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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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TCM's Application [2013] NIQB 3

IN THE MATTER OF AN APPLICATION BY TCM FOR JUDICIAL REVIEW

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GILLEN J

Introduction

[1] The applicant in this case is a Down Syndrome child who was born on 30 July 1998. She is the subject of a Statement of Special Educational Needs ("the statement") as amended and prepared on 24 March 2011 by the South Eastern Education and Library Board (the second notice party to these proceedings). Inter alia it stated:

> "[the child] should attend a special school. [the child's] parents have expressed a preference for main stream education.[the child] will attend St Columbanus College in September 2011."

[2] The statement was appealed to the Special Educational Needs and Disability Tribunal (hereinafter referred to as "the respondent" or "the Tribunal ") on a number of issues. That Tribunal gave its decision on 14 September 2011 wherein, inter alia, it decided not to alter the Board's recommendation that the most suitable school for the applicant was St Columbanus College (St Columbanus) Bangor and thus rejected the applicant's contention that the most suitable school for the applicant was St Joseph's College, Ravenhill Road, Belfast(St Joseph's).

[3] On a Notice of Motion the applicant now seeks orders for:

- A declaration that the decision of the Tribunal to name St Columbanus on the applicant's Statement of Educational Needs is unlawful.

- An order of certiorari quashing the decision.
- An order compelling the Tribunal to name St Joseph's on the applicant's Statement of Educational Needs.

[4] Leave was granted by Treacy J on 22 March 2012. At the leave stage the Board of Governors of St Joseph's and the South Eastern Education and Library Board had been proposed respondents. Treacy J ordered that both these parties should become notice parties leaving the respondent Tribunal as the lone respondent in this matter. The grounds upon which the plaintiff sought relief set out in the Order 53 Statement included:

- The Tribunal had irrationally distinguished between the facilities and resources available to St Joseph's and St Columbanus.
- The decision breached the applicant's right to be educated in an ordinary school pursuant to Article 7 of the Education Order 1996 (sic) by imposing a policy that Down Syndrome children should only be educated in schools with previous experience of children with Down Syndrome.
- Breaches of the applicant's rights pursuant to Article 2 of the First Protocol and Article 8 of the European Convention on Human Rights and Fundamental Freedoms.
- The decision was in breach of Article 53 of Schedule 2 to the Education Order 1996(sic)

I observe that I have assumed that the legislative references should be more accurately described as the Education (Northern Ireland) Order 1996 and paragraph 5(3) of Schedule 2 of that Order.

Statutory background

[5] Paragraph 5 of Schedule 2 of the Education (Northern Ireland) Order 1996 ("the 1996 Order") as amended by Article 12 and Schedule 1 of the Special Educational Needs and Disability (Northern Ireland) Order 2005("SENDO") under the heading "Making and Maintenance of Statements under Article 16" provides as follows where relevant:

> "5.-(1) Every board shall make arrangements for enabling a parent –
>
> (a) On whom a copy of a proposed statement has been served … to express a preference as to the grant-aided school at which he wishes education to be provided for his child and to give reasons for his preference
>
> …….

> (3) Where a board makes a statement in a case where the parent of the child concerned has expressed a preference in pursuance of such arrangements as to the grant-aided school at which he wishes education to be provided for his child, the board shall specify the name of that school in the statement unless –
>
> (a) The school is unsuitable to the child's age, ability or aptitude or his special educational needs, or
>
> (b) The attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources."

[*6]* Article 3(1) of SENDO amends the 1996 Order by replacing Article 7 of the 1996 Order. I pause to observe that the reference to "the provision of efficient education" in 5(3)(b) above mirrors the language used in the 1996 Order Part II at Article 7 which dealt with the duty to educate children with special educational needs in ordinary schools. Article 7 in that 1996 Order provided:

> "7.-(1) This Article applies to a child with special educational needs who should be educated in a grant aided school.
>
> ….
>
> (3) If a statement is maintained under Article 16 for the child, he shall be educated in an ordinary school unless that is incompatible with –
>
> (a) The wishes of his parent, or
>
> (b) The provision of efficient education for other children."

[8] There is force in the argument of Ms Murnaghan, who appeared on behalf of the respondent that the focus is on the duty to educate children with special educational needs in ordinary schools i.e. to promote the ethos of inclusion and is not focusing on the choice of particular schools within the ordinary school system.

[9] The document entitled "Supplement to the Code of Practice on the Identification and Assessment of Special Educational Needs" (hereinafter called "the Code") of 1 September 2005 at Section 4 gives guidance about the new provisions. It

emphasises the right to an ordinary school place for children with a statement unless it is against the wishes of parents or is incompatible with efficient education of others.

[10] This new provision delivers a general duty to enforce a strengthened right to a mainstream education for children with SEN. At paragraphs 4.1-4.7 of the Code the focus is on the fact that Boards in mainstream schools can only decide against mainstream education, contrary to parents' wishes, on the grounds that it would be incompatible with the efficient education of other children. A Board or school will only be able to rely on this ground if there are no reasonable steps that can be taken to prevent the incompatibility.

[11] Paragraph 4.12 of the Code raises a key issue however in this context and merits repetition in full:

> "It is reasonable to expect a Board to provide a mainstream education for most children with SEN who have a Statement. However, it may not be reasonable or practicable to expect all grant-aided mainstream schools to provide for every type of SEN. When making decisions about individual schools it is right to consider: what parents want; an individual school's suitability to provide for the needs of the child; and the impact the inclusion would have on the efficient education of others and on resources."

[12] Paragraph 4.14 provides as follows:

> **"Parents Express a Preference for a Mainstream School**
>
> 4.14 Where the parents' preferred choice of grant-aided mainstream school is not named on the child's Statement the Board must name another grant-aided school (whether mainstream or special). The Board must look across all the schools which it considers appropriate. The Board can only refuse a mainstream education where the child's inclusion would be incompatible with the efficient education of other pupils (in line with Article 3). In addition, the Board should demonstrate that there are no reasonable steps it or the grant-aided school could take to prevent the incompatibility. Parents can appeal against the Board's decision to the Tribunal."

Convention Rights

[13] Mr Lavery QC, who appeared on behalf of the applicant with Ms McCrissican invoked Article 2 of the Protocol 1 (A2 P1) and Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention").

[14] A2 P1 provides inter alia:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

[15] This right is only to provide access to such system of education as is provided by each Member State. Properly Ms Murnaghan drew my attention to Ali v Lord Grey School [2006] UKHL 14 where Lord Hoffmann said at paragraph 61:

> "The correct approach is first to ask whether there was a denial of a Convention right. In the case of article 2 of the First Protocol, that would have required a systemic failure of the educational system which resulted in the respondent not having access to a minimum level of education. As there was no such failure that is the end of the matter."

[16] I am satisfied that this does not apply in the present instance because this child has not been denied the right of access to education at St Columbanus which is a mainstream school. In any event I note in his skeleton argument that Mr Lavery acknowledged that even on his own case the Convention would not have taken the matter any further forward than the legislative provisions upon which he relies.

[17] Of all the Convention rights, Article 8 has by far the widest scope. It is has been described as "the least defined and most unruly" of the Convention rights. The closest to a unifying theme for such diverse subjects is the liberal presumption that individuals should have an area of autonomous development, interaction and liberty, a private sphere with or without interaction with others free from State intervention and free from excessive intervention from other individuals. Mr Lavery in this case relied upon the need to consider the wishes of the parents and the right of the mother to be working convenient to the child. I shall address this aspect of the case in paragraph [38].

Preliminary Matters

[18] Ms Murnaghan raised before me issues concerning delay on the part of the applicant in bringing this matter before the court, the standing of the child to bring

an admissions challenge and also the question of an alternative remedy available in the form of a statutory review of the Tribunal's decision available under Regulation 47(1) of the Special Educational Needs and Disability Tribunal Regulations (Northern Ireland) 2005. Although both counsel appeared to be uncharacteristically vague about precisely what had happened at the leave hearing before Treacy J, it seemed to me that these matters must have been considered by the Judge either expressly or by implication.In the absence of any positive assertion to the contrary by counsel I was content that they had been determined in favour of the applicant by Treacy J when granting leave and did not therefore require further determination by me.

Factual background

[19] The applicant in this case attended primary education at a school in Saintfield, County Down. According to the affidavit of the applicant's mother dated 13 February 2012, "there were difficulties in arranging for (the child) to be in that particular school which resulted in a successful judicial review in 2004."

[20] The child was due to commence secondary education in September 2011 and the preferred choice of the applicant's mother was St Joseph's. It seems to be common case that initially as set out in the affidavit of the applicant's mother, "The school seemed very receptive to the idea of (the child) undertaking her secondary level education at St Joseph's".

[21] On 24 March 2011 an amended Statement was sent to the applicant's mother by Lynda Morrison from the South Eastern Education and Library Board which included the above-mentioned reference to the child at paragraph [1] of this judgment.

[22] It is also apparent that on 2 March 2011 a letter was sent to Lynda Morrison from Clare McKenna of the Belfast Education and Library Board which stated that St Joseph's was of the view that the child's inclusion in this post-primary setting would not be appropriate in meeting her special educational needs adding "It is their view that such a placement would significantly impact on the efficient education of (the child) and be detrimental to her holistic development". A consultation form dated 28 February 2011 completed by Mr Joseph McCourt on behalf of St Joseph's College was exhibited making it clear that the school in reaching that decision included the determination by it "that a place in St Joseph's College (a mainstream post-primary school) is not appropriate". The comments go on to state that the school does not feel that it is sufficiently resourced or equipped and does not have the necessary expertise within the staff to cater adequately for those needs detailed in the statement.

[23] In correspondence of 24 March 2011 Mrs Morrison wrote to the applicant's mother and father acknowledging that the child's attendance at a mainstream school was compatible with efficient education of other children but listed a number of

reasons why it felt that St Joseph's College would not be appropriate and named St Columbanus as meeting the child's needs and named it in Part IV of the Statement of Educational Needs.

[24] The plaintiff's mother in her affidavit exhibited a letter of 3 March 2011 from Mr John Shivers, Education Officer with the South Eastern Education and Library Board to Ms Clare McKenna of the Belfast Education and Library Board referring to a letter he had received from her "confirming St Joseph's College feel unable to offer a placement to the child for September 2011". In that letter, upon which the applicant heavily relies, he made a number of points indicating why the child should be within a mainstream educational setting albeit it did also contain specific reasons why St Joseph's College could accommodate her. I pause to observe that I consider that the focus of this letter was on the issue of this child being suitable for mainstream schooling as opposed to special educational schooling albeit it did refer specifically to St Joseph's on several occasions. Moreover I do not consider that the response from Ms McKenna of 8 March 2011, which outlined the difficulties that St Joseph's faced in accommodating this child, was any derogation from the principle that this child should receive mainstream education. It is confined to a suggestion that St Joseph's felt unable to meet the child's severe learning difficulties in the context of its mainstream setting. In the event the South Eastern Educational and Library Board identified St Columbanus as the appropriate mainstream educational setting.

[25] The mother of the applicant held serious reservations about the understanding and insight of St Columbanus into supporting this child with Down Syndrome. She had concluded that the college operated a grouping approach which in practical terms segregated students with Down Syndrome from the more able students who would represent good role models.

[26] It is however also clear from the affidavit of the applicant's mother that the place where she works is Aquinas Grammar School immediately adjacent to St Joseph's College. It was her view that if the child was required by the law to attend St Columbanus, she would come under tremendous pressure to give up her present employment. Ms Murnaghan suggested that this was a primary motivation in the applicant's mother's decision to resist the child going to St Columbanus i.e. it was largely because of work and travel arrangements which Ms Murnaghan contended was outside the remit of the Tribunal to deal with.

[27] Accordingly an appeal was made to the Tribunal by way of a notice dated 12 April 2011. An oral hearing took place on 31 August 2011 and the decision of the Tribunal was delivered by way of letter dated 14 September 2011. The Board recommended that "St Columbanus would meet (the child's) needs effectively as the school already has experience and strategies in place to meet (the child's) needs. St Joseph's stated that at present they could not facilitate (the child's) needs".

[28] I observe that the Tribunal comprised a Chairman and two lay members. The Chairman was a solicitor who has acted in this capacity since the inception of the Tribunal in 1997 and has a longstanding interest in issues affecting children with special educational needs according to his affidavit of 27 April 2012. During the hearing I was furnished with a pen picture of the two lay members. Mr Patrick McCabe had qualifications including having been a registered nurse for persons with a learning disability and has a post graduate diploma in guidance and counselling. He had a 40 year career within the Northern Ireland Health and Social Services and had been a Trust Director for Mental Health and Learning Disability Services. Equally qualified was Mrs Setterfield who has a number of distinguished teaching qualifications, had taught in a secondary school for pupils with specific difficulties, had been school support co-ordinator sourcing and funding special needs requirements and was Vice-Principal of Park School, Belfast for seven years. I regarded this Tribunal as highly qualified and experienced in the services provided for persons with learning disabilities such as the applicant in this case.

[29] After the decision of the Tribunal, the applicant's mother refused to have the child placed at St Columbanus and provision was made on the interim basis for her to be taught at Saintfield High School. Although the child spent a short time in Saintfield High School, the applicant's mother has not been prepared to allow her to continue there. I was in possession of a summer 2012 report from Saintfield High School which recorded, inter alia, that:

> "She is beginning to learn how her school operates and is making progress with regard to finding her way to and from the many classes she now finds herself in. There has been a lot of information for (the child) to process in these first few weeks at Saintfield High School. However despite appearing quite tired at the end of the day she is doing her best to follow her timetable and is learning the boundaries which exist in a post primary classroom."

The applicant's case

[30] Mr Lavery in the course of a well-marshalled skeleton argument augmented by oral submissions made the following points:

- Any distinction between the facilities and resources available in St Columbanus or St Joseph's is improper and irrational and as such the Tribunal should have honoured the choice of the mother pursuant to the terms of the legislation.
- In effect the decision of the Tribunal serves to impose a policy that Down Syndrome children shall only be educated in schools with previous experience of children with Down Syndrome and this is entirely contrary to the spirit and terms of the legislation.

- The Tribunal should have explored what reasonable steps could be taken by St Joseph's to accommodate the child so as to ensure the school did not effectively have a veto over parental choice.
- The Tribunal failed to recognise that St Joseph's had always felt the child should be educated in a special school and this has erroneously dominated its thinking.
- The Tribunal failed to give the matter the anxious scrutiny necessary when human rights are involved in an issue.

The Respondent's Case

[31] Ms Murnaghan in an equally impressive and well researched counterargument contended:

- There was no irrationality on the part of the respondent which explored the various practical and obvious differences between the two schools at some length during the oral hearing.
- This court should not stray into an evaluative exercise as regards the general merits of the decision made by the experts sitting on the Tribunal.
- There was no evidence of any policy of confining children such as the applicant to schools where there had been previous Down Syndrome children.
- Neither Article 2 of the First Protocol nor Article 8 of the Convention can be invoked.
- The only reason the respondent was unable to follow the parental wishes was because St Joseph's was found to be unsuitable for the needs of the child based on the factual assessment.

Discussion

[32] I commence by recognising that the purpose of the relevant legislation and the guidance in this case is to strengthen the right to an ordinary school place in mainstream education for children with SEN. The starting point is always that a child with a Statement will receive mainstream education unless this would be incompatible with the wishes of the parents or the provision of the efficient education of other children. Consequently Boards must explain to parents the arrangements that allow them to express a preference for a particular grant aided (mainstream or special) school and the Board must name the parents preferred choice of school in the child's Statement unless the school is unsuitable to the child's age, ability, aptitude or special educational needs or the child's attendance at the school would be incompatible with the efficient education of other pupils with whom he would be educated or of the efficient use of resources. Consequently any policy should actively seek to identify and remove the barriers to learning and participation that hinder or exclude a child with SEN. Schools and Boards must approach inclusion as part of their overall improvement strategy. In short, there must be now an inclusive ethos.

[33] Accordingly the purpose of the legislation can only be accomplished and consolidated if schools are obliged to consider what steps can be taken to address the issue of suitability. Otherwise a declared intention of parents having a choice will become no more than a dust jacket endorsement which schools could avoid at will by refusing to consider change or challenge enthusiastically the difficulties of change. A constructive critique of facilities and resources rather than an obstructive attitude to change must be the order of the day.

[34] I consider that the head of the special education team Mr Leonard in the Department of Education correctly summarised the matter in a letter of 13 June 2012 to the applicant's mother when the said in the course of that letter:

> "Where a statutory assessment for a child with special educational needs indicates such the Department would consider that any mainstream school should be able to meet the child's needs with the support of any additional provision that may be specified in his or her statement. Where a Board consults with a school prior to a placement being named in the statement the school may object if it considers that it is unsuitable to the child's age, ability or aptitude or to his or her special educational needs or the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he or she would be educated or the efficient use of resources. However the school would be required to demonstrate reasonable steps it had taken to enable the child to be admitted."

[35] On the other hand, I endorse entirely the assertion in the guidance at paragraph 4.12 where it states that it may not be reasonable or practicable to expect all grant aided mainstream schools to provide for every type of SEN (see paragraph 11 of this judgment):

[36] Mr Lavery seemed to suggest that every mainstream school should cater for every child with a Statement. I reject that proposition. Context is everything and possibilities of change have to be assessed on a case by case basis.

[37] I consider this approach to be entirely consistent with Article 2 of the First Protocol and the right to education (see paragraphs 14-16 of this judgment).There was no denial of the right to education where for example a local educational authority, in operating a statutory admissions policy which imposed a limit on class sizes or obliged the authority to take into account parental preferences unless to do so would prejudice the provision of efficient education or the efficient use of resources, denied a place at the preferred school to a particular child (see R

(Hounslow London Borough Council) v School Admission Appeals Panel [2002] EWCA Civ. 900). Hence a wide measure of discretion must be left to each contracting State's educational authorities to decide how to make the best possible use of resources by balancing the interests of children with special educational needs and the interests of other children. Domestic courts are required to interpret Convention rights by applying the same margin of appreciation when assessing the lawfulness of the conduct of public authorities as the European Court would apply when assessing the lawfulness of the conduct of the national authorities from the perspective of an international court (see Sales J at [54] in R(S) v Secretary of State for Justice [2013]1 ALL ER 66)

[38] Mr Lavery attempted to extend the purview of this case to embrace Article 8 on the grounds set out in his skeleton argument that the rights of the child and other family members were transgressed by refusing the wishes of the parents and the fact that the applicant's mother wished to work adjacent to the parent's chosen school. I am satisfied that there is no basis for considering that such matters were traduced in this instance. Not only was it the child who was the applicant and not the mother but the former consideration was carefully considered by the Tribunal and the latter was irrelevant in the context of this hearing.Essentially this was not a case involving Article 8 rights and its entry into the case added nothing to the A2P1 argument.

[39] In any event the anxious scrutiny standard of review postulated by Mr Lavery requires careful analysis in each case in which it is raised. In R v (On the application of Daley) v Secretary of State for the Home Department [2001] 2 AC 532, 2001 UKHL 36, Lord Steyn at paragraphs 24-28 made observations about the intensity of review to be adopted in those cases in which it might be said that fundamental rights fell to be considered. He drew attention (see paragraph 27) to the fact that the intensity of review required of the court was somewhat greater where proportionality was a relevant approach and suggested that the doctrine of proportionality might require the reviewing court to assess the balance which the decision-maker had struck and not merely whether it was within the range of rational or reasonable decisions. The proportionality test might go further than traditional grounds of review in as much as it might require attention to be directed to the relative weight of the relevant considerations. Lord Steyn concluded at paragraph 28 that the differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results but it is still not a merits review process:

> "It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean there has been a shift to merits review. On the contrary, as Professor Jowell (2000) PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR

> 840 are correct. And Laws LJ rightly emphasised in Mahmood at p847 para 18 `that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights. In law context is everything."

[40] I respectfully agree with Langstaff J in R (On the application of L) v Leeds City Council [2010] EWHC 3324 (Admin) at (54), that in community care cases the intensity of review will depend on the profundity of the impact of the determination. This approach was cited with approval in KM v Cambridgeshire CC [2012] 3 All ER per Lord Wilson SCJ (36)).

> "On the other hand respect must be afforded to the distance between the functions of the decision-maker and of the reviewing court; and some regard must be had to the court's ignorance of the effect upon the ability of an authority to perform its other functions of any exacting demands made in relation to the manner of its presentation of its determination in a particular type of case. So the court has to strike a difficult, judicious, balance".

[41] This carries echoes of Lord Clyde in Reid v Secretary of State for Scotland [1999] 1 AER 481 at p. 500 when he said at page 506B et seq:

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court a review to examine the evidence with a view to forming its own opinion about the substantial merits of the case. It may be that the Tribunal whose decision is being challenged has done something which it did not have lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards a decision itself it may be found to be perverse or irrational or grossly disproportionate as to what is required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence or sufficient evidence to support it or through account being taken of irrelevant matter or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provisions which the decision-maker is required to allow. But while the

> evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of a review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

[42] In this context, the Northern Ireland case of Re E (a child) [2008] UKHL 66 repays study. In this case involving children being prevented from attending school by demonstrations, Lord Carswell said:

> "The police had the responsibility and were placed through their experience and intelligence to make a judgment on the wisest course to take in all the circumstances. They had long and hard experience of the problems encountered in dealing with riotous situations in urban areas in Northern Ireland. … The police had available to them sources of information about what was happening in the community and what was likely to happen if they took certain courses of action which they were experienced in assessing … The assertions made by the appellant that they might possibly have adopted more robust action are in my view quite insufficient to establish that the course adopted was misguided, let alone unreasonable".

[43] The intensity of review will thus depend on the context. It will be influenced in part by the administrative scheme under review; the subject matter of the decision; the importance of the countervailing rights and interests and the extent of the interference with their rights or interests. To invoke the phrase coined by Laws LJ the approach is "a sliding scale of review".

[44] Accordingly the court will review a decision where it affects fundamental rights with a scrutiny appropriate to the context. The intensity of that review will depend on the profoundness of the impact of the decisions but that profoundness has to be judged objectively and not necessarily by reference to the way in which a plaintiff or defendant might, in the circumstances of a particular case, perceive it. The more substantial the interference with the human rights of the applicant, the more the court will require justification before it is satisfied that the decision is reasonable. Whilst the courts will continue to abstain from merits review, in appropriate classes of case they will look very closely at the process by which facts have been ascertained and invest "anxious" or "heightened" scrutiny to soften the full rigour of the Wednesday unreasonableness.

[45] In this case there is no decision to deprive this child of mainstream education. The profundity of the impact of this decision is affected by the issue being confined simply to which of 2 mainstream schools the child is to attend. I am satisfied that

there is no basis for arguing that there was any confusion on the part of the school or the Board or the Tribunal at any relevant time as to the fact that this was an issue between a choice of mainstream schools and not an issue between mainstream or special education needs. I have heard no evidence that the Tribunal was ever in the slightest doubt as to the real issue here. The decision is one not to provide a specific form of remedy namely the particular mainstream school of choice of the parent. It was never contended that the child's inclusion would be incompatible with the efficient education of other pupils, the sole contention being that St Joseph's is unsuitable to the child's age, ability or aptitude or her special educational needs. Everything is dependent on context and I have applied standard principles of review with intensity appropriate to this limited context. I recognise that this is not an appeal from the Tribunal. In separating my function from that of the Tribunal I must be wary not to embark on my task by forming my own preferred view of the evidence particularly in circumstances where this is a Tribunal with enormous expertise and experience in this very field. To the extent that it might have needed a more intense scrutiny, I have re-examined the facts and conclusions at which ultimately I have arrived and I have come to the conclusion that so clear are the issues in this matter that whichever standard of review I were to adopt the same conclusion would be arrived at.

Conclusion

[46] I am satisfied in this instance that the decision of the Tribunal survives the challenges mounted by Mr Lavery on behalf of the applicant. My reasons are as follows.

[47] First I am conscious that this Tribunal was sitting shortly before the child was due to start school in September 2011. To that extent timing was important and this properly was a consideration in the minds of the members. I have reviewed this decision within that context.

[48] Moreover I consider that it was a rational approach on the part of the Tribunal to recognise that unlike for example the interim measures which Saintfield High School could invoke for the short period that the child was due to be educated there, the assessment of St Joseph's was to be on the basis of a rather more permanent long-term education for this child. It is reasonable therefore for the Tribunal to have looked at this matter in a different light from merely considering a stop gap or short term solution.

[49] The Tribunal had the inestimable advantage of hearing the evidence of Mrs O'Loane, the SENCO Manager at St Columbanus. It heard the experience she was able to demonstrate that this college had in terms of addressing the needs of children with Down Syndrome. It was able to balance this against the evidence of Mr Joe McCourt the Principal of St Joseph's who asserted that it did not have the requisite training to meet the reasonable expectation of the applicant's parents that

those teaching her child should have adequate training in respect of her educational needs specifically and Down Syndrome generally.

[50] I find no basis for challenging the factual finding of the Tribunal that St Columbanus had personnel who were trained in teaching those with Down Syndrome whereas St Joseph's did not. That is not to say that in an appropriate context it would not have been appropriate for St Joseph's to have ensured that such training was to take place and to have taken active steps to repair the deficiency. However the context and the timeframe of this child starting school in September 2011 has to be borne in mind. It was reasonable to conclude that that deficit could not be repaired within the timeframe appropriate to the best interests of this child. The Tribunal comprised lay members at least who would have had very substantial experience of the degree of training necessary in such a context and the timeframes that would be involved. Such experience cannot be lightly set aside by a court.It constitutes a locus classicus of where a court should strike a judicious balance, preserve the respective roles of court and tribunal and be careful not to institute a wholly merits based approach.

[51] Mr McCourt had conceded that his school could not provide adequate facilities for the applicant much less meet the level of facilities available in St Columbanus. Whilst schools cannot be accorded a veto over the spirit of the legislation by virtue of indolence or apathy, I consider that this is not such an instance. As I have already indicated, it is not the case that every school has to provide every facility for every child with a Statement provided it can show that reasonable steps will not obviate the impediments. In this case it is clear from the affidavit of Mr Shevlin of 29 November 2012 at paragraph 9 that in order to effect these changes, inter alia, a classroom assistant would need to have been advertised, shortlisted and interviewed (whereas Ms Murnaghan informs me that there is already in place a classroom assistant in St Columbanus) and would have required to resource appropriate trainers, specific training days, and deliver training to a wide number of different staff members. As I have indicated, the Tribunal members would have been au fait with such assertions. They were in a position to make an informed opinion as to their credibility and the conclusion by Mr McCourt that he could not assemble and provide the required multi-disciplinary approach to meet the needs of the applicant in a reasonable timeframe.

[52] Average class size was another matter raised by the applicant. The question of the timeframe arose here in that additional recruitment to reduce the average class size could not have been done within a reasonably short time and certainly not to the degree recommended by the educational psychologist in this case whose evidence was before the Tribunal. So far as class size is concerned, Mr Lavery contends that to have the child placed in a small class runs contrary to the concept of mainstream schooling. This is another area where expertise is vital and the report of the psychologist on this child is something that has to be taken into account in her own interest. Moreover on the issue of class size, the Tribunal made a finding of fact that there was a material distinction between class sizes in St Columbanus and

St Joseph's and I do not think this court should readily contradict such a finding since the significance would have been apparent to the experts on the panel.

[53] It was appropriate for the respondent to take into account St Joseph's lack of confidence fuelled by the current struggle it meets to address the needs of current pupils who have less serious needs than that of the applicant. Thus in this school Mr McCourt asserted that the needs of pupils in the upper end of the moderate learning difficulty spectrum were not being met by St Joseph's to the extent that the school was considering alternative placements for them. Whilst the Tribunal did not specifically consider what steps if any could have been taken by St Joseph's to remedy that level of confidence, nonetheless it was a clear factor that had to be taken into account when considering the appropriate timeframe for this child to enter mainstream schooling. The panel was entitled to regard as a factor the presence of a cognitively similar peer group in St Columbanus albeit in the future St Joseph's will address the absence of such children in its school.

[54] The Tribunal had considered the Shivers letter as well as the response from Ms McKenna. I see no basis for concluding that it was irrational to conclude as it did that it was more appropriate for the applicant to be taught by people trained in teaching pupils with severe learning difficulties and in a setting with therapy on site for advice and support. Similarly the Tribunal was well equipped to make the conclusion that St Joseph's did not have the resources to continue with the high level of internal support which was apparently necessary when the applicant was in primary school.

[55] Conceivably a differently constituted Tribunal might have come to a different conclusion based on the assertion that St Joseph's should have taken greater strides towards making the school appropriate for this child. However in reviewing its decision, I have concluded that I must afford deference to the distance between the functions of this decision-maker and the functions of me as a reviewing court. I see no basis to challenge the decision made by this experienced Tribunal. I therefore refuse the application.

[56] I conclude by recognising that this outcome is unlikely to find favour with the applicant's mother. I note that this child has apparently not been at school at all since having ceased to attend Saintfield School after the summer of that year. I trust that she will accommodate herself to the position as it now is in the interests of the child and take steps to have this child attend mainstream schooling so as to avoid any long-term damage to her education and wellbeing.