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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 JR94
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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KEEGAN J

Introduction

[1] The application for judicial review is dated 31 October 2019. It is an application brought by a minor acting through his mother and next friend in relation to his educational provision. Anonymity has been granted in this case as the applicant is a minor and a person under disability and as this case involves a sensitive subject matter.

[2] In the Order 53 the applicant asks for leave to be granted to apply for judicial review of:

(a) the decision by the Education Authority ("the EA") to discontinue home tuition for the applicant, which decision was made 15 August 2019; and

(b) the continuing decision by the EA to refuse to provide home tuition, pending the final determination of the appeal brought by the applicant's mother to the Special Educational Needs and Disability Tribunal ("SENDIST") with regard to a school being named as the educational placement for the applicant in his (recently amended) Statement of Special Educational Needs ("SEN").

[3] Mr McQuitty BL appeared on behalf of the applicant and Mrs McCartan BL appeared on behalf of the proposed respondent. I am very grateful to counsel for the written and oral submissions they have made. This matter first came before me on 11 November 2019. At that hearing I raised the issue of an alternative remedy as I was told that an appeal to SENDIST was listed for hearing on 5 December 2019 (now

adjourned on consent until 17 December 2019). Following on from this intervention, I heard submissions on the alternate relief issue on 15 November 2019. I adjourned those submissions part heard as I considered that there should be an attempt at a mediated solution between the parties. Counsel submitted a helpful note of a joint consultation and meeting which took place on Thursday 21 November 2019 between all interested parties. Unfortunately, matters could not be resolved as a result of that meeting and so I resumed the leave hearing on 25 November 2019. What follows is my judgment.

[4] I am grateful to the applicant's counsel, Mr McQuitty, for articulating where the challenge actually lies in his skeleton argument. He states at paragraph 2 that:

> "The applicant accepts that the issue before the Tribunal, as to the ultimate suitability and legality of the proposed placement at a special school is a matter solely for the Tribunal and this court should not, and need not, stray into that territory. There is an adequate alternative remedy available to the applicant to resolve the substantive disputed issue between his mother and the Education Authority. Distinct from this is the question of interim relief in this case."

[5] This case therefore centred upon the question of interim relief and the court was requested to make a mandatory order for provision of home tuition in favour of the applicant whilst the appeal is heard in relation to educational arrangements.

Factual Background

[6] The applicant's mother has set out a comprehensive factual background in her affidavit of 31 October 2019. In that she states that her son is a 17 year old boy. He is profoundly disabled and has severe learning difficulties. He has been diagnosed with Autism Spectrum Disorder (ASD) and he has very low functioning as a result of which he has very limited verbal communication and very limited capacity to do pretty much anything for himself. The affidavit also explains that the child's SEN was last amended in November 2011 when he was 9 years old. Detailed reference is made to the content of that statement in the affidavit.

[7] The affidavit also provides the following helpful information. The child has been a registered pupil at the school since he was halfway through his P1 year. Unfortunately, the placement at the school broke down in October 2018. The child had been showing frequent displays of very challenging behaviour including hitting, kicking and head banging. He would be aggressive, destructive and self-injurious. This behaviour became even more challenging around October 2018 in that the child had begun to smear faeces and had caused damage to the school property leading to an incident at the school where he injured a classroom assistant and attempted to throw a desktop computer across the school. As a result of this the child was removed from the school on 8 October 2018.

[8] It is apparent from the affidavit and from correspondence I have read that there was an initial pre-action letter sent by the applicant's previous solicitors in relation to the removal. This action is dated 6 November 2018. A formal reply was received from the EA solicitors dated 6 December 2018. Included in this reply is a statement that the child had been unable to attend school due to extremely challenging behaviour since 8 October 2018. This letter also stated that the school was keen that the child would return to school as soon as suitable accommodation and staffing were provided. Further, in the EA solicitor's letter, concerns were highlighted that the smearing of faeces caused a serious health and safety and infection control risk in the school environment.

[9] As the applicant's mother confirms, the letter from the EA of 6 December 2018 went on to explain that a modular unit was being built for the child in the school grounds and that this would be a bespoke unit to meet the child's needs and would be fully functional in terms of lighting, heating and would contain a classroom for the child, bathroom facilities and most importantly a safe area that the child could go to when experiencing a challenging episode, with facilities for staff to remain in a safe place during such times. The letter explained that units such as this modular unit were not readily available to purchase and would have to be designed and that it would not be available until February/April 2019. The letter advised that it was felt that the child could not return to school until appropriate accommodation such as this was provided and so a proposal was made for home tuition in the interim period of 4.5 hours per week depending on how receptive the child was to that arrangement.

[10] The child commenced this home tuition the week before the Christmas holidays in 2018 although as the applicant's mother states the hours were never increased however the tuition continued until the end of June 2019.

[11] The affidavit explains that a Northern Health and Social Care Trust and an EA Dual Agency Behaviour Support Service put together a positive behaviour support plan for the child in March 2019 this was subject to revisions in May 2019 and June 2019. A particular issue in the first and second drafts of the support plan which the applicant's mother raised was the recommendation for when police might be called into the school rather than just the child's father and/or mother or social services. The applicant's mother raised a specific concern about police being involved. This was removed from the third version of the behaviour support plan but as the applicant's mother sets out in her affidavit she is concerned that the suggestion remains that the school might take "whatever steps are necessary to render the situation safe". This she points out, coupled with the fact that at times neither she nor the child's father will be contactable by the school, may mean that the school will reach for social services and/or the police in any event.

[12] In her affidavit the applicant's mother also describes some of the family circumstances as follows. She explains that she has a very serious case of Crohn's disease for which she receives treatment. In addition, the child's father works shifts

and is difficult to contact on occasions. It is clear from the papers that the child's mother looks after the child at home on her own but with the support of the father who, whilst separated from the mother, provides assistance. The applicant's mother then refers to her request for home tuition to continue instead of the child returning to school. This is set out in some detail in her letter of 16 April 2019. She also refers to the reply which contains the EA position that this was an interim measure and that the modular unit was the preferred option for the child.

[13] In the affidavit the applicant's mother confirms that on 11 June 2019 she visited the school and met with a teacher and viewed the bespoke classroom which had been put in place for the child. She agreed that the classroom was contained within a nice modern building and she says in her affidavit that she enormously respects and appreciates the effort that has gone into and the money that has been spent for the child's benefit. However, the applicant's mother also raises some concerns about the accommodation and feels that it resembles a prison cell and that it is not workable for this child who would be isolated from his peers and the curriculum.

[14] An amendment notice to the child's Statement of Special Educational Needs ("statement") was issued by the EA on 20 June 2019. This sets out the plan for this child in the modular unit. The applicant's mother states that she returned the parental response to that amendment notice to the EA on 28 June 2019 requesting that home tuition be continued for the child. The applicant's mother then says that she received a letter from the EA dated 15 August 2019 advising her that it was seeking updated advice from a variety of sources. It was further stated that the EA would be putting in place a plan to facilitate re-integration into the school and that home tuition would cease. On 4 October 2019 the applicant's mother's solicitor lodged an appeal having received the amended Statement. The applicant's mother also references other evidence having met the principal of the school and an Educational Psychologist who visited the child in her home on 20 September 2019. The applicant's mother states that following this home visit she received a letter from the EA, dated 3 October 2019 enclosing a copy of the advice which had been issued by the Educational Psychologist following the assessment of the child which stated that:

> "The child's special educational needs could best be met in a school for children with severe learning difficulties, such as his current school …. A transition plan should be put in place to gradually introduce the child back to school life, following his absence from school."

[15] The beginning of the new school term has now passed and the child did not return to the special unit and home tuition ceased as advised by the EA. This is what the mother complains about. She has as I have said appealed the Statement of Special Educational Needs to the specialist tribunal and that hearing will take place in December 2019 to decide on the appropriate educational placement for the child.

Legal Context

[16] Article 86 of the Education (Northern Ireland) Order 1998 provides as follows:

> "**Exceptional provision of education**
>
> 86.—(1) The authority shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who by reason of illness or expulsion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.
>
> (2) The authority may make arrangements for the provision of suitable education otherwise than at school for those children over compulsory school age who—
>
> (a) have not attained the age of 19; and
>
> (b) by reason of illness or expulsion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.
>
> 2(a) Paragraphs 1 and 2 do not apply in relation to a child who is suspended from school.
>
> (3) In determining what arrangements to make under this Article in the case of any child the authority shall have regard to any guidance given from time to time by the Department."

[17] Article 46(1) of the Education and Libraries (Northern Ireland) Order 1986 as amended by Article 156 of the Education Reform (Northern Ireland) Order 1989 states:

> "In the education orders the expression "compulsory school age" means any person between 4 years and 16 years and accordingly a person shall be of compulsory school age if he has attained the age of 4 years and has not attained the age of 16 years."

[18] Article 10 the Education (Northern Ireland) Order 1996 also provides:

> "**Special educational provision otherwise than in a grant-aided school**

10.—(1) Subject to paragraphs (2) and (3) and to Articles 11 and 12, the authority may arrange for the special educational provision (or any part of it) which any learning difficulty of a child calls for to be made—

(a) in an institution outside Northern Ireland, or

(b) in Northern Ireland otherwise than in a grant-aided school.

(2) The authority shall not make any arrangements under paragraph (1) unless it is satisfied that—

(a) the interests of the child require such arrangements to be made; and

(b) those arrangements are compatible with the efficient use of resources.

(3) Before making any arrangements under this Article, the authority shall consult the child's parent.

(4) This Article is without prejudice to any other powers of the authority."

[19] In relation to the question of interim relief counsel referred to the case of *National Commercial Bank v Olint Corporation Ltd* [2009] UKPC 16 and the balance of convenience test. This is explained in Fordham: Judicial Review Handbook at paragraph 20.2 which states as follows in relation to the balance of convenience:

"The basic approach to interim remedies, adapted from private law, is:

(i) to require a prima facie (arguable case) for granting judicial review; and

(ii) to identify and avoid the greater risk of an injustice (from an interim loser becoming an interim winner) the court looks at the case in the round, taking into account matters such as: the strength of the challenge; whether some monetary order is available providing an adequate ultimate remedy for one side or the other (which will be rare in public law); the status quo; and the wider public interest."

Consideration

[20] The context of this case is important. Clearly this child has severe difficulties in terms of his learning and behaviour. There was no serious dispute about his removal from the school on 8 October 2018 which was necessary due to the child's behaviour towards staff and the risks associated with that for the staff, pupils and indeed for the child himself. There is also no doubt that this child has committed parents and that they want to do what is best for him. I am very impressed by the statement made in the mother's affidavit whereby she expresses her appreciation to the Education Authority for the money and effort that has gone into setting up the modular classroom for this child. By the same token the mother has raised some concerns about this plan which principally relate to her understandable concern that police or social services may get involved in the future as this child gets older and his behaviour becomes unmanageable and he may end up subject to other more invasive measures. That is an entirely understandable concern.

[21] The real issue is what should happen in terms of educational provision for this young person going forward. That is not an easy question and many dedicated professionals have attempted to find the best solution for him. The dispute as to his education now lies between the current Statement which provides for schooling at the modular classroom in the school that this child has always known or home tuition. The mother has objected to the Statement as is her right. This appeal is now to be heard before a specialist tribunal in December 2019. The applicant's counsel rightly concedes that this is an alternative remedy to determine the ultimate case being made. I reiterate the fact that the judicial review court is a court of supervisory jurisdiction. This court is not equipped to deal with the merits of dispute and these complicated and sensitive issues are best dealt with by specialist tribunals.

[22] Turning then to the issue of interim relief my decision is as follows. I am being asked to grant interim relief effectively because the tribunal does not have any jurisdiction to do so and because the home tuition ceased since the modular classroom became available. The test in relation to interim relief has been set out by counsel and is explained in the text I have referred to above. Clearly interim relief is available in judicial review but it will only be appropriate in particular circumstances. That point is reiterated in the three cases that have been presented to me in this area which are examined by counsel in their various arguments and which I comment upon as follows.

[23] In the case of *R (S) v Norfolk County Council* [2004] EWHC 404 a child S aged 13 who suffered from attention deficit hyperactivity disorder had attended a residential establishment and was making good progress. The placement was funded by the defendant, the local educational authority, but following an inspection of the college there was a child protection investigation which led to some allegations against staff and suspension of various staff. Concern on the part of the authority prompted its decision to remove all the children it was funding from the college including S. S's mother did not want him to be removed from the school as

he was doing well there and he wished to stay. An application for judicial review was therefore made. It was determined in that case that the claimant had an arguable case that the decision, in particular the decision not to fund the college placement pending the appeal hearing, was unreasonable. The authority had another child continuing at the college, connoting that it did not consider the college to be wholly unsuitable or unsafe for children and also the child was doing well at college. The court therefore granted permission for judicial review and the court concluded in what was an anxious case, that an interim injunction should be granted. The court pointed out that it was not at all clear that the child could possibly be advantaged in the two months or so before the hearing by being removed from the college, notwithstanding the concerns that existed. On the whole, the indications were that, for a relatively short period the child might be significantly disadvantaged if he were removed.

[24] The second case referred to is that of *R (G) v London Borough of Barnet* [2005] EWHC 1946. That was also a case before the administrative court for permission to apply for judicial review and for interim relief in respect of a decision of the London Borough of Barnet Council to issue a final amended statement of special educational needs in respect of a child aged 11 who suffered from exceptionally severe disabilities in learning, communication, mobility and development as a result of a chromosome disorder. In that case the judge found that it was arguable that the authority had erred in its procedures and as such it ordered that relief should follow. The court also referred to a case of *M* [1996] which is found in the Educational Law Reports in which the Court of Appeal was asked to consider a stay in relation to a change to educational support provision while an appeal to SENDIST was pending. In that case it was decided that the first question which the court should ask itself was whether it was an appropriate case in which leave for judicial review should be granted in respect of the central challenge. The Court of Appeal determined that it would be wrong to grant leave to apply for judicial review because the statutory appeal procedure ought to be followed and it did so in the context where the claimant had not identified any error of law on the part of the local authority. Paragraph 15 of the *Barnet* decision refers to this case by reiterating that in the *M* case the court "specifically rejected that it should be involved in providing interim reliefs simply because a tribunal could not do so."

[25] In a further case of which I have just been given a press report of *R (J) v LB Croyden* (25 September 2008) it appears that the administrative court gave permission for a judicial review and made an interim relief order that the authority arrange and pay for the claimant to attend the school of the parent's choice for a defined period pending resolution of a dispute over educational provision. In this case there was a failure to issue a statement of special educational needs and a failure to name a school at all in Part 4 of the statement.

[26] I have considered whether the decision of the Education Authority not to continue with home tuition is unlawful or amounts to irrationality. In doing so, I have considered the legislative framework. In my view, Mrs McCartan rightly

highlights the fact that the EA is quite clear that the applicant has access to suitable education at the school by virtue of the bespoke unit that has been provided for him on site. The only way in which this court would be able to determine that this was not the case would be to become engaged in the consideration on the merits which is clearly the province of the SENDIST Tribunal and not the role of the judicial review court. I also agree with Ms McCartan's assertion at paragraph 12 of her argument that it could not possibly have been the intention of the legislature for Article 86 to require the EA to provide education otherwise than at school where the child is not attending due to a dispute with the EA over the appropriate provision, as this is clearly the province of SENDIST and whether the dispute is legitimate as described by the applicant is a matter for that tribunal. I also accept the analysis provided by Mrs McCartan in relation to Article 86 of the Education (Northern Ireland) Order 1998. It is significant in my view that the applicant is over compulsory school age therefore the issue is not one of mandatory provision but rather discretionary provision under Article 86(2). The duty and discretion to provide education otherwise than at school, only arises where the young person may not receive suitable education if such provision is not made.

[27] I consider that the case does not meet either limb of the test in Article 10 of the 1996 Order as the clear position of the EA is that the applicant's interests do not require that provision of education otherwise than in a grant aided school be made, nor that such provision would be compatible with the efficient use of resources. In any case it also appears to me that these are matters for the tribunal and not this judicial review court.

[28] It follows from the above that the first question to ask is whether there is an arguable case in this judicial review which would lead to the grant of leave. All of the authorities I have been provided with can be distinguished in terms of the facts as in each of those cases there is a clear failing on the part of the local authority to take proper steps to facilitate educational provision. Here, the case is only sustainable if it is arguable that the EA has acted unlawfully or irrationally in providing education in accordance with the amended statement. I have to consider how the unlawfulness arises in this case. Having done so it is clear to me that the applicant faces difficulties in relation to this argument given that an amended Statement has been provided, a school identified, a bespoke modular classroom provided and available at the start of term. It is also clear from the correspondence that the provision of home tuition was an interim measure pending this classroom being constructed for the child. I therefore cannot see that any unlawfulness arises or that the actions of the EA are irrational.

[29] Even if there were an arguable case I do not consider that the balance of convenience lies with the applicant in this case. Fundamentally, I consider that it is improper for this court to become engaged in the merits of a dispute which is going to be heard very quickly before the specialist tribunal. There should be a level playing field for that particularly as home tuition has ceased since June 2019. This application was only brought at the end of October 2019. The applicant's mother can

make all of her arguments about that and the plan going forward to the specialist tribunal. If I am wrong about this, the expedited timescale for adjudication means that the court would not grant interim relief.

[30] I conclude this judgment by saying that I have great sympathy for the applicant and his family. It is not an easy task to care for this child or to see the way forward for him and as I have said I appreciate the mother's concerns which should be fully ventilated at the specialist tribunal. There is an imperative to have a swift decision for this family. The mother should be entitled to make her case which is that home tuition is the best for this child. I note that Mrs McCartan in her argument says that the EA has never challenged a SENDIST decision. If this is not the preferred option and the decision of the tribunal is that the school is the proper placement the mother can obviously consider that in the round. However, I do hope that there is respectful and proper engagement between the two parties in this case both before the tribunal and thereafter in trying to come up with what is the best solution in a very difficult situation for this child.

[31] Accordingly, this application for judicial review is dismissed as I have determined that there is no arguable case for leave and also that interim relief should not be granted on the facts of this case.