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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR 253
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE
DEPARTMENT OF EDUCATION

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Mr Frank O'Donoghue KC with Mr Eugene McKenna (instructed by Nicholas Quinn Solicitors) for the Applicant
Mr Philip McAteer (instructed by the Departmental Solicitors Office) for the Proposed Respondent
Ms Denise Kiley (instructed by Napier Solicitors) in attendance on behalf of the Council for Catholic Maintained Schools

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COLTON J

Introduction

[1] The court is grateful to counsel for their focussed written and oral submissions.

[2] The applicant is a primary school pupil who, through his mother, asserts that he intends to apply to enrol at St Patrick's Grammar School, Downpatrick ("SPGS") to pursue his secondary education.

[3] His mother explains that two of his elder brothers currently attend SPGS. He currently attends St Patrick's Primary School, Ballynahinch, County Down. His wish is to attend SPGS like his older brothers when his primary school education is completed. The court understands that this would be in the year 2024/2025.

[4] By these proceedings the applicant seeks to challenge a decision by the Department of Education to approve development proposals DP 604 - DP 607 inclusive. That decision was made by the Minister for Education on 10 October 2022. The effect of the proposals involves the amalgamation of three post primary schools

in the Downpatrick area including SPGS into one school located at the current SPGS site. The proposals are as follows:

- DP 604 – "With a view to facilitating the establishment of a new co-educational 11-19, voluntary grammar school, St Mary's High School (HS) will discontinue with effect from 31 August 2021, or as soon as possible thereafter."

- DP 605 – "With a view to facilitating the establishment of a new co-education 11-19 voluntary grammar school, De La Salle (HS) will discontinue with effect from 31 August 2021, or as soon as possible thereafter."

- DP 606 – "With a view to facilitating the establishment of a new co-education 11-19 voluntary grammar school, St Patrick's Grammar School (GS) will discontinue with effect from 31 August 2021, or as soon as possible thereafter."

- DP 607 – "A new co-education 11-19 voluntary grammar school for 1,600 pupils (being in effect an amalgamation of De La Salle (HS), St Mary's (HS) and St Patrick's (GS) will be established with effect from 1 September 2021, or as soon as possible thereafter. The new school will utilise the three school buildings pending capital investment for a one site solution. The new school will have an admission number of 250 pupils, with up to 40% being admitted through academic selection. The new school will be in the trusteeship of the De La Salle congregation."

[5] As is the way with such developments there has been delay in respect of the anticipated implementation date, which currently is scheduled for 31 August 2024.

[6] The applicant's mother's concern is that the amalgamation will result in a change to the enrolment policy currently operated by SPGS which gives a weighting to applicants whose older siblings attend the school.

[7] The Case for Change ("CfC") upon which the proposals were put forward to the Minister envisages retaining academic selection for up to 40% of those for whom the school is not the nearest Catholic post primary school (pupils attend from over 33 feeder primary schools) (Category B schools) and automatic entry for those for whom the school is the nearest Catholic post primary school (pupils attend from 13 local feeder primary schools) (Category A schools).

[8] It is anticipated that there will be 250 places for new entrants to the school.

[9] The applicant's mother expresses her concern in the following way in her affidavit:

"10. Pupils from Category A schools are eligible for a place at the new school automatically without academic selection. If the 250 places are filled by those pupils, then no pupils will be admitted via academic selection from Category B schools. This will distinguish between boys who attend schools in the Downpatrick hinterland which are not sufficiently proximate to the proposed site, to their peers attending schools in the proposed Category A.

11. I believe that under the current enrolment policy at SPGS, JR 253's application for enrolment would have been given favourable consideration due to the fact that his brothers already attend the school. The desirability of maintaining a family grouping within the school and the likely negative impact on younger siblings if this is not preserved, would be a matter which the school will take into account.

12. I believe therefore that if the DPs go forward as presently constituted, JR 253 will be at a disadvantage compared to the current position in addition to his disadvantage in comparison to pupils attending Category A schools. I believe that the decision is not in the best interests of JR 253's educational future and wish to challenge it for that reason."

Grounds of challenge

[10] The grounds of challenge are set out in the Order 53 Statement in the following way:

"5.1 **Legality**. The applicant contends that the impugned decision is unlawful as the proposed respondent:

(a) Failed to have due regard to rural needs in accordance with section 1 of the Rural Needs (Northern Ireland) Act 2016;

(b) Failed to have due regard to the needs promoting equality of opportunity under section 75 of the Northern Ireland Act 1998;

(c) Impermissibly abrogated or delegated the discharge of its statutory duties at (a) and/or (b) above;

(d) Failed to act in accordance with its guidance on publication of a development proposal contained in the Department of Education Circular 2017/09.

5.2 **Material considerations**. The applicant further contends that the impugned decision is vitiated by the proposed respondent having failed to take into account or give sufficient weight to the following material facts/considerations:

(a) The concerns raised by the Education and Training Inspectorate on the impugned DPs regarding:

(i) the potential inequality issue for Catholic boys' access to grammar education;

(ii) the potential impact on controlled schools' education provision in the Downpatrick area;

(iii) the potential for increased applications from the parents of primary school aged girls as the latter will lose eligibility for transport assistance;

(iv) the funding model of SPGS;

(v) the consultation process undertaken by the Catholic Council on Maintained Schools ("CCMS") sits outside the Department's guidance in Circular 2017/09.

5.3 **Breach of statutory/requirement**. The applicant contends that the impugned decision is vitiated by the proposed respondent's failure to comply with the following statutory duties/requirements:

(a) The proposed respondent's duty to ensure equality of treatment as between Catholic boys and other school aged children wishing to access grammar education, contrary to section 6(1) and Schedule 1 of the Human Rights Act 1998 and Article 14 of the European Convention for the Protection of Human Rights and Fundamental

Freedoms and common law taken together with Articles 2 and 8;

(b) The proposed respondent's duties under:

(i) the Rural Needs (NI) Act 2016; and/or

(ii) the Northern Ireland Act 1998; and/or

(iii) the Education and Libraries (Northern Ireland) Order 1986."

Consideration

[11] The amalgamation or closing of schools invariably raise strong emotions in all those connected with the relevant schools including staff, parents, and pupils alike. Such decisions are difficult for ministers and are invariably met with principled and genuine resistance from many of those affected. This is reflected in other public law challenges to closures/amalgamations and re-organisations of highly valued schools. This case is no exception.

[12] The development proposals in question have been approved by the Minister on behalf of the Department under Article 14 of the Education and Libraries (Northern Ireland) Order 1986.

[13] The statute provides a broad and open textured discretion to the Minister. The Minister is obliged to make a decision on a specific proposal which comes about after an express scheme setting requirements in terms of consultation. It is clear from the authorities that in such circumstances the court's role is a limited one. It in effect performs a supervisory role and should not engage in a merits assessment of the decision challenged.

[14] As Lord Clyde said in *Reid v Secretary of State for Scotland* [1999] 2 AC 512:

> "Judicial review involves a challenge to the legal delivery of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantive merits of the case."

[15] The exercise of the Article 14 discretion has been considered in this jurisdiction in cases such as *XY's Application* [2015] NIQB 75, *Re McDonald's Application* (Unreported) – Gillen J GILF5793, *In the matter of an application by KE for Judicial Review* [2016] NIQB 9.

[16] These proposals have already been the subject matter of a judicial review challenge in the case of *An Application by St Patrick's Grammar School, Downpatrick*

[2020] NIQB 81. In the course of a pre-publication consultation, the proposals were challenged by an applicant acting on behalf of the Board of Governors of SPGS. The legal action took the form of a challenge to the jurisdiction of CCMS and the Trustees of De La Salle Congregation as opposed to the Board of Governors of SPGS to bring forward the CfC to the Education Authority. In addition, there were allegations of procedural unfairness, a failure to take into account material considerations and taking into account immaterial considerations.

[17] The challenge halted the publication of the DPs pending the outcome.

[18] The legal points raised by the Board of Governors were subsequently dismissed in a written judgment delivered on 26 November 2020.

[19] Importantly for this application, the judge concluded that she was satisfied that the Department of Education, if it moved forward with the proposal, was a "public authority" within both the Northern Ireland Act 1998 and the Rural Needs Act (Northern Ireland) 2016 and was obliged to comply with both statutes.

[20] Before coming to a conclusion, I propose to summarise the issues that arise in this application.

Standing

[21] The proposed respondent argues that the applicant lacks standing to bring these proceedings.

[22] This issue has arisen previously in relation to challenges of this type.

[23] Perhaps the genesis of the issue is to be found in the fact that rights to education are seen through the prism of parental rights rather than rights of children themselves. This is clear, for example, in the jurisprudence in relation to Article 2 Protocol 1 ("A2P1") of the European Convention on Human Rights which provides:

> "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."

[24] In *Re Anderson's (A Minor) Application* [2001] NI 454 the Court of Appeal gave guidance to judges as to refusal of leave in respect of judicial review of Governors' or Tribunals' decisions in relation to school admissions. The headnote to the Report includes the following:

> "Per curiam (1) The parents must as a general rule be the parties to bring an application for judicial review to challenge the admission decisions of school Governors or the findings of Appeal Tribunals. In some cases, however, the children themselves may be the proper parties to bring the applications. Unless sufficient ground has been established for such an exception to operate, judges ought to refuse leave for applications for judicial review of Governors or Tribunals decisions in relation to school admission to be brought in the names of the pupils. By the same token legal aid should be refused when sought for such applications to be brought in pupils' names, unless sufficient cause is shown why they and not their parents should be the applicants."

[25] Subsequent jurisprudence has made a clear distinction between schools' admission cases and schools closure cases. Thus, in *XY* [2015] NIQB 75 Stephens J decided that pupils attending at a school facing closure did have standing to bring applications under Article 8 of the ECHR. He sets out his reasoning in paras [14] to [16]:

> "[14] That approach in school admission cases relies on the statutory scheme. It is correct that in relation to school closure the statutory obligation to consult is an obligation to consult with the parents of the registered pupil. However another aspect of the legislative framework is the Human Rights Act 1998 which incorporates Article 8 ECHR into domestic law. The question arises as to whether *XY* can establish that Article 8 is engaged and would be engaged for any child at Avoniel Primary School. The meaning of "private life" for the purposes of the Convention covers the physical and psychological integrity of a person (*X v Netherlands* [1985] E.H.R.R. 235 at paragraph [22]). It also encompasses a right to personal development and to establish and develop relationships with other human beings in the outside world (see *Botta v Italy* (1998) 26 E.H.R.R. 241/*Bensaid v United Kingdom* (2001) 33 E.H.R.R. 10). The ability to establish and develop relationships with other human beings and the ability to develop the psychological integrity of the applicant are all emphasised by virtue of *XY's* disabilities and have greater significance than in relation to other pupils. The Attorney General in response made a number of points including that (a) the relevant convention right in respect of education is contained in Article 2 of Protocol No. 1 and Article 8

should not be used to bolster the rights contained in that Article. The articles in the convention should be read harmoniously so that by the application of Article 8 one does not achieve what cannot be achieved under Article 2 of Protocol No. 1 namely a right to education at a particular school. In support of that proposition he relied on *Catan and others v Moldova and Russia* (2013) 57 E.H.R.R. 4; and (b) the level of seriousness of any potential breach of article 8 was insufficient to engage that article. For instance it was submitted that there was insufficient evidence to support the proposition that the applicant's relationships with *XY's* school friends would be seriously disrupted by the closure of Avoniel Primary School in that many of them would in any event be transferring to Elmgrove. In the event it is not necessary to resolve that issue given the decision in England and Wales in *R (on the application of B and another) v Leeds School Organisation Committee* [2002] EWHC 1927 and I do not do so. However, I entertain reservations about the proposition that the closure of a school does not give standing to the pupils at that school under Article 8 given that children have a fundamental right to have their basic needs fulfilled, not out of benevolence on the part of their parents or the authorities but as a result of their own status as separate human persons. Children can no longer simply be seen as the object of proceedings but as active participants and actors in their own right. The right to education under Article 2 of the First Protocol does not include any entitlement to education at a particular school, see for instance *In the Matter of an Application by JS for Judicial Review* [2006] NIQB 40. However, there are separate rights under Article 8 which arise in the context of a school environment and which by definition must be engaged separately from article 2 of Protocol No. 1. For instance, if a decision was made by a school authority to deprive a child of all contact with his peers, then that would engage article 8.

[15] I note that it was contended that the alleged failures in this case relate to the consultation process, but I do not consider that all of the alleged failures relate to that process. For instance there is an alleged failure on behalf of the Minister to make reasonable inquiries.

[16] *R (on the application of B and another) v Leeds School Organisation Committee* involved a judicial review

challenge, as in this case, to a decision to close a school. It was contended before Scott Baker J that children are not appropriate claimants in school closure cases. The argument was that for children rather than their parents to bring proceedings is an abuse of process and that the claim was in reality that of the parents and not the child. It was contended that whereas children are likely to be eligible for public funding the probability is that parents will not be. Scott Baker J was referred to *R v Richmond LBC ex p JC* [2001] ELR 13 which was the authority referred to by the court of appeal in *Re Anderson (A Minor's) Application for Judicial Review*. He stated that the observations of Kennedy and Ward LJJ in JC were related to admissions challenges whereas the present case is a school closure or reorganisation challenge and that there was no indication that their observations were intended for any wider application than the particular type of case with which they were concerned. He stated:

> '[37] My conclusion on this point is therefore as follows. Both parents and children have a sufficient interest to bring proceeding for judicial review in school closure or re-organisation cases. Ordinarily, it is likely to be the parents who have the real and primary interest in bringing the case. It is, as Ms Mountfield points out, the parents and not the children who have the right to be consulted under the legislation and the parents whose objections are required to be taken into account under the DfEE guidance. It may be an abuse of process for proceeding to be bought in the name of a child rather than a parent where this is done for the purposes of obtaining public funding and protection against a possible costs order. However, clear evidence would be needed to establish this and there is no such evidence in the present case.' (emphasis added).

I agree that in school closure cases both parents and children have sufficient interest to bring proceedings for judicial review. I consider that the applicant XY has sufficient standing in relation to all the grounds of challenge."

At para [13] Stephens J indicated that:

> "I consider that in school admission cases, as a consequence of the statutory scheme of parental preference and the potential for an appeal to a tribunal by a parent, that the approach endorsed by the court of appeal is that leave should be refused if the application is brought by a child as opposed to a parent, unless sufficient grounds are shown for the child to make the application."

[26] Thus, no issue in relation to standing was taken in the cases to which I have referred at para [15]. In the case of *JR87* [2022] NIQB 53, this court took no issue in relation to the standing of a child who brought a case along with her parents in the context of alleged discrimination against the child at the school she attended in the course of the religious education arrangements provided to the child.

[27] In this case can the applicant establish that there are sufficient grounds for the child to make the application?

[28] Mr O'Donoghue argues that the question of standing, and the potential engagement of Article 8 rights is an elastic concept. He points to the potential affect to the applicant in the context of his family relationships with his siblings who attend the school and the potential impact on the family should he fail to gain entry to the school.

[29] In the case of *JR140* [2021] NIQB 21, this court heard a challenge brought in the name of a child in relation to the admission criteria for entry to St Malachy's College, Belfast.

[30] The issue of standing was not raised in that case, which was dealt with on an emergency basis. The application was dismissed on the substance and the merits of the case.

[31] The court notes that in the written submission filed on behalf of the applicant it is conceded that "the particular choice of applicant in this case is informed by the availability of funding of legal aid to make this application."

The correct respondent?

[32] Not only does the proposed respondent argue that the applicant has no standing, but it says the complaint is premature, fundamentally misguided and misdirected at the Department. In short, the Department is not the correct respondent, it is argued.

[33] Returning to the applicant's affidavit, it is clear that her complaint relates to the proposed enrolment policy for the new school. She criticises the proposed admissions criteria for the new school. Her concern expressly relates to her assertion that her son "will be at a disadvantage compared to the current position."

[34] Two related issues arise from this. Firstly, the admissions criteria have not yet been fixed and, therefore, any claim based on them is arguably premature and speculative.

[35] Thus, in the submission to the Minister for her consideration of the CFC and the development proposals, para 2 provides:

> "2. It is intended to retain an element of academic selection at the new school, which, if you approve these proposals, would be able to select a percentage (up to 40%) of its approved admissions by an academically selective method. The proposed particular arrangements by which pupils would be admitted are set out in the Case for Change (CfC) which categorises anticipated future primary schools as Category A (children attending, who will have automatic entry to the new school) and Category B (children attending, will have to sit a transfer test). However, an approval of DP 607 would be the establishment of a type of school (VGS) and not including any form of admissions criteria for the school as this would be a matter for the school's BoG to determine."

[36] In similar vein, it is recorded at paras 27 and 28 of the submission that:

> "**Not in Scope**
>
> 27. It is important to acknowledge that the department is unable to assess aspects within the CfC that will fall, in the event of approval of these DP's under the rules and responsibilities of the newly established IBoG. These include arrangements for the development and application of admission criteria (including the proposed arrangements for the admission of pupils from the Category A and Category B feeder primary schools described in para 2 of the submissions); …"

[37] In contrast what was in scope for the Minister to decide was set out in para 28 as follows:

"**In Scope**

28. Having regard to the matters referred to above, your consideration of these proposals and the decisions you have been invited to take on them are confined solely to the discontinuation of existing provision on the establishment of a new school. The Department in its assessment of the DPs will assess the sustainability of each school; the historical, current, and projected enrolment trend; and the potential impact on other schools outside of proposed admissions arrangements, should the proposals be approved."

[38] Secondly, as is clear from the above passages, the admissions criteria are as a matter of law, a matter for the Board of Governors of the new school (which does not yet exist).

[39] That this is the proper approach is confirmed by a consideration of the relevant statutory and policy background.

Statutory Scheme

[40] Article 16(1) of the Education (Northern Ireland) Order 1997 ("the 1997 Order") provides as follows:

"16.—(1) Subject to the following provisions of this Article, the Board of Governors of each grant-aided school shall draw up, and may from time to time amend, the criteria to be applied in selecting children for admission to the school under Article 13."

[41] Article 16(5) does give the Department power to make regulations in relation to drawing-up of criteria and Article 16(7) provides for further matters that may be addressed by regulations. No regulations, however, have been made under Article 16(5) or (7).

[42] Article 16B of the 1997 Order provides:

"**Guidance as to admissions**

16B.—(1) The Department may issue, and from time to time revise, such guidance as it thinks appropriate in respect of the arrangements for the admission of pupils to grant-aided schools and the discharge by—

(a) boards;

(b) the Boards of Governors of grant-aided schools;

(c) appeal tribunals constituted in accordance with regulations under Article 15(8); and

(d) the body established by regulations under Article 16A(6),

of their respective functions under this Part.

(2) The guidance may in particular set out aims, objectives and other matters in relation to the discharge of those functions.

(3) It shall be the duty of—

(a) each of the bodies mentioned in paragraph (1); and

(b) any other person exercising any function for the purposes of the discharge by such a body of functions under this Part,

to have regard to any relevant guidance for the time being in force under this Article."

[43] From this it will be clear that the obligation to determine admissions criteria is statutorily one that rests on the Board of Governors. The Department has no supervisory or approval/authorisation role in that process. The Department has no power to authorise fresh admissions criteria unless an application is made to it by the Board of Governors to approve a change to its published admission criteria. The obligation on the Department is to provide guidance and that obligation has been fulfilled.

[44] The judicial review court is familiar with challenges brought in respect of admissions criteria. Thus, in *JR140's Application* [2021] by NIQB 21 it was confirmed that the obligation to avoid unlawfulness in the admissions criteria is one that falls on the Board of Governors, including in relation to human rights obligations (in the context of a challenge in that case, like this one, based on Article 14 ECHR in conjunction with Article 2 Protocol 1). In that judgment the court said at paras [83]-[88]:

"[83] I want to make some general points before coming to a final conclusion.

> [84] The Department has chosen not to issue regulations under Article 16 in respect of admissions to post primary schools.
>
> [85] It has chosen an alternative and less prescriptive form – namely guidance.
>
> [86] The Board is not legally obliged to adopt or follow the guidance.
>
> [87] It has a broad discretion to formulate admissions criteria in accordance with its own priorities and needs of the school.
>
> [88] In doing so it is constrained by its duty under Article 16B – to have regard to the guidance, by public law principles such as rationality, avoiding improper purposes and Human Rights Act obligations."

[45] Similarly, in *McKenna's Application* [2022] NIQB 35, Scoffield J concluded:

> "That the Department '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.'"

[46] Properly analysed, it seems to the court, that the applicant in this case complains about a decision as to admission criteria which has not yet been made (by a body that does not exist) and which cannot be made by the Department.

The grounds relied upon

[47] I propose to deal briefly with the substantive grounds relied upon by the applicant.

[48] The applicant places a heavy reliance on alleged breach of the proposed respondent's obligations to promote equality of opportunity under Section 75 of the Northern Ireland Act 1998 ("the 1998 Act").

[49] An obvious issue that arises in relation to this argument is that the duties under the section should be enforced through the mechanisms provided by Schedule 9 and paragraphs 10 and 11 thereof. This is an issue which has been dealt with in a number of applications in this jurisdiction by the Court of Appeal see *Re Neill's Application* [2016] NI 27 and *Peifer v Castlederg High School and others* [2008] NICA.

[50] It remains open to the applicant to avail of the enforcement mechanism provided by the 1998 Act by way of complaint to the Equality Commission.

[51] From the submission to the Minister it is apparent that regard has been had to equality of opportunity and to the section 75 duty in particular. By way of example:

(a) Page 4 of the submission – under statutory duty implications section 75 is explicitly identified.

(b) Pages 19-20, para 20(xv) under the heading "Breach of Statutory Duty/Requirements", the analysis of Quinlivan J in the previous judicial review is noted.

(c) The responsibility of the proposer to complete equality screening is noted throughout. It is additional to subsequent consideration of the due regard duty by the Department and is consistent with the Department's published guidance on the DP process which requires signed confirmation within the Case for Change by a proposer that "equality screening of the proposal has been carried out and the statutory requirements of the Rural Needs Act (NI) 2016 (where appropriate) have been considered."

(d) Paras 93-111 of the submission further consider equality considerations including denominational/single sex education/gender inequality."

(e) Paras 131-136 explicitly address section 75.

[52] Mr O'Donoghue raises an interesting point when he asserts that the Department has in fact, delegated its duties under section 75 by relying on the screening that was carried out by the CCMS. This exact issue was the subject matter of a judgment by Deeny J in the case of *Re SK's (A Minor) Application for Judicial Review* [2017] NIQB 9. In dealing with the issue, he concluded at paras [44] and [45] as follows:

> "[44] The Equality Commission published, as set out above, a Guide for Public Authorities in April 2010 which in effect requires screening to be carried out for the purpose of discharging the statutory duty. But as set out by me at [16] above, at Annex 1, page 51, the Equality Commission expressly enjoins a public authority such as the Department to complete screening 'at the earliest opportunity in the policy development process.'
>
> [45] I appreciate that as set out at [18] above the Commission 'recommends' that the lead role is taken by the policy decision maker. However, by statute here the role of developing proposals for the closure, opening or

> amalgamation of schools in the Catholic maintained sector in Northern Ireland is vested in CCMS. It is there that the proposals are being developed. It seems to me therefore that the Department and the Minister were perfectly entitled to conclude that it was proper for CCMS to carry out the screening process, in effect, on behalf of the Department. The ultimate decision rested with the Department but if no screening had taken place until that stage of the process the proposals would, contrary to guidance of the Equality Commission, have already been very largely fixed rather than fluid. I find that the Department was entitled to follow this aspect of the guidance and not to follow the recommendation that the decision maker should take 'the lead role' in carrying out the screening. There is a potential inconsistency between these two parts of the guidance which the Department was entitled to resolve in this way in the light of the statutory scheme for the management of schools and in the exercise of its own judgment."

[53] Mr O'Donoghue argues that this decision is inconsistent with the decision of the Divisional Court in England & Wales in the case of *R (Brown) v SSWP and another* [2009] PTSR 1506. There the court was looking at obligations under section 49A(1) of the Disability Discrimination Act 1995 which imposed obligations on every public authority carrying out its functions to have due regard to the need to eliminate discrimination that is unlawful under the Act.

[54] The court set out six general principles in relation to the imposition of the "due regard" duty. Of relevance to this case is that the court concluded that the duty imposed on public authorities that are subject to the relevant section is a non-delegable one. The duty will always remain on the public authority charged with it. In practice another body may actually carry out practical steps to fulfil a policy stated by a public authority that is charged with a section 49A(1) duty. In those circumstances, the duty to have "due regard" to the needs identified will only be fulfilled by the relevant public authority if:

(1) it appoints a third party that is capable of fulfilling the "due regard" duty and is willing to do so, and

(2) the public authority maintains a proper supervision over the third party to ensure it carries out its "due regard" duty.

[55] The duty is a continuing one. Mr O'Donoghue argues that that is not what has happened in this case.

Breach of duty to have due regard to rural needs, contrary to section 1 of the Rural Needs Act (Northern Ireland) 2016

[56] Similarly to the section 75 duty it is clear from the submission to the Minister that the Rural Needs Act (Northern Ireland) 2016 is specifically identified under "Statutory Duty Implications." The submission notes the analysis of Quinlivan J in the previous judicial review.

[57] The responsibility of the proposer to consider Rural Needs is noted throughout and paras 137-147 explicitly address the Rural Needs Act (Northern Ireland) 2016.

[58] In these circumstances the Department argues that it could not be suggested that the Minister has not had "due regard" to the obligations under the Rural Needs Act (Northern Ireland) 2016.

Failure to take into account the concerns raised by the Education and Training Inspectorate

[59] The ETI's comments were provided in full to the Minister. She was fully sighted of the issues raised. The respondent says that it cannot reasonably be argued that they were not taken into account.

Breach of A2P1/Article 14 of ECHR

[60] In relation to the alleged breach of section 6 of the Human Rights Act 1998 by reason of breach of A2P1 in conjunction with Article 14, as was recognised in the case of JR87, A2P1 imposes general obligations on the state to ensure that education provision is made available. This has been described as a "weak right." As Lord Bingham said of the right at para [24] in *Ali v Governors of Lord Grey School* [2006] UKHL 14 it is:

> "… In comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil ... The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny

> to a pupil effective access to such educational facilities as the state provides for such pupils?"

[61] In no way could it be said that the applicant has been denied the right to an education. It is questionable whether A2P1 is even engaged in the case. In addition, no Article 14 case is pleaded with reference to ambit, status, comparator, or alleged differential treatment.

Conclusion

[62] The court agrees with Mr McAteer's submission that the proposed challenge is misdirected and premature in that the target of the complaint is the proposed admission criteria of the new school. Those criteria have not yet been fixed (whatever the expressed intentions are) and will be a matter for the new Board of Governors of the new school in due course and are not a matter for the Department, the proposed respondent in this application. Any challenge to the admissions criteria is a matter for challenge when they have been determined, against the Board of Governors.

[63] This is a complete answer to the application.

[64] The applicant also faces significant difficulties in relation to the other issues that arise in this application. So far as standing goes, a credible case can be made that there are sufficient grounds for the child to make the application, but it is not necessary to make a specific finding in light of the conclusion above.

[65] In relation to the section 75 ground the applicant has failed to avail of the statutory remedies available under the 1998 Act. In any event, the evidence indicates that the proposed respondent has complied with its obligations under section 75 of the 1998 Act. Furthermore, its approach has been endorsed by a previous judgment in this court. It is not necessary to rule on this ground given the court's findings, but the applicant would face considerable difficulties in persuading the court that leave should be granted on this ground.

[66] Similar considerations apply in relation to the remaining grounds which are discussed above in the judgment. The court would not be inclined to grant leave on the remaining issues, but no such decision is necessary.

[67] For the reasons set out in this judgment, leave to apply for judicial review is refused.