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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 APPLICATION BY 'JR159' (A MINOR) ACTING BY HIS FATHER AND NEXT FRIEND FOR JUDICIAL REVIEW

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

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Steven McQuitty (instructed by Phoenix Law) for the Applicant
Tony McGleenan QC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the Respondent

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SCOFFIELD J

Introduction

[1] Thursday 1 July was a big day for the applicant in these proceedings. It was his fourth birthday. As I explain further below, not only will this have been a day of celebration for him, it is also a cause of concern. That is because the day on which the applicant's birthday falls means that he is obliged to commence his primary level education this coming September. He will be the youngest in the cohort doing so. His parents say that he is not ready to commence primary school this year, partly as a result of his being born prematurely, and they want his commencement to be deferred for a year. Despite the previous Minister having professed sympathy, the respondent in these proceedings, the Department of Education in Northern Ireland, says (in terms) that there is nothing that can be done for him. That is because the law governing this issue in Northern Ireland sets a firm cut-off point, based on children's dates of birth. The question in these proceedings is whether that is compliant with the Convention rights of the applicant.

[2] The applicant is acting by his father and next friend. He was represented by Mr McQuitty of counsel. Mr McGleenan QC and Mr McAteer of counsel appeared

for the Department of Education ('the Department'). I am grateful to all counsel for their comprehensive written submissions and their focused and efficiently presented oral submissions. This case has been expedited and dealt with by way of a 'rolled up' hearing in order to seek to clarify the position for the applicant as far as possible in advance of the forthcoming academic year. That could not have been achieved without the co-operation and industry of the various counsel involved.

Factual background

[3] The applicant was born on 1 July 2017. This was a premature birth, at 36 weeks gestation. He is now due to start primary school in September 2021. However, his parents wish that to be deferred until September 2022. The evidence before me suggests that they feel very strongly that such a deferral would be in the applicant's best interests. They assert that that view finds significant support generally within academic literature on this issue (discussed briefly below); and, more particularly, in the report of an educational psychologist, Dr Rooney, who has been instructed to prepare a report in relation to the applicant.

[4] The applicant's mother is a primary school teacher (at the school where the applicant has a place to commence his primary school education in September, should he be required to). One might think that she is unusually well placed, therefore, to make an assessment about whether her child is ready to commence school. Both she and the applicant's father are concerned about the applicant's ability to cope with the demands of primary school, leaving him susceptible to emotional and behavioural difficulties which he exhibits after a tiring day at nursery, and his risk of underachievement in his education relative to others in his class. These concerns have been exacerbated in light of the impact of Covid-19 and the related lockdowns over the past year

[5] The applicants' parents' request for a deferral has not been facilitated by the Department. This is because the relevant legislation operates on a 'bright-line' basis, without any element of discretion for unusual cases, unless the child in question is assessed as requiring a statement of special education needs (SEN).

[6] As it happens, the applicant falls right on the cusp of the dividing line. Had he been born just one day later (on 2 July 2017), or indeed on the 'due date' when he was expected to be born (in August 2017), he would not be due to start school until September 2022.

[7] The applicant's parents have been advocating for a deferral of the applicant's school starting date for some time. A brief summary of the interactions in this regard is set out below:

(a) The applicant's parents approached their local MP in the summer of 2020 to raise their concerns. He raised their case with the Education Minister, prompting a response in August 2020. That response was sympathetic,

including by noting that the Minister recognised the parents' "*genuine concerns and worries*" around the applicant starting school; but noted that "*there is currently no legal means in Northern Ireland by which a person can defer a child's school starting age.*" The Minister indicated that he would give consideration to whether "*changes to provide for legal deferral of school starting age in a small number of limited or exceptional circumstances may be the most appropriate way forward.*"

(b) Towards the end of 2020, at a time when the applicant's parents say that things were particularly difficult for him, they engaged with the Education Minister's special adviser. They described a range of challenging behaviours at home which they attributed to the applicant's nursery attendance; and gave further details of toileting problems, communication difficulties, and poor mood on the part of the applicant which they attributed to this attendance and which they felt would be exacerbated by school commencement. They said that, as his parents, they found it "*extremely hard to watch [the applicant] struggle and it breaks our hearts seeing the pressure he is under.*"

(c) In February this year the applicant's solicitors wrote to the Department and the Education Authority (EA) formally requesting that he be permitted to defer his entry to primary school. The EA pointed out that it did not have any statutory power to permit deferral. At the same time, the Minister announced his intention to bring forward legislation to allow for deferral in certain circumstances; but nonetheless replied to the applicant's parents relying on the present statutory provisions and declining to permit deferral in the absence of new legislation (which, it was said, it would be impracticable to introduce before the applicant was due to start school in September). Thereafter, the applicant's parents instructed solicitors to send the Department pre-action correspondence, and these proceedings followed.

[8] For its part, the Department appears to have recognised a need for reform of the legislation so that its operation is not so mechanistic. This has been under consideration since at least 2014. Further details of that are set out below. However, the Department has so far failed to amend the relevant provisions, despite what the applicant submits is overwhelming public support for such a move, and considerable academic support.

[9] More recently the Department has, under its former Minister (Peter Weir MLA), recognised that such reform should be a legislative priority. Nonetheless, Departmental officials still remain pessimistic about securing legislative change in advance of September 2022, with a deferral option only anticipated for children due to start school in September 2023.

The educational psychology report in this case

[10] The applicant relies on a report from an educational psychologist in this case in support of his contention that he is not ready to start primary school this year, and that it would be in his best interests to have his school commencement deferred. I have set out a considerable amount of the detail of this report below, since it is also relied upon strongly by the respondent, which contends that the report in fact undermines the applicant's case. Mr McGleenan submits that, properly analysed, the 'objective' assessment within the report does not support the more subjective element of the psychologist's assessment of what would be in the applicant's best interests.

[11] The report was provided by Dr Damian Rooney BSc (Hons), MSc, DEdChPsych, CPsychol, who is an Educational, Child and Adolescent Psychologist. He explains that he has been asked to complete an assessment of the applicant and to determine if it would be in his best interests to defer entry to Primary 1 until 2022, as well as commenting on potential adverse consequences of his commencing Primary 1 in 2021. Dr Rooney was briefed with a range of correspondence relating to this issue and was able to consult with the applicant's parents and to assess the applicant in person, administer a range of tests of cognitive and adaptive functions, review notes from the applicant's crèche, and consult with the applicant's nursery teacher.

Commentary on academic research and literature

[12] Dr Rooney has also conducted a review of research literature in relation to commencement of schooling and compulsory school age, particularly with reference to pre-term and 'summer born' children. ('Summer born' children does not have a specific definition of general application but essentially denotes the youngest children in the year, born in or just before the summer immediately after which they are due to commence school, in certain jurisdictions including in England and Northern Ireland.) He notes that there is "*very little evidence as to the rationale for children starting at the age of 4*". He also notes that the position in Northern Ireland – whereby children who have reached their fourth birthday on or before 1 July are required to commence primary school at the beginning of September that same year – is "*the youngest school starting age in Europe*". He then goes on to consider some academic literature relating to children who are young for their year group (YFYG) and children who were born prematurely. A short summary of this evidence is offered below:

(a) It is said that decades of research has consistently demonstrated 'season of birth effects' on the educational achievement of YFYG children across areas such as reading and maths. Traditionally, such children have been over-represented in the lower bands or learning streams and over-represented in those assessed as having special educational needs (SEN). There is some support for the effects of being YFYG continuing to be present throughout

post-primary education (although not, it seems, third level education). Generally, studies showed that older children outperformed those who were YFYG across the core curricular areas of English, Maths and Science. There is also some research indicating that those who are YFYG are more likely to be referred to paediatric and child psychology services (often by teachers, as opposed to by parents).

(b) A study completed in 2000 by educational psychologists in Northern Ireland found that the school starting age here lent itself well to differentiating between the summer born group, which split children born into the summer into two distinct groups (those born from May to 1 July, who would progress to school that September; and those born from 2 July to the end of August who would be the oldest children commencing school the following year). This study found:

> "*a statistically significant main effect between the month of birth and performance in literacy measures and behaviour, and that those born at the end of the NI school year, May or June (i.e., youngest in the year) were overrepresented in referrals to Educational Psychology Service for assessment and support*."

(c) A further review suggested that YFYG children may be disadvantaged from the time of entry into compulsory education because they may not have reached the level of cognitive competence required to tackle a curriculum developed for five year olds. In particular, children around the age of four may not be ready for the school environment and the number of social and emotional adjustments which it required. There is evidence to suggest that birth date effects may be the result of lower levels of relative maturity in the physical, cognitive, social and emotional domains of YFYG children.

(d) There is also some evidence that starting formal education later helps to reduce birth date effects (particularly having regard to countries such as Finland where children do not begin compulsory education until age seven and Denmark where formal education begins at age six – at least at the time of the study).

(e) Dr Rooney's conclusion was that:

> "*Overall, findings regarding month and season of birth effects in education demonstrate strong and consistent evidence that the YFYG children generally perform at a lower level to their relatively older peers at all levels of formal education, and have higher rates of referrals to paediatric, child and educational psychology services. The effects last until at least university level. Despite some levelling off, and the eventual reversal of fortune for those who do go on to university level, the reported*

disadvantage throughout primary and post primary education cannot be ignored."

(f) Dr Rooney then went on to consider some of the research on the educational, social, emotional and behavioural development of premature infants as school-aged children. He noted that there is an evidence base which documents the risk posed by pre-term birth for academic underachievement which is seen as one of the high-prevalence but low-severity impairments which is often associated with this population. It has been documented in research literature that infants who are born pre-term, both at the very pre-term gestation (less than 32 weeks) and modest pre-term gestation (32 to 36 weeks) have worse outcomes at school age, particularly with educational attainment. Pre-term infants, even with similar IQ scores to peers who were born at term, have a higher risk of having special educational needs at school and needing additional support. This would suggest that, despite having normal cognitive abilities such as IQ which would be considered a protective factor, the association between moderate and late pre-term birth and educational needs is not mediated by innate cognitive ability. (This was relied upon by Mr McQuitty as evidence of the fact that IQ is not a protective factor in education for those who are pre-term. This, he said, undermined the case made by the respondent that the assessment of the applicant's IQ indicated that the risks for him were not as high as his parents might suggest.)

(g) The evidence suggests that the degree of prematurity of birth is associated with worse educational outcomes, that is to say, children born at a lower gestation age are less likely to be ready for school. There are also some positive suggestions that a number of families are able to manage the morbidity related to pre-term birth and that, when measured educationally in a timeframe beyond the reported follow-up in most transition studies, these children perform well within expected school norms.

(h) In addition to educational attainment, Dr Rooney also considered some of the research in relation to the impact of prematurity on behavioural, social and emotional development. Again, prematurity is a recognised risk factor for developmental problems in childhood and adolescence; with some research suggesting that up to one third of children born between 30 to 35 weeks gestation may have school problems. Emotional regulation (a live issue in the applicant's case) has increasingly been recognised as a potential crucial marker of later psychosocial risk. On this, Dr Rooney concluded as follows:

"*The research evidence lends strong support that pre-term children are at much greater risk for behavioural and socioemotional difficulties, given brain immaturity and vulnerability during critical periods of development.*"

[13] This led to Dr Rooney commenting on the "*double disadvantage*" suffered by a child such as the applicant, who was both very young for his year group *and* a pre-term infant. Being in either category would tend towards underachievement or being outperformed by classmates and peers. A recent study has suggested that children who are in *both* categories face increased developmental risks, which was consistent with earlier research that the odds of not achieving a good level of development almost double in such children. "*In particular, children who entered school a year earlier than anticipated due to being born premature appeared to be at a substantial disadvantage.*" That group's odds of not achieving a good level of development were more than three and a half times greater than even the summer-born pre-term children who did not start school a year earlier than anticipated. This research demonstrated, Dr Rooney observed, "*that there are strong independent effects of both chronological age (i.e. being YFYG) and prematurity on a child's developmental readiness for schooling. Combined, these effects are even more deleterious*." On this issue, Dr Rooney's conclusion was as follows:

> "*It is evident then, that the relative immaturity of being preterm, summer-born and the double disadvantage of being both pre-term and summer born is a significant factor in underachievement and school readiness. The research consistently demonstrates that these differences appear because such children remain the youngest in their class. As long as summer-born children remain in age-cohort classes, where they are always the youngest and least cognitively and physically mature, they will not be able to benefit from the educational experiences provided as well as their older peers*."

[14] Although not addressed in Dr Rooney's report, it is worth mentioning that the House of Commons Library Briefing Paper on this issue (discussed below) refers to the fact that, in January 2015, the House of Commons Education Select Committee launched an 'evidence check' inquiry on school starting age, including the provision for those born in summer months or born prematurely. At the conclusion of its inquiry, the Committee wrote to the relevant Westminster Minister. Amongst other things, it stated that it was clear from the evidence which the Committee had received, including the (Westminster) Department's own analysis, that there was a measurable effect of the month of a child's birth on academic outcomes; and that the Committee had heard evidence about non-academic effects of being summer-born, including disproportionately high SEN diagnosis, bullying and placement in low ability groups. The Committee concluded that there was widespread agreement that a problem exists, on average, for summer-born and premature children. The key issue for debate arising from this, since there is a facility for such children to defer school entry in England, was the class into which children who have deferred entry should be introduced: Year 1 or the more introductory reception year, which the non-deferred children in their age group would by then have completed. The Government's intention appears to have been that the rights of parents to choose when their child enters reception class, and to ensure that children remain in the

same school year cohort throughout their education if they prefer, should be strengthened.

Individual assessment of the applicant

[15] However, as well as addressing the risks for YFYG and pre-term children in the abstract, as one might expect Dr Rooney also individually assessed the applicant in this case. This was done by way of completing a comprehensive neurodevelopmental history with the applicant's parents, as well as having the opportunity to interact with and observe the applicant both informally and formally for psychological assessment.

[16] Although the applicant was born (moderately) prematurely, at 36 weeks gestation, he was healthy and well on delivery and did not require any special care. Although he was a small baby, he thrived and gained weight as expected. There were no concerns around his early developmental milestones and his early developmental trajectory and medical history were unremarkable. He is currently not known to any medical, educational or allied health professionals. "*There is no concern around developmental delay or disorders.*" Indeed, the applicant's current speech, language and communication skills are said to be well developed. He is socially interested and wants to interact with others. His motor skills are also felt to be developing as expected; and he is said to be "*confident in the home and school environment and is able to navigate his way around play park equipment.*" He has a range of independent and self-help skills as expected for a boy of his age, including being toilet trained and familiar with other basic self-care regimes. "*There are no significant behavioural challenges on a daily basis.*"

[17] There can sometimes be behavioural and emotional challenges, especially after a long day at nursery school, which usually occur close to bedtime with periods of crying and upset. Emotional tantrums can be upsetting for the family – although these are said to be much reduced during periods when the applicant is not at nursery. After a long day at nursery school and crèche the applicant can be physically and emotionally exhausted, lacking energy even to feed himself. The applicant's parents emphasised to Dr Rooney that, although he is progressing well at nursery, the impact of the school day is only seen at home, when it is clear that demands have exceeded the applicant's capabilities.

[18] The applicant has attended crèche from the age of 14 months, when he began in the 'Baby Room'. He settled well, after some initial upset at leaving his parents; and did so again when he progressed to the 'Toddler Room', although staff felt that it would be in his best interests to keep him in the Baby Room for a while longer than usual, due to his emotional maturity. He also preferred being with the younger children where he felt more capable. Nonetheless, he made progress as expected in crèche across the range of physical, cognitive and learning, communication and language, and social, personal and emotional milestones. He remains at crèche for after-school care, after nursery, and he enjoys this setting.

[19] The applicant commenced nursery school in September 2020 and there are no concerns in relation to this attendance there, despite initial separation upset in the early days. He has again settled well and is making progress as expected across all areas of the early years' curriculum. His nursery teacher, whom Dr Rooney had the opportunity to consult, describes that the applicant has settled well; that he is a capable boy; and that "*she has had no concerns for [the applicant] in relation to his educational, social or emotional progress in school.*" He has developed in terms of his own self confidence and assertiveness and has made great progress in all domains. "*There are no adjustments or accommodations made for [the applicant] in his nursery setting. There is no evidence to indicate that [the applicant] should be registered on the [SEN] Code of Practice at this juncture.*" The nursery teacher also indicated that she would have no concerns in relation to the applicant's adaptive skills in the school setting.

[20] Dr Rooney goes on to describe a direct assessment conducted with the applicant using psychometrics in order to measure his cognitive ability, his social-emotional development, and his overall adaptive behaviour and functional skills. After some initial upset, the applicant engaged well in the assessment and was relaxed, calm and regulated. A summary of the findings is as follows:

(i) The *Wechsler Pre-School and Primary Scale of Intelligence – Fourth UK Edition* indicated the applicant to be above average in the verbal comprehension scale and average in the visual spatial, working memory and full scales. There was no concern indicated across any of these areas. In the full scale IQ area, the applicant's ability is within the average to high average range. There was no evidence of cognitive or learning delay and his language skills are an area of real strength.

(ii) The *Adaptive Behaviour Assessment System – Third Edition* was used to assess skills necessary for functioning effectively within daily life. The applicant was in the average category in respect of the general adaptive composite, conceptual skills and practical skills areas. He was in the high average category in respect of social skills. His adaptive skills were developing as expected for a boy of his age and ability.

(iii) Dr Rooney then used the *Ages and Stages Questionnaires – Second Edition: Social Emotional*, a set of questionnaires about behaviour and social emotional development in young children. Scores above 70 indicate cause for concern, with scores above 85 indicating significant concerns. In this instance, however, the applicant's score was 15, "*placing him well within the typical range of* ***no to low risk of social-emotional needs***" [bold emphasis in original]. He further noted that the applicant's parents responses indicate that he is a boy who is socially and emotionally on track for his age and that, other than being unsettled with separations and in initially unfamiliar environments, the applicant is making pleasing progress in the area of social and emotional

development, which was also in keeping with his teacher's report and observations.

Dr Rooney's Conclusions

[21] In all, Dr Rooney concluded that the applicant, despite his pre-term birth status and associated risks, had a neurodevelopmental trajectory which showed no evidence of delay. This was further evidenced during formal assessment of his cognitive skills and further substantiated through the qualitative observations of his parents and his teacher. As to his adaptive behaviour, he was said to be "*a boy of many strengths*" who was "*excelling across all areas, again despite his preterm birth status.*" The only exception was in the area of his pre-academic skills, which was below average. Dr Rooney was not able to formally assess academic attainments as the applicant was too young for such tests. He was also found to demonstrate age-appropriate social and emotional maturity (that being age-appropriate for a four year old, rather than a five year old, with those levels of maturity being quite different). The main presenting problem and concern for his parents was the emotional fall-out which he experiences after a long day at school and crèche. Dr Rooney also noted a number of protective factors around the applicant, including a family who are fully supportive of him and encourage him in all of his developmental endeavours.

[22] Mr McGleenan relies heavily on the following statement in Dr Rooney's summary: "*There is no evidence to suggest developmental delay, poor adaptive functioning or risk of social, emotional or behavioural needs associated with his preterm birth.*" There was also limited evidence presented to Dr Rooney that the applicant's education or development had been impacted by Covid-19 and the associated restrictions around education.

[23] Dr Rooney then says that the question as to the applicant's suitability for commencing formal education in 2021 is "*not easy to answer.*" On the one hand, the applicant presented on paper as very capable and managing well. On the other hand, there is a plethora of research which demonstrates underachievement and higher risks for children sharing the applicant's characteristics. In the present case, this was seen in the applicant's presentation at home, but not in the school setting. Weighing these factors together, Dr Rooney's ultimate conclusion was as follows:

> "*When considered in the context of the empirical data and research which clearly documents the underachievement of young for year group and preterm children across their education, the higher rates of referrals to paediatric, child and educational psychology services, and the fact that the researchers indicated that cognitive ability is not a protective factor for underachievement for the YFYG and summer born children, in my view, despite his success and development to date, [the applicant] is one of those children who is at increased*

> *risk of experiencing underachievement as he progresses through education. It is possible that such risks, arising from the sheer misfortune of being born prematurely and summer born and therefore subjected to arbitrary school start dates, may be mitigated by deferred entry to primary 1 until 2022, and would be in [the applicant's] best interests.*"

[24] On reading this, it was not immediately clear to me whether Dr Rooney was saying that, in his view, it *was* in the applicant's best interests to have his entry to Primary 1 deferred for a year, or merely whether it was *possible* that this would be in his best interests. This has been clarified after a further enquiry was made of Dr Rooney by the applicant's solicitor. In his response, he confirmed that, "*In light of the evidence of summer born, pre term children, I am saying that I agree that deferred entry until 2022 would be in [the applicant's] best interests*" [my underlined emphasis].

The comparative position in Great Britain and Ireland

[25] Dr Rooney has also addressed the comparative position in the rest of the United Kingdom. Some further detail in relation to this is contained in a helpful briefing paper compiled by the House of Commons Library, entitled '*Summer-born children: starting school*' (Number 07272, published on 18 December 2020) ('the HCL Briefing Paper'). The following is a summary of the evidence provided on this issue:

(a) Dr Rooney notes that in England, under the Education Act 1996 and the Education (Start of Compulsory School Age) Order 1998, a child reaches compulsory school age after their fifth birthday; although summer born children there (those born from 1 April to 31 August) do not need to start school until the September a full year after they could first have started school. The HCL Briefing Paper confirms that a degree of flexibility is provided in England, whereby a parent may request that a summer-born child is admitted to school outside of their normal age group; and that this is to accommodate longstanding concerns that children born towards the end of the school year suffer adverse educational impacts by virtue of starting school at a younger age than their peers. Decisions are made on a case-by-case basis according to what is considered to be in the child's best interest, with particular factors such as whether the child was born prematurely to be taken into account. School admission authorities are responsible for making the decision regarding to which year group a child should be admitted. Parents do not have the right to insist that their child is admitted to a particular year group, so a child who defers entry may miss the reception class.

(b) Dr Rooney's report indicates that, in Scotland, the school year begins in mid-August and any single school year group will consist of children born between the beginning of March in one year and the end of February in the following year. This means that children in Scotland usually begin education between the ages of 4½ and 5½ years old. Children born between March and

August start school in the August of, or following, their fifth birthday. Parents of children born between September and December can request to defer their child's entry to the following August, subject to approval by the local education authority. A study which dealt with such deferrals noted that the most common reason for deferral of school entry was that the child was "*not ready*" (44%) or was "*too young*" (32%). The HCL Briefing Paper confirms that, in Scotland, similar deferral processes are in place as operate in England (although the differing operation of the school year means those provisions apply to children born during the winter, rather than during the summer).

(c) Dr Rooney's evidence was that the School Admissions Code in Wales does not have any specific guidance in relation to summer born or YFYG children; but noted that requests for admission outside a child's normal year group may be considered in exceptional cases, for example cases of exceptional ability or ill health. In reaching such decisions, due regard would be given to an educational psychologist's report (where available). This is consistent with the HCL Briefing Paper's observations on the position in Wales.

(d) The applicant's father has averred that, in the Republic of Ireland, while children can start primary school in the September after their fourth birthday, they are not obliged to attend until they are six years old. That is supported by the joint consultation response provided to the Departmental consultation by the ATL union and ParentsOutLoud, which indicates that in the Republic of Ireland the statutory school starting age is six years. Children can commence school at an age as young as four if the parents wish; and most children do commence school at age four or five years. Within this system, however, there is plainly significant flexibility to give effect to parental choice, and statistical analysis shows that a small proportion of pupils enrol at age six.

[26] It can be seen, therefore, that the compulsory school age for children to start school is lower in Northern Ireland than elsewhere in the United Kingdom and Ireland and, also, that it has the system which is least flexible in terms of deferral. The statutory basis for this is explained immediately below.

Relevant legislation

[27] The key statutory provisions of relevance in this case are articles 45 and 46 of the Education and Libraries (Northern Ireland) Order 1986 ('the 1986 Order').

[28] Article 45 provides as follows:

> "*(1) The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable to his age, ability and aptitude and to any special*

educational needs he may have, either by regular attendance at school or otherwise.

(2) The provisions of Schedule 13 shall apply to the enforcement of the provisions of paragraph (1) and a parent who contravenes the provisions of that Schedule shall be guilty of an offence and liable to the penalties provided by paragraph 4 of that Schedule."

[29] Article 46 of the 1986 Order provides, so far as material, as follows:

"(1) Subject to the following provisions of this Article, in the Education Orders the expression "compulsory school age" means any age between four years and sixteen years and accordingly a person shall be of compulsory school age if he has attained the age of four years and has not attained the age of sixteen years.

(2) Where a person attains the age of four years –

(a) on any date occurring in the period beginning on (and including) 1st September in any year and ending on (and including) 1st July in the following year, he shall be deemed not to have attained the lower limit of compulsory school age until 1st August in that following year;

(b) on any date occurring in the period beginning on (and including) 2nd July in any year and ending on (and including) 31st August in the same year, he shall be deemed not to have attained the lower limit of compulsory school age until 1st August in the following year."

[30] Article 45 therefore imposes a duty on the parents of every child of compulsory school age (those aged 4-16) to ensure that such children receive suitable full-time education, either by regular attendance at school or otherwise (for instance, by means of home schooling). This is on pain of a variety of available sanctions, both civil and criminal, which are set out in schedule 13 to the 1986 Order. Paragraph 1(1) of schedule 13 to the 1986 Order provides that, if it appears to the Education Authority that a parent of a child of compulsory school age is failing to perform the duty imposed on them by Article 45, it shall serve a notice in writing on the parent requiring them to satisfy the Authority within a specified time that that the child is, by regular attendance at school or otherwise, receiving suitable education. This initial notice will generally be followed up, where the Authority considers it expedient that the child should attend school, with a school attendance order. Where a child is a registered pupil at a school, pursuant to paragraph 3(1) of

schedule 13, it is the duty of their parent to secure their regular attendance at that school. Failure to comply with a school attendance order, or with the duty to secure regular attendance at the school at which the child is registered, may result in prosecution and/or an application for an education supervision order (see paragraph 4 of Schedule 13).

[31] As appears from Article 46 of the 1986 Order, 1 August is used as a notional date each year for determination of whether or not children have reached compulsory school age. Those children with birthdays from 1 September to 1 July the following year (inclusive) are deemed not to have reached age 4 until 1 August in the second of those years. That includes the applicant. On the other hand, those with birthdays from 2 July to 31 August (inclusive) – the 'summer birthday' children - are deemed not to have reached age 4 until the year *after* their birthday, that is to say 1 August in the following year.

[32] The statutory scheme is designed to ensure that there is certainty about the date of each child's (deemed) attainment of the age of four years. However, it allows for no flexibility in terms of deferring the attainment of compulsory school age or the imposition of the Article 45(1) duty once compulsory school age has been attained.

The Department's position

[33] The applicant's father has pointed to the fact that a previous Minister for Education (John O'Dowd MLA) previously considered a change in the law to permit deferral of primary school commencement in or around 2014/15. There was a public consultation on the issue at that time. The planned legislation was not taken forward, however, in light of there not being sufficient time in the legislative calendar in that Assembly mandate.

[34] The respondent's deponent in these proceedings is Mr Sam Dempster, an acting principal officer in the Curriculum and Assessment Team in the Department. His evidence has provided more detail about the consideration which has been given to legislative reform. The consultation (entitled, '*Proposals to Introduce Deferral of Compulsory School Starting Age in Exceptional Circumstances*') ran from 15 December 2014 to 6 March 2015. The proposal which was agreed by the Minister at that time was that a system of deferral in exceptional circumstances be introduced, where it was established that deferring the commencement of primary school for one year would be in the best interests of the child. The evidence to this effect provided by a parent would be subject to assessment and approval by a panel of experts, overseen by the EA. Mr Dempster has explained that the underlying principles for introducing a system of deferral would be that all decisions would be taken in the best interests of the child; deferral should only be granted in exceptional circumstances, where the existing education provisions cannot meet the child's needs; the child's needs would be considered by a panel of experts to ensure deferral was necessary; and the parent would be required to provide evidence regarding why deferral was considered necessary.

[35] The Department received a total of 296 responses to the consultation. The Northern Ireland Commissioner for Children and Young People (NICCY) submitted a response which was strongly in favour of the principle behind the proposal. So too did a variety of other organisations, such as School Starting Age Flexibility NI, a group which campaigns on this issue, which is co-led by the ATL teaching union and a UK-wide parents forum called ParentsOutLoud, as well as being supported by a range of other charities and groups with an interest in education and children who were prematurely born.

[36] The Department has provided its summary of the consultation responses in its evidence. This shows that the consultation which was undertaken was thorough and extensive. 93.8% of consultation respondents strongly agreed or agreed that a parent should be able to apply to defer his or her child's school starting age for one year. 98.6% of respondents strongly agreed or agreed that the needs of the child should be paramount in deferral decisions, although there was much less agreement on other principles which should govern deferral, including whether it should be considered only in exceptional circumstances, and the practical implications of deferral. Focus groups undertaken with both parents and primary school children suggested that both groups were strongly in favour of parents being able to apply for a deferral of their child starting school.

[37] However, given the legislative programme at the time, priority was given to taking forward other legislation and the relevant Minister then decided not to take forward legislation on this issue and a number of others. Further detail has been provided in relation to this in the Department's evidence. In summary terms, however, there was simply not enough time to take this proposal through the Assembly in light of other Executive legislative priorities (some of which arose from the Stormont House Agreement which was reached in December 2014) and other legislation sponsored by the Department which was judged to have higher priority.

[38] In the absence of legislation on the issue, the then Minister instructed the EA to develop guidance on starting school to provide clarity for parents and schools. A copy of this guidance was in evidence. It provides helpful advice for parents as to the admissions process but says little, if anything, of particular significance for the issue under consideration in these proceedings. It does advise parents that if they have concerns or feel that their child would need additional support, this should be discussed with the relevant school principal. As to deferral of starting school, the guidance references the earlier consultation, explains that any change will be for a future Minister to decide; and concludes, "*As such, parents currently do not have the option of applying to defer school starting age*."

[39] The guidance does have a section on educating a child outside his or her chronological age group and accepts that "*in exceptional cases, it may be in the child's best interests to be educated outside his/her chronological year group*" either by 'skipping' a year or repeating a year. Such a decision would be made by the relevant school's

Board of Governors, taking into account the parents' views and with advice from the school principal. The applicant relies on the following portions of this section of the guidance:

> "*However, the Department recognises that every case is different and needs to be looked at on its own merits. The best interests of the child are paramount.*
>
> *In relation to transfer from primary to post-primary, the Board of Governors will have to consider at an appropriate stage, whether a child being educated outside his/her chronological age group should transfer a year later or a year earlier than normal or whether he/she should transfer at the normal time.* ***At all times, the best interests of the child should be central to the decision making process.***"
> [Bold emphasis in original]

[40] Following the Assembly election in May 2016, a new Minister of Education was appointed, Peter Weir MLA. He was briefed on the previous work which had been undertaken on this issue. However, before it could be progressed, the power-sharing administration collapsed in January 2017, leading to a hiatus in government until January 2020, during which time there was no functioning Executive, Ministerial oversight or control of departments, or Assembly. The Executive was restored on 11 January and Mr Weir was reappointed Minister of Education from that date. Shortly afterwards, however, the Covid-19 pandemic again interrupted the normal conduct of departmental business. Nonetheless, on 16 February 2021, in response to an oral question in the Assembly, the Minister advised members that, during the time remaining in that Assembly mandate, his priority was to introduce legislation that addresses the flexibility around school starting age. He advised that he had instructed officials to begin scoping out the work for a potential Bill during this Assembly mandate; and indicated that he was supportive of the principle of flexibility around school starting age, particularly for parents of children born prematurely and those born late in the school year. Unsurprisingly, Mr McQuitty has seized on these comments – and particularly that legislative change in this area is a Ministerial priority – to add rhetorical flourish to his case. The Minister did acknowledge, however, that, given the proximity to the end of the current Assembly mandate, with elections due to be held in May 2022 at the latest and a period of prorogation in advance of that, it may not be possible to bring the intended legislation forward before the end of the mandate.

[41] The Minister also indicated that officials would need to assess the implications of any planned legislative change across a broad range of policy areas, including pre-school provision, special education, the age at which a person commences post-primary education, school leaving age, the curriculum at certain Key Stages and area planning. In other words, allowing children to start school later than they would otherwise do is likely to have knock-on effects across a range of

education policy (many of which are also set out in the primary legislation). Further consultation both with the public and other educational stakeholders would be required. A team was established to take this policy development forward; and a variety of meetings with stakeholders and educational partners have been held to discuss the issue. A circular from the Deputy Secretary of the Department (Head of Education Policy and Children's Services) to various Directors of 26 February 2021 explained three options which had been identified for further consideration, namely (i) providing for a single compulsory school starting age of five years with an option for children to start earlier if their parents requests (which is said to be similar to the position in the rest of the UK); (ii) providing for a graduated approach to compulsory school starting date depending upon during which of four periods throughout the year the child reaches compulsory school starting age; and (iii) providing a mechanism for deferring school starting age in individual circumstances.

[42] Departmental officials also briefed the Assembly Committee on Education in relation to this work on 5 May 2021. During the course of this briefing, one of the Departmental officials attending (the Director of the Curriculum, Qualifications and Standards Directorate) gave the following evidence, upon which the applicant in these proceedings relies:

> "*The reason why we want this legislation is so that parents do not have to go through that process and the system recognises that it might be in the best interests of a child to defer. We need something that works.*"

[43] More recently still, a new Minister of Education, Michelle McIlveen MLA, was appointed on 14 June 2021. The new Minister will have to decide on the options on which she wishes to consult, following which a public consultation will take place. This is expected to be in autumn 2021. Assuming this is achieved, the Department's assessment is that "*there appears to be very little prospect of legislation being enacted by early 2022 to enable parents to defer in September 2022*". If a Bill could be introduced into a newly elected Assembly after May 2022, the Department's aim would be to have legislation passed in early 2023 to enable parents to defer their child's entry to primary school from September 2023 to September 2024. Obviously, this would be of no assistance to the present applicant.

[44] To summarise, therefore, the former Minister (Minister Weir) announced in February 2021 that he intended to bring forward legislation to permit deferral of school commencement in certain circumstances. In principle, the Department is committed to this approach and to bringing it forward as a priority; but it considers that there is still considerable work to be done to assess and shape the precise policy proposal and then legislate for it and any knock-on implications it may have.

The Applicant's Challenge

[45] The key issue for the court in these proceedings is whether the relevant legislation, and its operation in this case, is compatible with the applicant's Convention rights, particularly those under Article 8 and Article 14 (read in conjunction with Article 8) ECHR. If not, as the applicant contends, the question of remedy arises and, in particular, whether those provisions can be read in a way which renders them compatible with the applicant's rights pursuant to section 3 of the Human Rights Act 1998 (HRA). The applicant has not pursued a claim initially made under Article 2 of the First Protocol ECHR (A2P1). In my view, having regard to the jurisprudence on the nature and import of that provision, he was right not to do so.

[46] The applicant's counsel has indicated that his parents do not complain, on behalf of their son, about the general duty imposed on parents to ensure that their children receive suitable full-time education, whether in school or at home. Nor do they object to the trigger for this duty being the attainment of 'compulsory school age'. Nor even do they, directly, complain about what they assert is the "*arbitrary way*" in which 'compulsory school age' is determined under the legislation. Rather, their complaint, on behalf of the applicant, is directed at the complete absence of any mechanism or discretion within the statutory scheme to permit deferral (or, at any rate, any express discretion). This means, they submit, that no account may be taken of "*the well-attested reality that not all children who fall within the 'compulsory school age' bracket as arbitrarily defined by the law are, in fact, ready for primary school so that it would not be in their best interests to commence school in the mandated year.*" [underlined emphasis in original, taken from the applicant's skeleton argument]. It is submitted that this represents a failure by the Department to treat different children differently and to account for their best interests.

The Article 8 claim

Interference with Article 8 rights

[47] The respondent contends that there is no interference with the applicant's Article 8 rights or that, if there is, this is minimal. Both in terms of (lack of) interference, and the proportionality of any interference with Convention rights, the Department relies strongly upon the support available to children when starting school. In particular, the Foundation Stage curriculum for pupils in Years 1 and 2 has been specifically designed to take account of the young age at which children start school in Northern Ireland, with learning through play being an important element at this stage. The curriculum is delivered by qualified teachers, often with the support of at least one classroom assistant. The Foundation Stage is tailored to provide a smooth transition from pre-school education to school, which can and will be adapted by teaching staff for individual children depending on their earlier learning experiences and their specific needs. Where a child is eligible for a statement of special educational needs, that would give rise to additional support

and assistance, including (exceptionally) unlocking the possibility of a child of compulsory school age continuing to be educated in a funded nursery school place, rather than commencing Primary 1.

[48] In light of the ability for his education to be tailored to his needs in Primary 1, and the absence of any clear detriment to him of commencing Primary 1 having been identified in Dr Rooney's report, Mr McGleenan contends that there is no interference with the applicant's Convention rights. Requiring him to attend school will promote his well-being, rather than impeding it, Mr McGleenan argues.

[49] I reject the submission that there is no interference with the applicant's Article 8 rights arising from the statutory provisions which are impugned in these proceedings. The practical result of them (at least in this case where home-schooling is not a viable option) is that the applicant is required to attend school on pain of civil or criminal penalties imposed upon his parents if he does not. In my view, that represents an obvious interference with his right to respect for private and family life. The statutory phrase "*compulsory school age*" illuminates the nature of the interference. It is compulsory that the applicant attend school, which will see him separated from his family; or, in the case of home schooling, will require the provision of education to him within the home to a standard equivalent to that which would be provided to him in school. This is an obvious intrusion into his private and family life. That notion includes the applicant's right to personal development and to establish and develop relationships with others and the outside world (or not to do so): see, for instance, paragraph 61 of *Pretty v United Kingdom* [2002] ECHR 427.

[50] Mr McGleenan's argument ultimately resolves to a proposition – which I accept without hesitation – that any such interference can and will readily be justified in the vast majority of cases. It is generally in a child's best interests that they receive education, particularly an education which is "*suitable to his [or her] age, ability and aptitude and to any special educational needs he [or she] may have*", using the language of Article 45 of 1986 Order. The provision of such an education should be compulsory, at least between certain ages; and it is legitimate that parents are required either to send their children to school to receive such an education or to demonstrate that they are providing education to the appropriate standard by some other means. I can also accept that it is in general best for a child to begin to receive such a full-time education as soon as they are ready to do so; or, at least, that that is a perfectly legitimate position for the legislature to adopt.

[51] However, this case raises the logically prior question of whether a child *is ready* to commence full-time education. It does so in circumstances where the Department has publicly accepted that it has adopted the earliest compulsory school starting age in Europe and where the applicant's parents are fervently convinced that he is not ready to start school and should not be required to do so. In that context, for the applicant to be torn from the bosom of his family (as his parents might characterise it) would plainly represent an interference with the applicant's

rights under Article 8 ECHR which requires to be justified. The points made by the respondent about the mitigations which are in place, or which may be put in place, fall to be addressed in the assessment of the proportionality of any such interference; but they do not alter the fact that the requirement to provide compulsory education for the applicant from September of this year represents an intrusion into his private and family life.

Legitimate aim

[52] As appears from the discussion above (see, in particular, paragraph [50]), the court accepts that the compulsory provision of education to children pursues a legitimate aim, namely ensuring that children receive an appropriate education in their own interests and that of society generally. That is an obviously appropriate aim for the State to pursue. Indeed, that was not disputed by the applicant's representatives in this case. The more nuanced question is what legitimate aim is pursued by the particular provisions under challenge in these proceedings in terms of the point at which they set the compulsory school starting age and the absence of any flexibility in deferring the commencement of compulsory education.

[53] The Department's affidavit evidence in these proceedings identifies a number of aims pursued by those aspects of the present legislative scheme. In the first instance, the Department says that its position is that children should be educated with their peers:

> "*The Department's position is that children should be educated with their peers. This will allow them to learn the routine of school, socialise with peers, make friendships and learn with peers at a pace which suits them.*"

[54] That entirely makes sense. But it does little more than beg the question: who are the applicant's peers? Had the applicant been born just one day later, the statutory scheme would have assigned him an entirely different group of 'peers' with whom he should be educated, some of whom would be almost one year younger than him rather than, as his position stands at present, some of his 'peers' being almost one year older than him. Even accepting that the identification of a child's peers should be addressed primarily in terms of those born at around the same time as he or she was born, rather than through an individualised assessment of their educational needs or capabilities, the approach which is adopted to this by the current statutory scheme is a blunt instrument. The Department's desire that children should be educated with their peers is a proper and legitimate one. However, it has little purchase in the circumstances of this case where the real question is whether the applicant will indeed be educated with a cohort who *are* his peers; or whether some adjustment in the usual approach is required in order to ensure that he is educated with a cohort who are *actually* his peers.

[55] The Department also relies on the fact that deferring school commencement could serve to have a detrimental impact on a child's education, welfare and best interests where support may not be available. In other words, the Department is seeking to guard against children who defer school commencement spending a year without educational support or provision in circumstances where they would be better off in school. That is plainly a valid concern. For instance, in the present case, it is unclear what precisely the arrangements would be for the applicant next year if he were to be permitted to defer his commencement in primary school. The Minister's letter to the applicant's parents' MP in August 2020 noted that, with the exception of a child with an SEN statement, "*children over compulsory school age are not currently legally permitted a funded pre-school place should their parents wish to defer entry into Year 1.*" Put bluntly, even if a child is not ready to start primary school, a year in school may be a better result than a 'wasted' year at home where the child was making no progress or had their development impeded further. Indeed, the applicant's case appears to proceed on the hope or assumption that, if he was permitted to defer entry to primary school for a year, he would be permitted to continue in nursery school for another year and to do so with a funded place. Whether continuing in his present nursery school would be possible is unclear; and doing so with a funded place appears unlikely.

[56] The Department also relies upon the fact that its current policy is "*designed to ensure that pupils receive seven years of education from Foundation Stage to Key Stage 2 and a further minimum five years at post primary school leading to a formal qualification.*" The nub of this concern is that if entry to compulsory education is deferred, this will have a knock-on effect at the end of the child's period of compulsory education so that (providing they have not been 'moved up' a year during their education, so re-joining their originally intended peer group) they are likely to have reached the upper limit of the compulsory school age before having sat their Year 13 (GCSE) exams. Such a child may therefore be able to leave the education system without having received the intended 12 years of compulsory education and without having achieved (or had the opportunity to achieve) any formal secondary level qualifications.

Proportionality

[57] Turning to the question of proportionality, the applicant relies upon the fact that the school starting age in Northern Ireland is the lowest in Europe; and upon the fact that there is effectively no flexibility in the system – unlike the position in the rest of the United Kingdom and Ireland – to permit the commencement of compulsory education at a later time in circumstances such as those of this applicant. It is these twin factors which, the applicant submits, gives rise to a lack of proportionality, since the applicable statutory scheme contains no express mechanism or discretion to permit a child to defer starting school, even where this would be manifestly (and uncontestably) in his or her best interests.

[58] The Department's riposte is three-fold. Firstly, it relies upon the flexibility *within* the school system to cater for each child's individual needs (see paragraph [47] above). Secondly, it relies upon the fact that, pursuant to Article 16 of the Education (Northern Ireland) Order 1996, a child of compulsory school age with a statement of special educational needs could be educated for a further year in nursery school without being required to commence primary school, if the result of the SEN process was that he or she should be placed for a further year in a nursery school. Thirdly, it notes that one option open to the applicant's parents is to home school him. Mr Dempster has averred that:

> "*In the absence of a legal means by which they can defer school starting age, a small number of parents each year voluntarily make their own arrangements to educate their child outside the formal school system once they reach compulsory school age. Although some parents advise the EA of their decision to home school, it is not currently compulsory for them to register this information.*"

[59] Mr Dempster's evidence also explains that, where a parent has educated their child outside a school setting and they subsequently begin to attend school, the child would normally be admitted to his or her chronological age group (which is established by reference to the age at which a cohort reaches compulsory school age). In practical terms, this means that, if the applicant was home-schooled for a year, he would then ordinarily be expected to join Primary 2, rather than commence school next year in Primary 1.

[60] The applicant's parents reject this as a viable option for a variety of reasons. Firstly, they say that home schooling is simply not a practical option for them since they both work. Additionally, they say that this option does not address the source of their concern, namely that the applicant is not yet ready to commence full-time education. Requiring him to be educated at home and then to simply re-join his assigned cohort in Primary 2 would not, they submit, address the key issue, which is that it is not in the applicant's best interests to commence full-time education at this point. I accept this latter submission. Home-schooling, with a requirement that full-time education be provided otherwise than at school, would simply serve to relocate the difficulty, not resolve it.

[61] The mitigations relied upon by the respondent are not sufficient in my judgment to cure the lack of proportionality inherent in the rigid statutory scheme. They fail to properly address the circumstances of a child whose best interests would clearly be served by *not* being required to commence full-time education when they would otherwise be required to do so. Such a child may not qualify for a statement of special educational needs; or may not have been assessed for the purposes of the statementing process in advance of the time when they are due to commence primary school. The circumstances in which the flexibility inherent in the Primary 1 curriculum will not be sufficient to cater for a child's needs are likely to be rare.

However, I am satisfied that such cases will exist; and the evidence suggests that this is likely to occur most often where a child is very young for their year group and/or of premature birth. The Department's own avowed intention to legislate to increase flexibility in relation to school starting age is also strongly supportive of the contention that it agrees that there is a limited number of children who are not being properly served by the current arrangements.

[62] The respondent must therefore ultimately fall back on the justification that this is an area which warrants the application of bright line rules in the service of the aims identified at paragraphs [55] and [56] above, and that the mere fact that the application of these rules gives rise to 'hard cases' does not denude the system as a whole of proportionate effect. I am not persuaded by this argument.

[63] The Department's concerns about the 'knock-on effect' on the child's later education of deferring the commencement of their schooling for a year can carry little weight when one takes into account that precisely the same type of issues will arise where a pupil is held back a year at a later stage of their school career when this is judged to be in their best interests. Nonetheless, the existing policy – set out in the EA guidance referred to above (see paragraph [39]) – makes clear that a child can be required to repeat a year or can be held back from post-primary transfer for a year where this is in their best interests. If the ramifications of such a decision can be adequately addressed where it is in the child's best interests to be educated outside their chronological age group, having commenced their education with that year group, there is no reason in principle why they cannot be adequately addressed by that decision being made at the very commencement of the child's education. Indeed, existing legislation for which the respondent is responsible – Article 46A of 1986 Order – permits a child to commence their secondary education a year later than they would ordinarily do where the appropriate Board of Governors "*is of the opinion that it is in the best interests of the child to commence secondary education*" at that later stage and their parent agrees.

[64] Although the Department is right to be concerned that any potential mechanism for deferring school entry is neither abused nor used in a case where it would be detrimental to the child's interests, that does not meet the concern that there will be rare cases where it is demonstrably in the child's best interests for them not to commence school at the current compulsory starting age and where the risks arising from deferral are clearly outweighed by the risks of requiring them to commence school before they are ready.

[65] Convention jurisprudence recognises that blanket measures which apply automatically and indiscriminately are at risk of falling outside the State's margin of appreciation (see, for instance, paragraph 82 of the judgment of the Grand Chamber in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41). The task of the Court in such cases is to assess the proportionality of the statutory categorisation and not its impact on individual cases, although the impact in an individual case may be illustrative of the impact of the scheme as a whole. Ultimately, the question is

whether legislation by reference to pre-defined categories is justified. In considering this issue, the Court is entitled to consider the availability of intermediate options between a bright-line rule on the one hand and a wholly individualised system on the other. Such intermediate options may include "*a more properly tailored bright line rule, with or without the possibility of making exceptions for particularly strong cases which fall outside it*" (see the observations of Lady Hale at paragraph [37] of her judgment in *R (Tigere) v Business, Innovation & Skills Secretary* [2015] 1 WLR 3820).

[66] In my judgment, the respondent has failed to discharge the burden of showing that the approach it has adopted is necessary in a democratic society or proportionate to the aims it has identified. Its own policies and legislation – which permit a child at every other stage of their 12 years of compulsory education to step away from their chronological year group – demonstrate that valid and substantiated concerns about a child beginning their education at a time when it is not in their best interests could be addressed by other means. Put another way, the aims which the respondent contends justify the current rigid approach in the legislative scheme could be achieved by less intrusive measures; and the current legislative scheme fails to strike a fair balance between the rights of individual children and the interests of the community more generally. Those aims are not sufficiently important to justify the blanket approach which has been adopted and the impact in practice on the limited number of cases where deferral would be warranted; nor has there been any material advanced by the respondent to demonstrate any significant parliamentary review or consideration of the rigid approach taken in the 1986 Order (cf. paragraphs 108-109 of the ECtHR's judgment in *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21).

[67] The availability of significant additional flexibility as to school starting age in the other jurisdictions of the United Kingdom and the Republic of Ireland also point to this conclusion. Nor are the cut-off points used in Article 46 of the 1986 Order clearly and independently demarcated. Although it may not be correct to categorise them as "*arbitrary*" as the applicant has in submissions; it certainly is correct to note that, in this case for instance, the particular date of 1 July has no especial significance outside of the statutory scheme.

[68] In reaching my conclusion on the disproportionality and hence Convention non-compliance of the current statutory scheme, I also take into account that, as a matter of policy, the Department has determined that there should be a measure of flexibility built into the system to allow for deferral in exceptional cases. Although this is not determinative of the legal question for the court, it is a factor of some significance that the Department itself has recognised that the current approach gives rise to difficulties in a limited range of cases and that there is a strong case for reform in order to further the best interests of children who are demonstrably not ready to commence full-time schooling at the time when they would otherwise be required to do so. The Department has made it a legislative priority to address this issue. It has done so in circumstances where, each year, a small number of requests are made by parents requesting deferral, usually from parents with children who

were born in May or June. (A submission to the Minister suggests that there are roughly 12 such requests each year). Plainly, the drive to reform the statutory scheme in this area is motivated by a concern – strongly supported by the response to the 2014-15 consultation – that the present system is not providing adequate safeguards for a small number of children.

[69] The potential, which was rightly acknowledged by the respondent in oral submissions, that there may be cases where the present scheme does *not* give effect to the result which would be in the best interests of the particular child is a further factor which leads me to conclude that the inflexibility of the scheme as a whole is disproportionate, since the bests interests of the child should be an integral part of the proportionality assessment by the court (see *Zoumbas* [2013] UKSC 74, at [10]). Indeed, it seems to me that issues involving important aspects of children's development fall towards the end of the spectrum where bright line rules and rigid categorisations are least likely to be acceptable, since that minimises the opportunity to treat each child as an individual and act in their best interests and maximises the potential for individual children to be disadvantaged. Although there is a reasonable case for the application of a bright line rule in this area in the interests of convenience and simplicity, and in light of the differential attention to individual needs which is incorporated within the curriculum, I accept the applicant's case that a bright line rule without the safety valve of the possibility of deferral in exceptional cases is unlawful.

Victim Status

[70] The respondent also contends that the applicant does not have victim status for the purposes of section 7 of the HRA because, it submits, the applicant has failed to establish that requiring him to commence school would have any detrimental effect on him.

[71] The Department's 2014 consultation proposed a policy allowing deferral where this would be in the best interests of the child. However, it also noted that the intended policy would be such that "*the decision to defer will relate to a child's achievement of developmental milestones.*" The evidence of Dr Rooney in this case, which I have discussed in some detail above, concludes that it *would* be in the applicant's best interests to have his school commencement deferred. However, it also fails to provide any concrete evidence of the applicant's having failed to achieve any significant developmental milestones.

[72] In light of the dissonance between Dr Rooney's ultimate conclusion and some of the results of his assessment of the applicant – and the absence of his having given oral evidence to allow these issues to be tested and explained – I have found this issue very difficult to resolve. His review of the academic literature suggests that a child with the characteristics of the applicant – being very young for his year group and having been born prematurely – is likely to be disadvantaged by being required to commence school with others who are materially older and more

developed than he is; and that it may well therefore be in his best interests not to commence schooling until the next year.

[73] Viewing this issue as an objection to the applicant's standing to rely on Convention rights, however, I accept Mr McQuitty's submission that the *potential* for the scheme to violate the applicant's Convention rights is sufficient for him to overcome the respondent's objection. It has long been established that those at risk of being affected by an act or omission may qualify as victims for the purpose of Article 34 of the European Convention, provided that there is a risk of the applicant being directly affected and that this is not merely a theoretical possibility. I consider that threshold to have been met by the applicant in this case. A clear view of whether *his* Article 8 rights would be breached by the requirement that he commence full-time education this year has not yet been reached. This is partly because of the speed with which these proceedings have been brought on and the nature of the judicial review process. I am not prepared to dismiss the applicant's claim on a standing ground, however, since Dr Rooney's evidence is sufficient to persuade me that there is at least a real risk that requiring the applicant to commence school in September would be in breach of his Convention rights; and that he therefore has the requisite standing under the HRA to challenge the Convention-compatibility of the statutory scheme.

The Article 14 Claim

[74] There is considerable overlap between several elements of the applicant's claim under Article 14 ECHR, and the court's assessment of it, and his claim under Article 8, which is dealt with above. Accordingly, I propose to deal with the Article 14 arguments only in brief compass.

[75] The applicant contends that the failure to permit him to defer entry to compulsory education is an instance of *Thlimmenos* discrimination, that is to say, an unlawful failure to treat different cases differently where he warrants different treatment on the basis of a protected status: see *Thlimmenos v Greece* (2001) 31 EHRR 15. He submits that the one-size-fits-all approach to compulsory school age in Northern Ireland fails to make appropriate allowances for him on the basis of his age and/or premature birth.

[76] I accept that the issue at the heart of these proceedings falls within the ambit of the applicant's Article 8 rights (for the same reasons that I consider the compulsory school age provisions to interfere with those rights: see paragraph [49] above). I have greater doubts about the question of whether the alleged discrimination falls within the ambit of the applicant's A2P1 rights, in light of the limited nature of the right conferred by that provision. Given, however, that this case is about the question of *access* to education, and when the applicant should be *required* to access full-time education, rather than merely a case about the quality of provision of education, I would be prepared to accept that it falls within the ambit of A2P1 (unlike, for instance, the position in *Re Nhembo's Application* [2021] NIQB 52

– see paragraph [56]). Given my conclusion in relation to Article 8, however, I do not need to decide this issue.

[77] The applicant's discrimination case is partly based on age (because he is younger than the vast majority of the rest of those who are to be assigned to his year group) and partly based on the circumstances of his birth. The difference in age is relatively marginal, although submitted to be material. "*Birth*" is a protected status within the express terms of Article 14. I accept Mr McGleenan's submission that the great majority, and perhaps all, of the Strasbourg cases dealing with this protected characteristic relate to what used to be described as the legitimacy of a child's birth, namely whether they were born inside or outside of a marriage relationship on the part of their parents. However, I also accept Mr McQuitty's submission that there is no reason to limit the meaning of the term "*birth*" in this way. A premature birth is quite capable of constituting a circumstance of birth which finds protection within the characteristic of 'birth' which is mentioned in Article 14. At any rate, it could qualify as an 'other status' for the purposes of Article 14, since it is an identifiable characteristic which is personal to the applicant and which was outwith his control (although it is also clear that there are various degrees of prematurity in this regard). In either event, however, I do not consider that the protected characteristic relied upon is a 'suspect' characteristic. In a case such as this, the two characteristics relied upon are conceptually distinct but shade into each other. Where, as here, they are relied upon in combination, the resulting status relied upon by the applicant will fall towards the outer orbit of the concentric circles identified by Lord Walker in *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 as a useful tool for analysis of the justification required to render differential treatment lawful.

[78] As explained above, all children within the statutorily defined cohort are treated the same. Notwithstanding that, for the reasons given above I consider that there will be exceptional cases where a child is in a materially different situation – on the grounds of his or her age and birth – from the rest of the children who are assigned to their year group. Put shortly, where a child is clearly and demonstrably not ready for school to a degree which establishes that it would be contrary to their best interests to require them to commence education at the normal compulsory school age, they will currently be treated in the same way as other children who are in a materially different situation. Whether or not the delay in their development is an aspect of their age and/or the circumstances of their birth will require to be assessed in each individual case. There may be some children who are not ready for school (to use that shorthand phrase) where this is nothing to do with either their age or premature birth but relates to some other aspect of their development. For the applicant to succeed in his pleaded discrimination case, he would have to establish both that he was not ready for school and that this was clearly linked to the status relied upon. If he is ready for school in September, then he would not be treated less favourably than other children who are also ready to attend.

[79] In the present case, I have not (yet) been satisfied that the applicant is in a materially different position from those from whom he seeks differential treatment. In a *Thlimmenos* case, the court should still assess the question of whether the applicant is or is not in a relevantly analogous position to that of his comparator. To succeed in such a case, the applicant will generally have to show that they are in a relevantly different position by reason of their protected status but (unjustifiably) treated in the same as way others. On the basis of Dr Rooney's evidence as it stands, and particularly in light of his conclusion that there is "*no evidence to suggest developmental delay, poor adaptive functioning or risk of social, emotional or behavioural needs associated with his pre-term birth*", I do not consider that the applicant has established that he is in a relevantly different position from that of the appropriate comparator. I would accordingly dismiss his claim under Article 14 of the Convention.

[80] Had I been satisfied that the applicant was in a relevantly different position from others starting school this September (namely that he was clearly not ready to commence full-time education and that this would be contrary to his best interests by reason of his age and/or premature birth), the next question would be whether it was justified for him to be treated in the same way as other children within his year group who did not have those characteristics. For the same reasons that I consider that it would be disproportionate to require such a child, on pain of criminal prosecution of their parents, to commence school, I would also have considered that the non-differential treatment in such a case was not be justified. I would certainly reach that view applying a proportionality assessment to the issue, for which Mr McQuitty contends, on the basis discussed as paragraphs [57]-[69] above. I might not have reached the same view applying the test of 'manifestly without reasonable foundation', for which Mr McGleenan contends. For completeness, however, I would add that, although this case concerns social policy to some degree, it is not a case which directly raises questions of the allocation of scarce resources (such as arise in discrimination cases involving the conditions of entitlement to pensions or welfare benefits) or national security. If necessary, I would have proceeded on the basis that the stricter proportionality assessment was appropriate in this case. In any event, in light of my conclusion in paragraph [79] above, these observations are academic.

Remedy and further case management

[81] Other than the grant of a declaration to reflect my finding in relation to the applicant's Article 8 claim, the question of remedy does not arise at this stage. That is because I have proceeded on the basis that the applicant has the required victim status by reason of a potential breach of his Convention rights. He is at risk of a violation if the evidence, properly examined and tested, in due course establishes that it would be in his best interests not to commence his formal education in September this year and that the detriment to him of doing so is not outweighed in the circumstances of his case by the general aims pursued by the Department's current policy. Put another way, it first has to be established clearly that the

applicant's case is one of those exceptional cases where a departure from the usual approach is required. The present evidence on that issue, for the reasons discussed above, is inconclusive. It has been insufficient to persuade me that requiring the applicant to commence his schooling would necessarily be a breach of his Convention rights. Nonetheless, it is sufficiently cogent to persuade me that this issue cannot be decisively determined in the respondent's favour, resulting in the dismissal of this application for judicial review.

[82] Before making a final order in these proceedings, I direct the parties to engage further with a view to seeking to agree how best to proceed in the light of the court's findings to date. One outcome may be that the Department, perhaps with the benefit of further evidence or enquiry, reconsiders its position that the applicant's case does not merit a departure from the usual approach. I do not underestimate the practical issues to which such a concession may give rise; and these will no doubt be a matter for discussion between the parties. In deference to the submissions already made on the question of remedy, I would express the following views on how, practically, any such accommodation might be given effect as matter of law. These views are necessarily provisional, pending any further argument which might be required.

[83] In the event that a conclusion was reached that it would be a breach of the applicant's Convention rights to require him to commence full-time education in September this year, the issue *might* be capable of being resolved by use of the interpretative obligation in section 3 of the HRA. If, for instance, the applicant was able to attend nursery school for another year, the Article 45(1) obligation might be construed as having been met in those circumstances by reason of the applicant receiving an education suitable to his particular needs next year, not in school but "*otherwise*" within a Convention-compliant reading of that term in Article 45 of the 1986 Order. In any event, since all of the relevant provisions are provisions of secondary legislation, if it was not possible to construe the provisions compatibly through section 3 of the HRA, any incompatibility may ultimately have to be dealt with by disapplication of the provisions (for instance, in the context of proposed enforcement of the Article 45 duty under Schedule 13).

[84] It is of course possible that the Department may maintain its position that, whatever sympathy one may have for the applicant or his parents, his circumstances simply do not fall within the category of exceptional case where deferral is in his best interests because the detailed assessment of his needs and capabilities shows that, notwithstanding the disadvantages he may face as a result of his young age and premature birth, he will be able to cope well with the commencement of his schooling. The applicant's parents might reflect further on Dr Rooney's findings and, on further consideration, decide that their earlier fears about the applicant commencing school were more cautious than really warranted. Assuming no agreed position is reached and that the resolution of this issue requires further determination by the court, either in these or separate proceedings, that can be accommodated and should be addressed as quickly as possible. A fully

informed determination of that issue, however, is likely in my view to require (at least) the giving of oral evidence by Dr Rooney. The respondent may also wish to call its own evidence on the issue. In addition, it may be a case where consideration should be given to the involvement of the Official Solicitor as an *amicus*, in light of the applicant child not having representation which is independent of his parents (since he acts through his father and next friend). I propose that the question of how best to proceed should be considered at a case management review to be convened as soon as possible after the parties have had an opportunity to consider this judgment, take instructions and engage with each other as suggested above.

Conclusion

[85] In summary:

(a) I find that the statutory scheme which is impugned in these proceedings is disproportionate in its operation by reason of its lack of flexibility and, thus, its incapacity to deal adequately with a case where requiring a child to commence full-time education at the current compulsory school starting age is clearly and demonstrably contrary to that child's best interests and unjustified by the aims pursued by the present legislation. In such a case, I consider that the present scheme would operate in a way which was in violation of that child's rights under Article 8 ECHR. The use of a 'bright line' scheme capable of having this effect is not proportionate. I will grant a declaration in suitable terms to reflect this finding and I invite the parties to seek to agree appropriate wording for such a declaration (without prejudice to either party's appeal rights), failing which I will hear the parties further on this issue.

(b) I find that the applicant has sufficient standing and victim status for the purposes of section 7 of the HRA to raise this issue on the basis that he is a child whose Article 8 rights are at risk of being violated by the usual application of the statutory scheme.

(c) Notwithstanding the conclusion set out at sub-paragraph (b) above, I make no finding that the applicant's Article 8 rights would actually be violated by his being required to commence school in September 2021. This is an issue which requires further exploration. A clear conclusion that not starting school would be in the applicant's best interests would go a considerable way towards establishing a violation of his Convention rights, although it would not of itself be determinative. As matters stand, I am not able to reach a clear conclusion on whether this would, or would not, be in the applicant's best interests – for the reasons set out at paragraphs [71]-[73] above. I direct the parties to liaise further with a view to seeking to reach a consensual position on this issue, failing which the court may require to hear further evidence (including by means of oral evidence from Dr Rooney) and submissions.

(d) I am minded to dismiss the applicant's claim based on Article 14 ECHR for the reason set out at paragraph [79] above.

[86] I therefore grant leave to the applicant to apply for judicial review on both of his core grounds of challenge. I allow the application on his Article 8 claim but will make no final order in relation to relief or the Article 14 claim pending the further engagement between the parties which is directed above and any consequential further hearings which are then required.