications, he is not a practising solicitor or barrister. The grant of a right of audience or right to conduct litigation to such a person on behalf of another will rarely be appropriate. There was nothing exceptional in this case which would justify a departure from the usual approach of declining to permit this. This was so even accepting (as I do) that Mr Robinson was acting bona fide and with no selfish interest in the case.

[15] The current applicants subsequently indicated an intention to act as the next friends of their respective children; but that did not resolve the question of non-compliance with Order 80, rule 2(1), since it was still proposed that they would act without a solicitor. Eventually, therefore, an application was made that the applicants be named themselves as the moving parties in these proceedings; and I permitted an amendment to be made to that effect and accepted that each of the

mothers has standing to bring the application in relation to decisions concerning their child's school admission. The stay was lifted and a detailed case management hearing was held on 28 April 2022, which morphed into a part-heard leave hearing. A further leave hearing was held on 17 May 2022, before which the applicants were afforded a further opportunity to (with Mr Robinson's assistance) amend their Order 53 statement and provide further submissions and evidence, to which the School then responded.

[16] Initially, no relief at all was sought against the Tribunal or the Department. In a revised Order 53 statement of 5 May 2022, the Department and the Tribunal were added as proposed respondents but with no formal relief against them specified, nor any substantive grounds of challenge against them particularised. I understand this to have been prompted by the discussion at the hearing on 28 April as to how, if at all, the applicants' daughters could seek to secure admission to the School even if the court was ultimately persuaded that any of their grounds were made out.

The Applicants' Case

[17] The grounds of challenge relied upon are those of illegality and irrationality. The core arguments underpinning the grounds are (i) that certain terms within the School's admission criteria required to be, but were not, properly defined ("girl of the family" and "girl in the family"); (ii) that criteria giving priority to applicants on the basis of familial connections were used, contrary to the advice contained in Departmental guidance, to which the Board of Governors was required to have regard; (iii) that there was in any event a failure to properly apply the criteria in turn; and (iv) that the use of date of birth as a criterion was irrational and/or discriminatory on the basis of age. On a variety of these bases, the applicants seek declarations that criteria 1.1 and 1.3 which were used by the School were unlawful, of no force or effect, and ought not to have been applied by the School.

The Merits

[18] The first ground of challenge is that the Board of Governors of the School did not comply with their legal duty, set out in Article 16B of the Education (Northern Ireland) Order 1997, to "have regard to" the Department of Education's guidance on school admissions processes. I examined this obligation in *Re OV's (a minor's) Application* [2021] NIQB 78, at paras [44]-[54]. In order to withstand a challenge on this ground, a school's Board of Governors will generally have to show that they considered the guidance, understood it, consciously engaged with it and, where they departed from it, did so for rational reasons.

[19] Although the first proposed respondent has not yet filed any evidence in this case, since leave has not yet been granted, the School has recently provided a detailed response to the applicants' challenge, including further information as to the process by which the impugned criteria were adopted. This includes extracts from the minutes of relevant Board meetings; and information provided by way of

direct instruction from the school's principal, Mrs Cullen (with an offer that this could be put on affidavit should the court consider that necessary or desirable). In particular, I have been provided with details of the express consideration of the relevant Departmental guidance at the Board meeting of 3 December 2020, at which it was specifically minuted that due regard had been given to the Departmental guidance in Circular 2016/15, as revised and updated on 21 October 2020. Legal advice which had been sought and received was also discussed at that meeting. Mr McQuitty has made the point that, although the School did not run with all that the Department recommended, it did not adopt any criterion which the Department advised against.

[20] I am satisfied on the basis of the material provided that the School did conscientiously engage with the Departmental guidance and, in departing from it (where it did so), did so consciously and for reasons which it felt to be valid and which could not be condemned as irrational, particularly in the highly unusual circumstances of this transfer process where academically selective schools were deprived of the normal transfer test procedures on which they usually rely as a result of meeting the exigencies of the pandemic. In short, the reasons offered were a desire to maintain consistency, as far as possible, with sub-criteria which had been used by the School in normal years (including keeping families together by means of the sibling criterion); and a desire not to use geographic criteria which would interfere with the School's usual wide catchment area and/or may have a disproportionate effect on those from a non-Catholic background who may wish to attend the school. I do not consider the first ground has any reasonable prospect of success.

[21] The applicants complain about criterion 1.1 of the school's criteria, which is in the following terms:

> "Applicants who at the date of their application have another girl of the family (as defined by the Department of Education) currently enrolled in the school or have a girl of the family selected for admission to the school in the coming school year."

They contend that this criterion is void for uncertainty and/or that the School unlawfully delegated to the Department the capacity to define the key phrase.

[22] I accept the School's submission that the challenge to this criterion is also one which has no realistic prospect of success. Although not specifically mentioned, it is in my view clear that the criterion is referring back to the Departmental guidance on the transfer process, which contains a detailed recommended definition of who should be treated as a child "of the family" for school admissions purposes. That definition, rather than being unclear, is designed to bring clarity and certainty to what might otherwise be a complex concept given the increasing variability in modern family structures. There is nothing wrong in principle with an admissions

criterion incorporating by reference a definition or concept contained in another document. I would say that this is not necessarily best practice, since schools should strive to ensure that their criteria are as accessible, clear and transparent as possible to parents who are reading them. Nonetheless, there was nothing unlawful in my judgement about the way in which the School crafted this criterion. It used a shorthand reference to an already established and accessible definition recommended by the Department. It was not intended to confer a discretion on the Department to define, at some later point, what or who should be accepted as being a child of a family for this purpose.

[23] Mrs McKenna made the point that the Departmental guidance was not directed towards parents or provided to them. However, Mr McAteer confirmed the court's assumption that the document was publicly available and readily accessible on the Department's website at all material times. In addition, no request for clarification appears to have been made by or on behalf of the applicants to the School in relation to the meaning of this criterion. Finally, its application does not appear to me to have been contentious in either case. I do not consider this aspect of the applicants' case to have a reasonable prospect of success.

[24] The applicants' point which was raised in the papers to the effect that the School did not properly apply its criteria since it wrongly used criterion 1.3 (the birth date or age criterion) to distinguish only between girls who met criterion 1.2 was not pursued orally at the leave hearing. In any event, I consider it to be unsustainable. The Tribunal specifically considered whether the School had properly applied its criteria and found that it had done so. Any challenge to that decision on the part of the Tribunal should have been clearly set out. In any event, it is clear that the tie-breaker used by the School (based on the initial letter of their surname as it appeared on their birth certificate, using a randomly generated sequence of letters) was only to be applied as between girls who had the same date of birth; thus indicating that, even if over-subscription occurred at criterion 1.2, the Board had to progress to apply criterion 1.3, rather than immediately moving to the tie-break provision.

[25] The applicants' primary complaint appears to me to be in relation to criterion 1.3, which was in the following terms:

> "Applicants ranked by date of birth as entered on the Birth Certificate with the eldest being admitted first."

They observe that this criterion is recommended by the Department as a tie-breaker; but that the School has effectively adopted this as one of its main admissions criterion. Mr McQuitty, on behalf of the School, disavowed this description; but it is consistent with how the criteria are drafted and, what is more, the information available as to the effect of the various criteria suggests that the age criterion was the one which was the crucial determiner in respect of most of the applications for

admission. This was said to be contrary to the Departmental guidance and discriminatory.

[26] In particular, the applicants relied upon para 5.28 of the Department's Equality Impact Assessment (EQIA) in respect of the 'Transfer 2010 Guidance: Post-Primary School Admissions Process for Admissions in September 2010'. That EQIA pointed out that age-based criteria had been common among schools to that point. The Department did not then propose to recommend age-based tiebreakers (preferring instead some other means of random selection) so that "the minimal degree of age-based discrimination" would "no longer exist". The applicants seized on this reference to suggest that the Department accepted that an age-based criterion was unlawfully discriminatory. On the other hand, the Department pointed out that, notwithstanding this comment in the EQIA, when the 2010 transfer guidance itself was published, it *did* still permit age-based tiebreakers. It is also worth noting that there was no concession that age-based discrimination in this field was *unlawfully* discriminatory. Obviously, all admissions criteria are designed to be discriminatory in *some* sense, since it is their purpose to differentiate between applicants for permission.

[27] This ground of challenge is not well pleaded. There is no apparent reliance on Article 14 ECHR, nor is any other statutory provision identified as the relevant anti-discrimination provision which is said to have been contravened by the School (save for section 75 of the NIA which does not apply to the School's Board of Governors). It seems to me likely that Article 14 is the likely to be the best, if not the only, way to formulate a discrimination claim in this field based on age as a protected characteristic. The strength of any such argument is uncertain but, had it been properly formulated by the children as applicants (who therefore enjoyed the relevant victim status for the purposes of section 7 of the Human Rights Act 1998) I would have been inclined to consider it to be arguable or at least worthy of further investigation, since there is plainly less favourable treatment on the grounds of age, which is capable of being a protected characteristic. I do not share the same view of the applicants' challenge to criterion 1.3 purely based, as it is, on irrationality; particularly in circumstances where the Department's guidance still admits the possibility of using an age-based tiebreaker. In light of these considerations, I also consider this issue to be unarguable on the basis of the claim as it is presently formulated.

[28] I would, therefore, refuse the applicants leave to apply for judicial review against the School on the basis of the merits of the claim. However, I am entirely satisfied, for the further reasons set out below, that is appropriate to refuse the grant of leave in this case in any event, even if I were to have taken too pessimistic a view about the proposed merits of the applicants' case.

[29] I accept the other proposed respondents' submissions that there is no arguable case raised against them. In the case of the Tribunal, no complaint is made about its decision. Rather, as it seems to me, the Tribunal has been added as a

potential respondent only as a means of seeking to overturn its decision and remit the relevant appeals back to it for reconsideration if and in the event the applicants were successful in their primary claim against the School. In terms of the Department, I accept Mr McAteer submissions that it has no overarching supervisory jurisdiction over admissions criteria set by the school; and that the claim against it (if any) based on section 75 of the Northern Ireland Act enjoys no reasonable prospect of success. A complaint to the Equality Commission against the Department has been made and the Commission has determined that it ought not to be investigated. That decision is under review. However, if the Commission is correct, there is no substance to the applicants' complaint (or, at least, none which would warrant the grant of leave in the context of a challenge to the School's admissions criteria); and, if the Commission's present decision is incorrect, that can be considered in the course of the review process which represents an alternative remedy addressed to the Department's actions.

Delay

[30] From the court's earliest consideration of this case, it highlighted that the application prima facie appeared to be out of time since it either challenged the adoption of the impugned criteria by the School (which were published in early February 2021) or it challenged the School's admission decisions in relation to the applicants' children (which were communicated on 12 June 2021). The proceedings were only commenced on 29 October 2021, well outside the 3 month time limit contained in RCJ Order 53, rule 4, on either basis. The Court of Appeal's decision in *Re OV's Application* [2021] NICA 58, at paras [18]-[21], makes clear that time begins running for a challenge to school admissions criteria when the relevant criteria are published. When the criteria in this case were published, Maria's mother would have known that she was disadvantaged by criteria 1.2. Both mothers would have known that, since their children had late birthdays and were young for their year, criteria 1.3 was likely to disadvantage them. No challenge was brought at that time. Even when these proceedings were commenced, no application for an extension of time was made, much less a good reason for the delay having been shown.

[31] Since that time, the applicants have effectively applied for an extension of time and, albeit not on formal affidavit, have provided an explanation for at least some of the period of delay in bringing these proceedings. In short, the applicants contend that they understood judicial review to be a remedy of last resort which should only be initiated after having exhausted all other available avenues of redress. In this regard, they have cited a range of authorities which support the unexceptional proposition that judicial review is generally a matter of last resort (including, for instance, *R v Inland Revenue Commissioners, ex parte Preston* [1985] AC 835, at 852). In this case, that entailed them pursuing their appeal rights before the Tribunal. It was only after those appeals were unsuccessful that they considered that judicial review became viable.

[32] I accept the proposed respondents' submissions that these proceedings have not been brought in compliance with the rules and that there is insufficient basis to extend time. I understand the applicants' approach in proceeding before the Admissions Appeal Tribunal first; but, in law, that was not the correct way to proceed. The reason for that is because this proposed judicial review application is focused on the legality of the school's admissions criteria. That was something which would not, and indeed could not, be determined by the Tribunal. Put another way, it was not an alternative remedy in terms of the subject matter of these proceedings. The Tribunal could only look at whether the criteria were applied (and it found that they had been). Where the real complaint is that the criteria were themselves unlawful and should *not* have been applied, only the court can deal with the matter.

[33] I accept that the applicants' mistaken view in this regard and the fact that they were not entirely inactive (but, rather, were pursuing an appeal which they hoped would further their ultimate goal of securing the children's admission to the School) might be matters which could go to establishing good reason for extending time. However, even assuming that in the applicants' favour, this is not a case where an extension would be appropriate.

[34] There are a variety of reasons for this. First, as the Court of Appeal accepted in *OV*, there is a significant public interest in challenges to the legality of schools' admission criteria being brought at an early stage in the interests of clarity and certainty for all concerned. That public interest should weigh heavily with the court. Second, the delay in this case is significant, with the proceedings only having been brought well into the academic year to which the admissions criteria related. There is no good reason offered for the period of delay between the Tribunal giving its decisions in the relevant appeals in early August and the commencement of these proceedings in late October. Third, and relatedly, this gives rise to concerns about whether any effective relief could ever be granted to the applicants (see further the discussion of this topic below). Fourth, I also take into account the further significant delay engendered by the incorrect manner in which the proceedings were brought, which had to be resolved before the application for leave could properly be dealt with, which means that this application is now being considered towards the end of the relevant academic year.

[35] Although the applicants place some reliance on the extension of time by the Court of Appeal in the *OV* case (see [2021] NICA 58), that was in very different circumstances to the present. Specifically, the applicant mounted his challenge in that case very soon after learning of the school's admissions decision and well in advance of the commencement of the school year in respect of which he was seeking admission. That led to the case being dealt with on an expedited basis in the summer and, in light of that, a provisional conclusion on the merits at first instance even though the case was considered to be out of time. That conclusion – which is absent in this case - was considered to be the "defining characteristic" in the *OV* case by the Court of Appeal for the purposes of an extension of time: see para [28] of the

judgment of Keegan LCJ. In addition, the Court of Appeal accepted that a good reason for delay had been shown on the basis of additional information provided to it in an affidavit from the applicant's mother and next friend relating to her specific circumstances: see paras [23]-[24]. This case is therefore readily distinguishable.

[36] I would also add that Mr McQuitty was correct to observe that the issues giving rise to the objection on the grounds of delay in this case highlight the importance of prospective litigants seeking and securing, insofar as they can, professional legal advice on the options open to them in the correct course of action at an early stage. I am aware that the applicants in this case did seek to secure some professional legal advice at certain points. In at least one instance, there were pointed to the first instance decision in *OV* and warned that there may be an issue with delay if a judicial review were mounted. I am prepared to accept that the applicants may have been advised that their best hope at that stage was to pursue an admissions appeal but, for the reasons given above, that did not stop time running for the purposes of a challenge to the School's admissions criteria published in February.

Utility

[37] A further very real concern in this case is whether the court could, even if otherwise persuaded of the merits of the applicants' case, grant any relief which would be of any practical benefit to their daughters at this stage. The applicants have confirmed that their hope and desire is that their daughters should be admitted to the School at the commencement of Year 9 in the 2022/23 academic year, if their application for judicial review is successful. This outcome is not within the gift of the court for two prosaic reasons. First, the court cannot simply order a school to create an additional place and award it to specified child. Whether or not there is a place at the School is determined by reference to its admissions and enrolment numbers. Even where a place is available, if the School were to award that place to a child otherwise than by way of the application of its published criteria, that would be vulnerable to legal challenge. These concerns do not, of course, arise where an Admissions Appeal Tribunal directs the admission of a specified child on foot of a successful appeal pursuant to the provisions of the Education (Northern Ireland) Order 1997. Second, these proceedings are concerned with admission to Year 8 in the current academic year and do not speak to either the availability of places or the criteria for the allocation of places within Year 9 in the forthcoming academic year.

[38] The practical difficulties which arise in such circumstances were discussed in some detail in the remedies judgement in the *OV* case: see [2021] NIQB 103, at paras [31]-[38]. Unlike in that case, in the present case there are no adjourned or outstanding admissions appeals to the Tribunal. The time for bringing such an appeal has passed. Any challenge to the Tribunal's decisions relating to the applicants' daughters are also well out of time, since the Tribunal was not included as a proposed respondent until a short time ago. In these circumstances, even if the case was within time and meritorious, the route to the ultimate remedy which was

available in the *OV* litigation would, at the very least, be much more difficult to navigate. It is doubtful whether it would be available at all, or available without doing unwarranted disservice to the principles which usually apply in this field in the public interest.

Conclusion

[39] For the reasons given above, I propose to refuse the applicants leave to apply for judicial review. Their case has not surmounted the leave threshold of establishing an arguable case with a reasonable prospect of success; but, in any event, it is irreparably out of time. It is a challenge to the legality of the School's admission criteria which ought properly to have been brought within three months of their publication. I also consider it likely that, even if their case was permitted to proceed and was successful, practically speaking it would not be within the power of the court to grant or secure for them the relief which they understandably seek, namely the admission of their daughters to their post-primary school of first choice. For all of these reasons, it is not appropriate to permit the case to proceed (and, in so doing, to expose the applicants to a risk of an adverse costs order).

[40] That conclusion, which is based purely on the application of the relevant legal principles in this area, is not to say that the court does not understand the grievance felt by the applicants on behalf of their daughters. On the evidence available, it seems probable that both girls would have been likely to secure admission to Mount Lourdes if its usual selective criteria had been used. The applicants' evidence as to the disappointment and sense of exclusion and unfairness which their children felt when they learned of the outcome of their transfer applications made for grim reading. These feelings were exacerbated by the fact that the two girls were not given an opportunity to secure a place on their own merit in the usual way and saw their friends admitted on grounds which seemed to them to be arbitrary. There was evidence to the effect that one of the applicants' children suffered stress-related migraines, for the first time, as a result of anxiety preceding and shortly after learning of the admissions decision in her case. A certain degree of heartache will always result in circumstances where children are vying for limited places at popular schools which are over-subscribed. It seems indisputable that this heartache, for at least some, was magnified in the transfer procedure with which these proceedings are concerned given the upset to the usual process caused by the pandemic, which upended numerous plans and expectations. Sadly, the applicants' daughters are some of the many young victims of circumstance of the pandemic in this regard.

[41] Notwithstanding the outcome of this application, the applicants are to be commended for their determination and efforts to secure the outcome for their children for which they had hoped. I wish both Ellie and Maria well in their continued education; and sincerely hope that they settle in their present school, or whichever school in which they continue their post-primary education if they

happen to move school, and that, wherever they attend, they can be happy and achieve their full potential.

[42] The remaining issue is that of costs. I will hear the parties on the issue of costs but provisionally take the view that the court ought to follow its usual approach where an application is dismissed at the leave stage and make no order as to costs between the parties.