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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 'OV' (A MINOR) ACTING BY HIS MOTHER AND NEXT FRIEND 'BV' FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE BOARD OF GOVERNORS OF THE ABBEY CHRISTIAN BROTHERS GRAMMAR SCHOOL, NEWRY

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Ronan Lavery QC and Colm Fegan (instructed by Paul Campbell, Solicitors) for the applicant
Philip Henry (instructed by the Jones Cassidy Brett, Solicitors) for the respondent

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SCOFFIELD J

Introduction

[1] The applicant in these proceedings (who is anonymised and referred to as 'OV') is an 11 year old boy, acting by his mother and next friend, who seeks to challenge a decision of the Board of Governors ('the respondent Board') of the Abbey Christian Brothers' Grammar School ('the respondent school') to refuse him admission to that school and, relatedly, the admissions criteria adopted by the respondent Board which led to that refusal.

[2] The application has been dealt with by way of a 'rolled-up' hearing; and was heard during the summer vacation with a view to seeking to clarify the applicant's school placement as early as possible for the forthcoming academic year. Mr Lavery QC appeared with Mr Colm Fegan for the applicant; and Mr Henry appeared for the respondent. I am grateful to all counsel for their detailed written submissions and economically presented oral submissions. In light of the relative urgency with which this judgment has been delivered, not all of the reasons for my conclusions have

been set out in as full detail as might otherwise be expected in order to do justice to the detailed submissions which were made on behalf of each party.

Factual background

[3] As noted above, the applicant is an 11 year old boy. He was born in Northern Ireland. However, for the purposes of this application he relies upon his nationality and his national origins as being Lithuanian. This is because his mother, father and grandparents are all Lithuanian (although they all now reside in Northern Ireland). The applicant's mother and father moved to Northern Ireland in 2005 and 2004 respectively. The applicant is described in his mother's evidence, which is unchallenged, as being Lithuanian. Indeed, in the proposed respondent's response to pre-action correspondence of 23 June 2021 it is noted that, "The Respondents accept that the Applicant is of "Lithuanian national origin and/or nationality.""

[4] The applicant applied to be admitted to the respondent school for entry into Year 8 for the term commencing in September 2021. The respondent school was his first preference school. However, as it was oversubscribed, it had to allocate its places in Year 8 by means of the application of its admission criteria. The application of these criteria resulted in the applicant being refused admission or, perhaps more accurately, in other applicants being admitted before him until the school reached its admissions number. The applicant is in the unfortunate position of not having gained admission to any of the (four) schools to which he applied for admission in his transfer form. He has more recently secured a place in another school (which, unlike the respondent school, is not a grammar school); but this is not the school he would wish to attend if he were able to secure admission to any of the schools for which he had expressed a preference and, in particular, the respondent school.

[5] As discussed further below, pursuant to the Education (Northern Ireland) Order 1997 ('the 1997 Order'), the Department of Education (DE) ('the Department') sets the admissions number for schools: see Article 12. The Boards of Governors of schools determine the criteria for admission to their school: see Article 16. Unsurprisingly, Governors are then obliged to apply their criteria to all applicants for places so as to determine who should be admitted when there are more applications for admission than places available: see Article 13. Provision is made for appeals to be heard by an independent tribunal, which will consider the limited questions of whether a school has applied its criteria and has applied them properly: see Article 15. In this case, the applicant has lodged an appeal against the respondent school's admissions decision with the Admissions Appeals Tribunal. However, that appeal has been 'parked' pending the outcome of these proceedings. That is because the applicant accepts that the school has applied its criteria as they stand at present; but wishes to leave open before the tribunal an argument that the school has not properly applied its criteria in the event that he secures relief from this court declaring one or more of those criteria unlawful.

[6] This case therefore concerns the legality of the respondent school's admissions criteria for entry into Year 8 in September 2021. They were in the following terms:

> *"The Abbey Christian Brothers' Grammar School has always prided itself as a school that serves the local community and these are reflected in our past pupil links in the criteria below. We are also clear that, where possible, keeping together siblings and indeed parents and sons reinforces this sense of community.*
>
> *The Board of Governors will admit boys strictly on the following basis:*
>
> *(i) Boys who, at the date of their application, have a parent/guardian who is a member of the permanent teaching, administrative, or ancillary staff of the Abbey.*
>
> *(ii) Boys who, at the date of their application, have another boy of the family (as defined by DE in Transfer 2010 Guidance) attending the school or having been selected for admission to the school in the coming school year.*
>
> *(iii) Boys who have had another boy of the family (as defined by DE in Transfer 2010 Guidance) previously attend the school.*
>
> *(iv) Boys whose father/guardian attended the school.*
>
> *(v) Boys who are the first boy of the family (as defined by DE in Transfer 2010 Guidance) to transfer to secondary education, i.e. the eldest boy of the family as defined above.*
>
> *(vi) Boys who are the first boy of the family (as defined by DE in Transfer 2010 Guidance) to apply to a Grammar School.*
>
> *(vii) Boys who, at the date of their application, are entitled to Free School Meals Provision (as defined by DE in Transfer 2010 Guidance).*
>
> *(viii) Other boys ranked by date of birth with the youngest boy admitted first and all other boys admitted by age (youngest first) until all places have been filled.*
>
> *If there are more boys who meet one of the above sub-criteria (i) to (viii) than there are places available, then the remaining*

criteria will become sub-criteria and applied successively in the order set out until the final selection is completed. In the event of two or more boys having the same date of birth and thereby qualifying for the last place(s), the boys will be ranked by alphabetical order of surname and then forenames as listed on the birth certificate."

[7] There is no dispute that the above criteria were applied (and applied properly, on their face) in the applicant's case. There were 189 applications for admission, with only 125 places initially available (although two additional places were subsequently permitted by the Department). When the criteria were applied, the applicant was placed 133rd in rank order. Accordingly, the school had filled its available places before he was eligible for admission. He was eliminated in the course of the application of criterion (vi), in conjunction with criterion (viii). That is to say, he was the first boy of his family to apply to a grammar school; but, since there were more such boys eligible for admission under criterion (vi) than places remaining available, the remaining criteria had to be applied as a tie-breaker between those boys, as explained in the final paragraph of the criteria set out above. The final places were decided by the dates of birth of the candidates.

Summary of the applicant's challenge

[8] The applicant challenges a range of the criteria adopted by the respondent Board. The main focus of the application is on criterion (iv) – which gives preference to boys whose father or guardian attended the school – but the applicant also challenges criteria (i) and (iii), which also give some advantage to boys with a current or prior familial connection with the School.

[9] The applicant seeks to have each of the impugned criteria quashed by this court. The school's affidavit evidence has addressed the question of how that would have affected his prospects of admission – if a quashing order was granted and one or more of those criteria were to be viewed as void *ab initio* as a matter of law (and severable from the remaining criteria). The evidence suggests that two boys were admitted under criterion (i), having a parent or guardian who was a current staff member; that seven boys were admitted under criterion (iii), having a brother who was a past pupil; and that 28 boys were admitted under criterion (iv), having a father or guardian who was a past pupil. Accordingly, some 37 boys (out of 125 available places) – almost 30% – were admitted on foot of criteria which are challenged in these proceedings.

[10] Perhaps more importantly for present purposes, if only criterion (i) was removed, the applicant would still not have secured admission. However, he would have secured admission if either criterion (iii) or criterion (iv) was removed, either alone or in combination with the removal of any of the other impugned criteria. The applicant's pragmatic 'target' in these proceedings, therefore, is to knock out as unlawful either criterion (iii) or criterion (iv) and to achieve a grant of relief which

means that, had only the lawful criteria been applied, he would have been granted admission to the School.

[11] As regards the substance of the challenge to the impugned criteria, the applicant relies on two broad grounds. First, he contends that the respondent Board of Governors failed to have regard to the DE guidance in drawing up its admissions criteria, contrary to its obligation under Article 16B of the 1997 Order. Second, he contends that the impugned criteria amount to unlawful discrimination against him on the grounds of his (Lithuanian) national origins. The discrimination claim is put in a number of ways – both as indirect and direct discrimination; and as contrary to the Race Relations (Northern Ireland) Order 1997 ('the Race Relations Order') and/or his Convention rights (Article 2 of the First Protocol ECHR taken alone or Article 14 ECHR, in conjunction with his A2P1 rights).

Summary of the proposed respondent's case

[12] For its part, the respondent Board defends the applicant's claim on its merits. They contend that the DE guidance was properly considered and taken into account but that, as they are legally entitled to do, they departed from that guidance for good reason in the setting of their admissions criteria. In respect of the applicant's discrimination claim, the respondent denies that there was any direct, or indeed indirect, discrimination. The key issue of contention in respect of that aspect of the claim is the identification of the correct comparator to the applicant in order to frame his complaint of differential treatment. In short, the respondent contends that any disadvantage suffered by the applicant would similarly be suffered by an applicant of Northern Irish origins (that is to say, with parents from Northern Ireland) who, like the applicant, happened to have moved to the Newry area in recent times or recent years. The fact of being a newcomer to the area in which the school is situated is, the respondent contends, both independent of the issue of national origins and a relevant factor which cannot be ignored in the selection of an appropriate comparator. If and in so far as it may be required to do so, the respondent Board also contends that any indirect discrimination is justified.

[13] Before addressing the substantive merits of the claim, however, the respondent also relies on three preliminary points as a result of which it invites the Court to either refuse leave to apply for judicial review or to dismiss the substantive application for judicial review. First, it contends that the applicant is out of time to bring these proceedings and should not be granted an extension of time for this purpose. Second, it contends that the applicant has an effective alternative remedy in respect of his claim based on discrimination (or, at least, in respect of that aspect of his claim based on the Race Relations Order) which should result in the refusal of leave to apply for judicial review. Third, it contends that any claim based on the Race Relations Order which might otherwise properly be made in this application for judicial review is barred by the failure on the part of the applicant to put the Department of Education on notice of this aspect of his claim, as he is statutorily obliged to do. I propose to deal with each of these preliminary objections first.

Delay

[14] Dealing first with the question of delay, I have not found this aspect of the case easy to resolve. For the reasons outlined below, however, I have concluded that the applicant did not lodge these proceedings within the time limit specified by the rules of court and that no extension of time should be granted.

[15] The starting point is the wording of RCJ Order 53, rule 4(1), which provides that:

> "An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[16] As this application centrally involves a challenge to the respondent school's admissions criteria, the grounds for the application "first arose" at the time when those criteria were adopted and it became clear that they would be applied to the applicant in the event that he applied for admission to respondent school. The applicant, as a prospective or intending candidate for admission to the school, would have had standing to bring a judicial review claim at the time when the school's admissions criteria were first published, relying upon the same grounds upon which he now relies, including as someone who "would be" a victim of a violation of his Convention rights pursuant to section 7(1) of the Human Rights Act 1998. He did not bring proceedings at that time. However, the fact that an application could properly have been made at that time indicates that, for the purposes of the judicial review time limit, the grounds for this application "first arose" at that time.

[17] It seems to me that this analysis represents no more than the application of basic first principles. Those principles are expressed, by way of example, in the following observations at paragraph 9-021 of *Judicial Remedies in Public Law* (6th edition):

> "The claimant should challenge the decision which brings about the legal situation of which complaint is made. There are occasions when a claimant does not challenge that decision but waits until some consequential or ancillary decision is taken and then challenges that later decision on the ground that the earlier decision is unlawful. If the substance of the dispute relates to the lawfulness of that earlier decision and if it is that earlier decision which is, in reality, determinative of the legal position and the later decision does not, in fact, produce

> any change in the legal position, then the courts may well rule that the time-limit runs from that earlier decision."

[18] Had it not been for the decision of the Court of Appeal in *Re Anderson (a minor) and Another's Application* [2001] NICA 48, I would have had no hesitation in concluding that this application was *prima facie* out of time and that the applicant was required to show good reason why he should be granted an extension of time. The decision in *Anderson*, upon which the applicant strongly relies, suggests that a different approach may be taken in school admissions cases where an applicant chooses to come to court only after the allegedly unlawful criteria have resulted in an adverse admission decision their case. Unfortunately, and perhaps unusually for Carswell LCJ, this issue was dealt with only cursorily in the judgment. In the single paragraph of the judgment dealing with this issue, he said this:

> "Counsel for both respondents argued that the time started to run when the criteria were adopted by the governors, which took place early in the school year. At that stage, however, parents of children of transfer age had not made any decision which schools to specify as their preferences and may not have done so until after the publication of the criteria in early February. They would not know the grades which their children received in the transfer procedure until later in the month of February. Until the governors carried out the process of application of the criteria the appellants' parents could not know whether their sons would be accepted as pupils. We do not see how parents could be expected to launch a challenge to the criteria of the College until their validity became a live issue. Whether or not the time could strictly be said to have run from the date when the governors adopted the criteria, accordingly, we do not consider that it was reasonable to ask any parents to challenge them until after they had received notification that their sons had not been accepted as pupils. If it is necessary for us to extend the time specified by RSC (NI) Order 53, rule 4, we therefore do so."

[19] The difficulty with this passage is twofold. First, although the Court of Appeal expressed the view that a parent could not be expected to mount a challenge to admissions criteria until their validity "*became a live issue*", no clear explanation is given of when precisely that ought to be held to have occurred. Second, it is not made clear whether or not the Court of Appeal considered itself to be granting an extension of time. On the first of these issues, Mr Lavery's approach is that the criteria's validity only becomes a live issue when their application has resulted in a decision to refuse admission to the school. He draws support for this from Carswell LCJ's reference to the fact that it was not reasonable to ask parents to challenge the

criteria in the *Anderson* case "until they had received notification that their sons had not been accepted as pupils."

[20] However, in my view, the better reading of the *Anderson* judgment is that time began to run when the admissions criteria were adopted, or at least when they were published; but that it was appropriate for an extension of time to be granted, since it was not reasonable to expect the applicants in the circumstances of that case to bring a challenge until they knew that the impugned criteria had been engaged in their case, leading to an adverse admissions decision. The reference to whether it would be "reasonable" to expect the applicant to bring his challenge sooner is language more naturally appropriate to the question of whether an extension of time should be granted, rather than the more hard-edged question of when the grounds for challenge first arose. This reading of the way in which the delay issue was dealt with in *Anderson* is in my view consistent with basic principles, discussed above; and supported by Carswell LCJ's references to the fact that "strictly" time might be said to have run from the date of the adoption of the criteria and to the court extending time pursuant to the rules (albeit with the caveat, "if necessary"). In any event, the absence of a clear finding that the application in *Anderson* had been brought within time, coupled with the express indication that time would be extended in the circumstances of that case, in my view means that the Court of Appeal's approach on this issue should not be viewed as part of the *ratio* of the case which is binding on the High Court.

[21] I also consider that, in the present case, the validity of the impugned criteria became a 'live issue' much earlier than in the *Anderson* case. That is because, in *Anderson*, the school was a grammar school which selected pupils principally on the basis of academic selection. An applicant who did not achieve a high grade in the transfer test would likely miss out on a place at the school for that reason; and an applicant who achieved a high grade may well secure admission to the school on the basis of their academic performance without the school having to resort to the application of its sub-criteria, the legality of which were at issue in *Anderson*. In short, the applicant's academic performance (and that of others) would determine whether or not it was likely that the sub-criteria to which objection was made would have any role to play. In contrast, for this year at least, the respondent school has removed its academically selective criteria. It was clear from the off, therefore, that the criteria it adopted (which usually, as in the *Anderson* case, would only operate as sub-criteria to distinguish between candidates of the same or similar academic ability who were tied for places) would apply across the board. There was no hope that the present applicant, through academic achievement, could avoid the potentially disadvantageous elements of the criteria to which he has now drawn attention. He would, or ought, to have known from the time of their publication that they were likely to have a material, adverse impact on his prospects of securing a place at the respondent school.

[22] On the basis, therefore, that the applicant has failed to bring these proceedings within the time limit prescribed by Order 53, should an extension of time be granted

in this case? Mr Henry relied upon the fact that (until the provision of his amended Order 53 statement on the morning of hearing) the applicant had not even formally sought an extension of time, much less provided a good reason for any delay on his part. It does rather appear that the applicant proceeded on the basis that, in light of the approach of the Court of Appeal in *Anderson*, an extension of time would be his for the asking. However, well-worn authority in this area establishes that the court should only grant an extension having addressed its mind to a number of relevant considerations: see, by way of example, *Re Zhanje's Application* [2007] NIQB 14, at paragraph [7].

[23] I do not consider that the applicant has established a reasonable, objective excuse for mounting this application late. The respondent has made much of the fact that it provided early notice of its position in relation to the non-use of academic selection for the forthcoming academic year in or around May or June 2020. The applicant's mother contends that they were not aware of this indication on the part of the group of grammar schools concerned. However, the applicant's mother's evidence indicates that the family became aware in January 2021 that the use of academic selection had been cancelled; and that they became aware of the criteria which the respondent school was using when they completed the applicant's transfer form (in either late February or early March). The school's criteria were published by the Department on 2 February 2021. The application was neither made then; nor when the applicant's family considered the school's criteria at the time when his transfer form was completed and selected it as his first preference school; nor even within three months of that time.

[24] Upon publication of the school's criteria, in the absence of its usual primary criterion of academic selection, it would have been obvious to the applicant that the limited places available at the school would be distributed on the basis of criteria which would normally only be sub criteria or operate as some form of tiebreaker. In short, these criteria were bound to have determining effect in distributing the places available in this unusual year. It is perhaps for this reason that two other grammar schools which had abandoned reliance on academic selection in their admissions criteria for this year faced judicial review challenges shortly after the publication of their criteria. Mr Henry rightly drew attention to the fact that these challenges (to the criteria adopted by Belfast Royal Academy and St Malachy's College, Belfast respectively – one of which was successful to the extent that the school amended its criteria and the other of which was unsuccessful) were widely publicised and the subject of debate in the media and amongst those interested in the transfer process this year. The significant point, however, is that a challenge brought at that stage was able to result in the legal arguments being analysed and dealt with before parents and Primary 7 children were required to complete their transfer forms. Therefore, the schools' admissions criteria were both known and legally settled at the time when third parties made important decisions in reliance upon them.

[25] If the applicant was correct that the time for such a challenge began to run only upon being informed that one's admission application has been refused, or

alternatively that an extension of time would be granted to permit a judicial review which would otherwise be out of time to be brought after that notification, this would have a number of undesirable effects in terms of legal certainty and third-party rights. Any applicant could 'take their chances' with admissions criteria which they contended were unlawful and then mount a challenge only at a very late stage, having effectively sat on their hands whilst others had made significant decisions on the basis that those criteria were valid. Significantly, given that those seeking admission to post-primary schools were only advised of the school in which they had been placed in mid-June, if the applicant was correct any disappointed applicant would still be within time to challenge the admissions criteria of any school which refused them admission up until mid-September, notwithstanding that many post-primary schools have already commenced their first terms for Year 8s by that time, or several weeks before.

[26] It is in the interests of schools, parents and pupils, and in the public interest more generally, that the legality of schools' admissions criteria are established – including by way of legal challenge, as appropriate – at an early stage. The transfer process is time-limited and, given the variety of interests engaged, there is a strong case for ensuring that admissions criteria are not liable to variation after admissions applications and admissions decisions have been made on the basis of them. Indeed, the limited grounds on which an appeal before the Admissions Appeal Tribunal may succeed reflect the fact that, once admissions decisions have been taken, the central focus will be upon ensuring that the published criteria were applied and were applied correctly. This court, of course, retains a supervisory jurisdiction in relation to the legality of admissions criteria which schools have adopted; but the issue here is when that jurisdiction ought to be invoked.

[27] Although the analogy is far from perfect, the approach I have outlined above is also consistent with that taken in case law relating to time limits for challenges to procurement decisions under the Public Contracts Regulations 2015. That is another area where a prospective litigant has an opportunity to challenge criteria (there, contract award criteria) once they are published but before they have been applied; but may wish to wait and see if the criteria result in an adverse award decision before resorting to litigation. In that field also, there is a strong public interest in the criteria being transparent and fair, including in terms of non-discrimination; but also in there being legal certainty in light of the engagement of third party interests. As with judicial review, a challenge must be brought within a tight timeframe, running from when "*the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen*" (see regulation 92(2)). Leaving aside that that time limit (unlike the judicial review time limit) is formulated by reference to the claimant's date of knowledge, case law establishes that time begins to run once the award criteria have been published which may later give rise to an unfavourable award decision. The prospective challenger must bring their claim when they are aware of the likely or potential unfair outcome at the later stage; they cannot simply sit back in the hope of a successful outcome whilst at the same time reserving the right to rely on asserted illegality of which they have been aware for some time.

[28] This approach is perhaps most clearly articulated in the decision of the English Court of Appeal in *Jobsin Co UK Plc (t/a Internet Recruitment Solutions) v Department of Health* [2001] EWCA Civ 1241, which was decided under an earlier version of the 2015 Regulations. Although recognising that a challenger had a 'stark choice' when faced with criteria about which he was concerned, but in the absence of an adverse decision in relation to him at that point, Dyson LJ pithily expressed the approach of the court in this way (at paragraph [38] of his judgment):

> "It seems to me that a tenderer who finds himself in such a situation faces a stark choice. He must either make his challenge or accept the validity of the process and take his chance on being successful, knowing that the other tenderers are in the same boat. In my view, it is unreasonable that he should sit on his rights and wait to see the results of the bidding process on the basis that, if he is successful he will remain quiet, but otherwise he will start proceedings. I do not believe that a tenderer who deliberately delays proceedings in an attempt to have his cake and eat it has good reason for an extension of time if the outcome of the process is not to his liking."

[29] He added that it was not necessary for there to be particular evidence of prejudice to third parties. It was "inherent in the process itself that delay may well cause prejudice to third parties as well as detriment to good administration." These factors of prejudice and detriment to good administration are further issues which the court should address in considering an application for an extension of time.

[30] The respondent suggests, in terms, that allowing the challenge to proceed at this point, if it were successful, would be to cause mayhem in terms of both this school and others which had used similar admissions criteria. Many more children may have to be admitted having brought similar judicial review claims in relation to similar criteria and, as necessary, also challenging unfavourable Admissions Appeal Tribunal decisions on the basis that they had been determined in error of law (on the basis that the criteria being considered were lawful, when they were not). In turn, children who have been awarded places at such schools may be at risk of losing those places if the admissions process had to, in some way, be re-run on the basis of admissions criteria with those which had been found to be unlawful having been excised. I consider some of the respondent's suggestions in this regard to be overblown. There may well be some disappointed applicants who might be able to mount legal proceedings in a range of schools; but this is unlikely to be a tsunami, since it is likely only to avail those who made an admissions appeal and who could show (as this applicant can) that, if certain criteria were removed as being unlawful, that would have resulted in their securing admission to the relevant school. The

prospect of pupils who have already been admitted being pushed out is, in my view, unrealistic.

[31] Nonetheless, I accept the respondent's basic point that further challenges and uncertainty, and further transfers of pupils between schools at this late stage, would generally be undesirable for schools. The evidence shows that there was a very high number of admissions appeals this year, both in respect of the respondent school and generally: well over four times the usual number of admissions appeals which might be expected in a single year. Albeit successful appeals may result in increased admissions numbers for oversubscribed schools, a further significant intake of pupils can still cause difficulties in terms of schools' overall enrolment numbers and class sizes, and may have an impact on the Year 8 places available next year. I consider that some element of prejudice has been made out by the respondent; and, for the reasons summarised already above, that there is significant detriment to good administration in allowing a school's admissions criteria to be challenged at the end of the process. As I have already mentioned, the fact that many other children will have made choices, and accepted decisions, on the basis of the published admissions criteria which were presumed to be lawful, raises a general issue of fairness.

[32] Turning to the public interest, I do not consider that there is an overriding public interest in this matter being permitted to proceed. Although the application raises an interesting issue in relation to the use of certain school admissions criteria, and is (I readily accept) of very significant import to the applicant and his family, it is not a matter of general public importance.

[33] I therefore accept the respondent's case that the application has been brought out of time and, in light of the various factors considered above, decline to extend time.

[34] My conclusion on the issue of delay is sufficient to dispose of these proceedings. However, I have set out my views on the remainder of the issues argued by the parties – although in less detailed terms than might otherwise have been the case – for two reasons:

(a) First, I am conscious that the applicant has a right of appeal against this ruling (or to renew his application for leave before the Court of Appeal) and may wish to do so. In the event that he does so, and given the urgency in the case in light of the recent start of the academic year, it would be better for a reasoned judgment to have been given on each of the issues raised in the proceedings. It would be in no-one's interest for a successful appeal on the delay issue simply to result in a remittal back to the High Court for a first instance determination on the remaining issues, on which I have heard substantial argument. A conclusion on those issues may also be helpful if an appeal were mounted and the Court of Appeal determined to exercise its powers under Order 53, rule 5(8) to go ahead to hear and determine the substantive application for judicial review.

(b) Second, although less importantly, Mr Lavery made a submission to the effect that it is in everyone's interest that the nettle be grasped in terms of an authoritative consideration of the legality of the type of criteria impugned in this case. A previous application for judicial review on these issues was compromised (see paragraph [57] below); and the issue may well arise in future. I accept that there is some force in this submission. I do not consider that there is sufficient public interest in the case to require the grant of leave; but I nonetheless hope that the discussion below (which is necessarily *obiter* in light of my conclusion on the delay issue) may be of assistance to those making relevant decisions in this field.

Alternative remedy and failure to notify the Department

[34] A significant element of the applicant's case rests on an alleged breach of Article 18 of the Race Relations Order, which is within Part III of that Order. An issue arises as to whether, and if so how, this claim should be litigated by way of judicial review. These issues form the basis of the respondent's second and third preliminary objections.

[35] Article 51 of the Race Relations Order provides for a general restriction on proceedings for breach of the Order's provisions. Article 51(1) is in the following terms:

> "Except as provided by this Order no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of this Order."

[36] The effect of Article 51(1) is that no proceedings can be brought for breach of the Order "except as provided by" the Order itself. That is to say, the Order contains an exhaustive code as to what proceedings may be brought by way of enforcement of its provisions or for redress arising from them. Crucially for present purposes, however, Article 51(2) provides that, "Paragraph (1) does *not* preclude the making of an application for judicial review" [emphasis added]. I take from this that judicial review stands outside the general restriction contained in Article 51(1); and that, therefore, the normal principles in relation to the bringing of judicial review proceedings apply.

[37] Further potential complications, however, arise from the provisions of Article 54, on which the respondent also relies. Article 54 relates to claims under Part III of the Order. It provides – in material part only – as follows:

> "(1) A claim by any person ("the claimant") that another person ("the respondent") —

(a) has committed an act of discrimination against the claimant which is unlawful by virtue of Part III; or

(b) is by virtue of Article 32 or 33 to be treated as having committed such an act of discrimination against the claimant,

may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.

(2) Proceedings under paragraph (1) shall be brought only in a county court; but all such remedies shall be obtainable in such proceedings as, apart from this paragraph and Article 51(1), would be obtainable in the High Court.

…

(5) Civil proceedings in respect of a claim by any person that he has been discriminated against in contravention of Article 18 or 19 by a body to which Article 20(1) applies shall not be instituted unless—

(a) the claimant has given notice of the claim to the Department of Education; and

(b) either—

(i) the Department of Education has by notice informed the claimant that it does not require further time to consider the matter; or

(ii) the period of 2 months has elapsed since the claimant gave notice to the Department of Education."

[38] As a result of these provisions, Mr Henry submits that the present applicant has a right of action which can be pursued in the county court; that, indeed, his claim *must* be pursued in the county court; and that, in such proceedings, the county court would be empowered to make any order which the High Court could make, including in this application for judicial review. Further, he contends that, even if an application by way of judicial review is possible, it still cannot be commenced in

reliance on Article 18 of the Race Relations Order unless and until the notification requirements in relation to the Department of Education under Article 54(5) have been complied with. He did not go so far as to suggest that these proceedings were a nullity on that ground; but relies upon it as an additional reason why leave to apply for judicial review ought to be refused.

[39] Mr Lavery submitted that the restrictions within Article 54 applied only to civil claims for damages; and contended that these proceedings were unaffected by those restrictions (pointing out, additionally, that no claim for damages has been included in the applicant's Order 53 statement). If and insofar as necessary, he contended that the notification requirements in respect of the Department had been discharged by the Education Authority having been put on notice of the proceedings; or that this was a procedural defect which could be readily remedied and which ought not to result in the dismissal of the application.

[40] Construing Articles 51 and 54 together, I accept Mr Lavery's submission that an application for judicial review is not subject to the restrictions in Article 54(2) and (5). The purpose of Article 54(1) is to render breach of a Part III prohibition on discrimination an actionable tort in respect of which civil proceedings for tortious conduct can be brought. Such proceedings are one of the ways in which the anti-discrimination provisions in the Order may be enforced under Part VIII. Other enforcement mechanisms under the Order include complaint to an industrial tribunal where the alleged discrimination arises in the employment field (Articles 52-53); and enforcement action by the Equality Commission (Articles 55-63). However, Article 51(2) makes clear that the anti-discrimination provisions in the Race Relations Order can be relied upon in applications for judicial review, where judicial review would otherwise lie against the respondent, in a regime which is independent of the enforcement mechanisms provided under the Order itself.

[41] Viewed in that way, it becomes clear that it is only a claim in tort (under Article 54(1)) which must be brought in the county court. The provision in Article 54(2) to the effect that, in such proceedings, all such remedies shall be obtainable in the county court as would be obtainable in the High Court operates primarily in my view to ensure that the monetary jurisdiction of the county court to award damages is unlimited for this purpose. No doubt the county court could also grant a declaration or injunction in appropriate terms; but the provisions of Article 54 are not designed to allow the county court to hear an application for judicial review, either directly or by circumventing the usual rule as to the procedural exclusivity of RCJ Order 53 for such proceedings. In short, Article 54(2) has no application to judicial review proceedings for the reasons given above. Judicial review proceedings relying on prohibitions within the Race Relations Order can be brought independently of any requirement to rely on Article 54. This is also supported by the further procedural provisions in Article 65 as to time limits which, in my view, make clear that claims to the county court will generally be claims for damages in tort. It could not be the case that Parliament intended that Article 65(2) would extend the time for bringing proceedings in the county court in the form of an application or

quasi-application for judicial review to 6 months. Rather, the purpose of that provision is to shorten the usual limitation period for civil claims in this field and to require them to be pursued promptly.

[42] The same reasoning disposes of the objection that the applicant in this case has not notified the Department of his proposed proceedings pursuant to Article 54(5). Had this not been so, I would not have been inclined to accept that notification of the EA amounted to notification of the Department for this purpose. However, I consider that the reference in article 54(5) to "civil proceedings in respect of a claim by any person that he has been discriminated against in contravention of Article 18" refers to civil claims under Article 54(1), rather than reliance on Article 18 in the course of judicial review proceedings which are independently permissible under Article 51(2).

[43] Accordingly, the respondent's second and third preliminary objections are not upheld.

The duty to have regard to the Departmental guidance

[44] Turning to the substance of the applicant's challenge, Article 16B of the 1997 Order is entitled '*Guidance as to Admissions*' and provides, amongst other things, that the Department may issue guidance in relation to admissions and that, where such guidance has been issued, Boards of Governors should have regard to it. Article 16B(1) is in the following terms:

> "The Department may issue, and from time to time revise, such guidance as it thinks appropriate in respect of the arrangements for the admission of pupils to grant-aided schools and the discharge by—
>
> (a) boards;
> (b) the Boards of Governors of grant-aided schools;
> (c) appeal tribunals constituted in accordance with regulations under Article 15(8); and
> (d) the body established by regulations under Article 16A(6),
>
> of their respective functions under this Part."

[45] By virtue of Article 16B(3), "it shall be the duty of… each of the bodies mentioned in paragraph (1)… to have regard to any relevant guidance for the time being in force under this Article." It is clear, therefore, that the Board of Governors of the respondent school was required to have regard to the Departmental guidance.

[46] A significant number of cases were cited in argument in relation to what this duty means and entails. In my view, the starting point is that a 'have regard' duty in

public law is generally a relatively weak obligation. The decision-maker must consider the factor to which they must have regard; but that factor is not to be determinative. The decision-maker is free to give it such weight as they think fit. The bare minimum, however, is that the decision-maker turns their mind to the relevant factor and properly understands it. Where there is a duty to give reasons for a decision, this will also generally entail an obligation to explain how the relevant factor was considered and why it was not given determining weight.

[47] Sometimes a plain 'have regard' duty is bolstered (or arguably bolstered) by an obligation to have 'have *due* regard' to a particular consideration. Ultimately, however, what a particular such duty will require in any given statutory scheme will be a matter of construction, including in particular the context in which it is imposed. In some cases – particularly where the factor to which due regard is to be had is normative (such as advice or guidance pointing to a particular outcome) – a 'have regard' obligation has been elevated into an obligation to comply with the advice or guidance in the absence of a cogent reason. Planning policy often falls into this category. In most such contexts, a cogent reason will simply be a reason which withstands rationality challenge, with the intensity of the court's rationality review depending on the subject matter and the interests at stake. Since the potency of a 'have regard' obligation, as construed and applied by the courts, will depend upon its statutory context, I have found more assistance in the cases cited which deal specifically with the obligation under Article 16B of the 1997 Order.

[48] In *R (on the application of Mavalon Care Ltd and others) v Pembrokeshire County Council* [2011] EWHC 3371 (Admin), Beatson J summarised the legal status of guidance as follows (at paragraph [22]):

> "It is clear on the authorities that while guidance is not mandatory, it should be given great weight and an authority can only depart from it for cogent reasons: see *R v Islington LBC, ex parte Rixon* [1997] ELR 66 at 71, 32 BMLR 136, [1998] 1 CCL Rep 119; *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58 at 21 and 68-69, [2006] 2 AC 148, [2006] 4 All ER 736; *R (Forest Care Homes Ltd) v Pembrokeshire County Council* [2010] EWHC 3514 (Admin) at 28."

[49] A similar, but perhaps slightly more muscular, obligation was recognised by Sedley J in *R v Islington LBC, ex p Rixon* (1996) 1 CCLR 119, at 123, when considering a statutory requirement imposed on local authorities exercising a particular discretion to "*act under the general guidance of the Secretary of State*." That formulation, however, lends itself to the decision-maker having less room for manoeuvre, since they are required to "*act under*" the guidance.

[50] In *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, the House of Lords considered a code of practice on the seclusion of patients detained under the Mental

Health Act 1983. The Act provided for the Secretary of State to issue a code of practice 'for the guidance of' relevant public bodies. The House of Lords considered that a public body could only depart from the code where there were cogent reasons for doing so, with Lord Bingham stating that the court would scrutinize any such reasons "*with the intensity which the importance and sensitivity of the subject matter requires*." It was clear in that case that the statutory context was important in considering the status of the guidance, including the fact that (unlike in the present case) the code of practice had to go through a Parliamentary procedure before it was published. Lord Hope considered that, "*Statutory guidance of this kind is less than a direction. But it is more than something to which those to whom it is addressed must "have regard to.""* To lawfully depart from it, the decision-maker would have to show "*clearly, logically and convincingly that it had cogent reasons for departing*" from it.

[51] In the context in which this case arises, Treacy J considered the obligation to have regard to DE guidance on admissions in *Re JR 56's Application* [2011] NIQB 78. Like this case, that was a challenge to a secondary school's refusal to admit an 11-year-old boy, and against the admissions criteria which the school had employed. In the *JR56* case, the school's criteria which were under challenge were held to be contrary to the DE guidance, but the school, among other things, claimed that the criteria were *not* contrary to the guidance. The court quashed the decision not to admit the applicant because, in setting the criteria, the school had not had "proper regard" to the guidance (because it erred in considering that the criteria it adopted were not contrary to the guidance, when they were). However, in the course of the judgment, Treacy J considered (at paragraph [14]) what the 'have regard' duty under Article 16B entails. In that case, he adopted the approach set out in the guidance itself, which was accepted by both parties as an accurate statement, namely that:

> "Boards of governors and others addressed by this guidance should understand that the duty to have regard to this guidance is a legal one. In practical terms this duty for a post primary schools board of governors means that in drawing up admissions criteria for the 2010/2011 school year they should give active and receptive consideration to the guidance's recommendations on admissions criteria and record this consideration."

[52] This approach – active and receptive consideration with a record of reasons for departure – is broadly similar to the *Munjaz* requirement, although perhaps permitting Boards of Governors more leeway for departure, bearing in mind the difference in context between schools admissions decisions and the seclusion of patients.

[53] Colton J also considered this same issue very recently in *Re JR140's Application* [2021] NIQB 21. In that case, an 11-year-old applicant challenged the admissions criteria of St Malachy's College Belfast – although he did so in advance of any particular admissions decision which had adversely affected him. At paragraph [64]

of his judgment, Colton J considered the court's approach and described the Article 16B(3) obligation in this way:

> "In approaching this matter and, in particular, what is meant by "have regard to" I take the view that the respondent must engage with and give real weight to the guidance. It should only depart from the guidance on the basis of cogent and reasoned justification."

[54] I do not consider Colton J's reference to Boards having to give "real weight" to the guidance to mean that they are only permitted to make limited exceptions in exceptional circumstances or something similar. I reject Mr Lavery's submission that it is not open to Boards of Governors to simply set aside portions of the guidance where they disagree with it. They are free to do so provided that they can show that they have understood and conscientiously engaged with the guidance and that their reasons for disagreement are identified and rational.

Relevant portions of the DE guidance

[55] The relevant guidance which is the subject of the Article 16B obligation is 'DE Circular 2016/15 revised and issued on 21 October 2020 – The Procedure for Transfer from Primary to Post-Primary Education.' The applicant draws attention to paragraph 9.16 of this guidance – in relation to the obligation to have regard to it and the consequences of not doing so – which is in the following terms:

> "Boards of Governors should carefully consider the content of their school's criteria and where guidance is not being followed the reasons for this should be clearly recorded (e.g. in the relevant Board of Governors minutes). If a school fails to follow guidance and does not have sufficient reasons for doing so the school may not be indemnified by the Education Authority if legal proceedings are initiated against the school."

[56] More substantively, the applicant relies on the following portions of the guidance which, he says, indicate that the respondent Board has departed from it:

(a) First, at paragraph 9.6, the guidance recommends a list of criteria to be used. These include applicants who are entitled to free school meals (so that a certain proportion of such children are admitted); aapplicants from a feeder or named primary school; applicants residing in a named parish (with nearest suitable school); applicants residing in a geographically defined or catchment area (with nearest suitable school); applicants for whom the school is the nearest suitable school; applicants who have a sibling currently attending the school; and tie-breaker criteria. The applicant contends that only three of the seven recommended criteria have been used by the respondent.

(b) Second, at paragraph 9.15 of the guidance, there is a list of criteria which schools are cautioned *against* using. These include familial criteria beyond that of a sibling who is currently attending the school; and criteria prioritizing the children of employees and/or governors of a school. The applicant points out that the three criteria he challenges in these proceedings are each, therefore, criteria which the DE guidance advise Boards of Governors not to use.

[57] At paragraph 9.16, the guidance also gives brief details of a previous judicial review challenge against similar admissions criteria. It notes that the matter was eventually resolved when the school involved received legal advice that the use of particular admissions criteria which departed from the departmental guidance may be difficult to defend successfully. In that case, the school's admissions criteria were not tested in court. However, the judge (Keegan J, as she then was) quashed the impugned criteria by consent of the parties. That included quashing a criterion which gave familial preference beyond a sibling currently attending the school and a criterion prioritising family members of employees of the school. The applicant notes that, albeit there was no formal judicial adjudication in that previous case, the guidance makes a point of discussing it in terms which are clearly designed to heighten the caution a school ought to use before adopting such criteria.

Has the respondent complied with its 'have regard' duty?

[58] In support of its contention that it properly considered the DE guidance and lawfully departed from it, the respondent has provided minutes from a sub-committee of the Board of Governors which met on 28 September 2020 in order to discuss the admissions criteria which the respondent school should adopt. The minutes expressly record that the committee reviewed the school's criteria using the DE guidance as a reference. The applicant concedes that, "*It is clear from the minutes that the school considered the DE guidance, but in relation to the familial criteria that the DE recommends against, the Respondent rejected same*…." The minutes also provided some reasoning for rejecting the DE guidance against the use of familial links (other than siblings currently attending the school). In light of the applicant's concession that the respondent Board clearly considered the guidance (and the absence of any suggestion that it misunderstood the purpose or effect of the guidance), the outcome of the applicant's first ground of challenge really resolves to whether the school's reasons for departing from the guidance are 'cogent', in the sense required by the authorities discussed above.

[59] The core portion of the sub-committee's minutes which is relevant to this issue is in the following terms (at paragraphs 6-8):

> "We modelled applying quotas to each criterion based on the pattern of applications to the school in each criterion over the past three years. This virtually ensured all FSM

> [applicants entitled to free school meals] were admitted when it was used as a subsidiary criterion within any individual criteria oversubscribed. While this ensured equal fairness in each criteria it reduced the number of admissions involving sibling and parental relationships. The committee felt that this was in ad variance [*sic*] to the ethos and community spirit of the school. While DE guidance does not recommend the use of such criteria, the direction is not as strong as that for FSM. The committee felt that the DENI guidance totally excludes the community aspect of a school in its local community.
>
> With the very wide catchment area and over 40 feeder schools the use of feeder primary schools or feeder parishes as a criterion could not sensibly be used. Family links are key in contributing strongly to the community that is the school. Therefore, the board felt that the family links should promoted discarding quotas in point 5 above as a methodology. The rank order of family based criteria should therefore not be changed.
>
> It was felt that in the short-term the committee was unable to accommodate changes which would secure places for families who had just come to the area with no previous relationships with the school. Using quotas for each criteria is one way of supporting this but it would in turn impact on all criteria."

[60] Mr Lavery seized on the indication from these excerpts that the committee recognised that using quotas across each of the criteria "ensured equal fairness" but nonetheless prioritised family links with the school over that fairness. However, in assessing whether the school had regard to the DE guidance in accordance with its legal obligations, it is not for the court to assess the general fairness of the criteria adopted. For present purposes, the minutes have satisfied me that the committee considered the DE guidance carefully; that it recognised that the criteria it ultimately proposed should be adopted were contrary to the recommendations in the DE guidance; that it assessed the strength of various recommendations in the DE guidance; and that it decided to depart from the recommendations in the guidance on the basis that the recommended criteria catered insufficiently for "the community aspect of a school in its local community."

[61] An immediate objection to this reasoning might be that the DE recommended criteria do in fact cater for clear links between a school and its local community, although it does so by means (principally) of geographic criteria, defined by local feeder primaries, the local parish or parishes and catchment area. As appears from the excerpt of the minutes above, however, the sub-committee considered that such

criteria "could not sensibly be used" in light of the breadth of the catchment area and the large number of feeder schools from which the respondent school receives pupils.

[62] It was on this basis that the familial criteria were used as a means to retain or promote a close link to the community – either in terms of the local community or, perhaps more correctly, the past and present *school* community. The respondent's affidavit evidence, which is addressed in further detail below in relation to the question of justification of any discriminatory effects, is to similar effect. That evidence also establishes that the school's proposed criteria, and the Departmental guidance, were discussed at some length; that the school principal took the sub-committee through the DE guidance; and that one of the Governors, who was legally qualified, explained the obligation to have regard to the guidance. The sub-committee met again before the full Board of Governors' meeting on 6 October 2020 which adopted the criteria, at which the full Board also discussed each point of the sub-committee minutes. A proposal that boys one of whose grandfathers had attended the school (although not their father) should be given priority was discussed but not adopted.

[63] Whatever one's views on the merits of a school seeking to protect a sense of community and continuity by preserving its intake to the type of student who has traditionally attended the school, it seems to me that there is clear authority to the effect that this is a permissible aim for a school to adopt in crafting its admissions criteria. Mr Henry relied on the cases of *Re Moore and Others* [1994] NIJB 99 and *Re JR56's Application (No 2)* [2011] NIQB 89 to this effect. Plainly, any criterion adopted must not fall foul of statutory anti-discrimination provisions but, leaving those aside, a school is entitled to seek to preserve the character of its intake.

[64] In the *Moore* case, Carswell LJ had considered that there was material to support a suspicion that the Board of Governors concerned had wanted "to adhere to their traditional pattern" of entry. In that case, the suggestion was that the school wished to favour children from rural families rather than children who lived in local, urban housing estates. Carswell LJ considered that, even if this had been proven, "whether or not other people might agree with or disapprove of such an approach, the Board would, in my opinion, have been entitled as a matter of law to frame its criteria in such a way as to perpetuate a social pattern of intake if it chose." Although recognising that some parents may be incensed by the apparent unfairness of this, it was held that such an approach would have a "sustainable basis" and was not irrational – provided, of course, that it otherwise complied with the law. When the *Moore* case went on appeal to the Court of Appeal ([1994] NIJB 111), Kerr J (who gave the leading judgment) also considered that criteria seeking to reflect the "traditional intake" of the school were permissible. This reasoning was followed by Treacy J in *Re JR65 (No 2)*, on essentially the same facts. Provided such criteria did not amount to unlawful discrimination – which is addressed below – it was not unreasonable or impermissible for a school to seek to preserve its traditional intake of pupils.

[65] In the recent case of *Re JR140's Application* – the challenge to the admissions criteria adopted by St Malachy's College, Belfast referred to at paragraphs [24] and [53] above – Colton J also appears to have accepted that familial criteria extending beyond siblings who currently attend the school were permissible on the basis of strong family and pastoral perspectives which were central to the ethos of the school. That appears to follow from paragraphs [59], [87] and [96]-[97] of his judgment, although it was not dealing with a criterion relating to a *parent* who had attended the school as has been used by the respondent in this case.

[66] I accept the applicant's contention that the reason to depart from the guidance provided by the respondent must be a lawful reason. In other words, if its justification amounts to unlawful discrimination, that would not be a sufficiently 'cogent' reason to depart from the guidance (and proper regard would not have been had to it). That is entirely consistent with the judgments in *Moore* and *JR65 (No 2)*. However, viewed in that way, the applicant's reliance on Article 16B of the 1997 Order really adds nothing to the second limb of his case, namely his discrimination ground.

[67] Assuming that the reasoning does *not* constitute unlawful discrimination, I would hold that the respondent has adequately discharged its obligation to have regard to the DE guidance. Continuity in the school community, pursued by means of granting some priority to those with previous family links to the school, which the school contends is of assistance in terms of both pastoral care and in encouraging past pupils to continue to support and engage with the school, is a rational and lawful aim which the school is entitled to pursue in its admissions criteria. The school recognised in this instance that it was departing from the DE guidance but did so consciously and on a basis which was not irrational. Whether that reasoning is sufficient to justify any discriminatory effect of the impugned criteria is, of course, a separate question.

The discrimination claims

[68] I address the applicant's discrimination claims under the Race Relations Order and (in much less detail) under the European Convention in turn below.

Indirect discrimination on racial grounds under the Race Relations Order

[69] Pursuant to Article 18 of the Race Relations Order, it is unlawful for the respondent school, as a grant-aided educational establishment, to discriminate against a person:

> "(a) in the terms on which it offers to admit him to the establishment as a pupil; or

(b) by refusing or deliberately omitting to accept an application for his admission to the establishment as a pupil…"

[70] Unlawful discrimination for this purpose is defined in Article 3 of the Order. Articles 3(1)(b) and 3(1A) provide for two types of indirect discrimination. Article 3(1A) indirect discrimination – which was inserted into the Order by the Race Relations Order (Amendment) Regulations (Northern Ireland) 2003 – arises where a person applies to another person "a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but (a) which puts or would put persons of the same race or ethnic or national origins as that other at a *particular disadvantage* when compared with other persons; (b) which puts or would put that other at that disadvantage; and (c) which he cannot show to be a proportionate means of achieving a legitimate aim" [italicised emphasis added]. It is this species of indirect discrimination which is applicable for the purposes of Article 18: see Article 3(1B)(b).

[71] A racial group for this purpose means a group of persons defined by reference to colour, race, nationality or ethnic or national origins; and references to a person's racial group refers to *any* racial group into which he falls: see Article 5(1). The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group for the purposes of the Order: see Article 5(4).

[72] It is accepted by the respondent that the applicant is Lithuanian and/or of Lithuanian national origins, but I accept that his racial group is not confined to this. Some helpful assistance as to how the question of 'racial group' is to be approached in this context may be found in *Orphanos v Queen Mary College* [1985] 2 All ER 233. That was a case in which the applicant, who had been resident in the United Kingdom for education for some time, challenged his classification as an overseas student for fees purposes under the Race Relations Act 1976 when he was accepted into the defendant college. The applicant there was considered to belong to three racial groups: Cypriot, non-British and non-EEC. Lord Fraser, in the course of his judgment which was the judgment of the court, explained that in order to assess whether there is a 'particular disadvantage', it was important to isolate and rely upon the correct national or racial group. If the racial group was too narrowly defined, the comparison required may be too difficult to apply. For this reason, the House of Lords considered that the appropriate racial groups were non-British and non-EEC, rather than Cypriot. In other words, sometimes the correct approach is simply to examine what the applicant is *not* in order to see whether he or she is at a disadvantage because they are not from an advantaged racial group.

[73] I accept that this is the correct analysis to use in the present case. The applicant here is not at a disadvantage simply because he is of Lithuanian national origin rather than, say, Polish national origin. He is at a disadvantage (it is argued) because he is not of Northern Irish national origin. National origin is different from

nationality and citizenship (although they are often linked); and is usually related to lineage or descent. Authority also indicates that national origins may relate to coming (or not) from a recognised state, of which the component parts of the United Kingdom may be examples (see, for instance, *Northern Joint Police Board v Power* [1997] IRLR 610). Accordingly, an English company might unlawfully discriminate against a Scottish person on the basis of their national origins, notwithstanding that the claimant's nationality and that of an English person treated more favourably were both the same (British). Leaving aside the sometimes vexed issues of national identity and citizenship in Northern Ireland, I accept the applicant's submission that it is quite possible to consider those coming from this jurisdiction to have distinct Northern Irish national origins. Here, in summary, the applicant contends that his family (and his national origins) are from outside Northern Ireland, making it harder to comply with familial criteria requiring past association with the respondent school.

[74] Against that background, has the applicant raised facts from which it may be presumed that there has been indirect discrimination, so that it is then for the respondent to show that there has been no unlawful discrimination? In my view, he has, at least in relation to criterion (iv) in the school's admissions criteria. Put simply, those who have fathers who are not from Northern Ireland are obviously less likely to be able to satisfy the criterion of their father having attended the Abbey Grammar School. They are at a particular disadvantage in this regard. This seems to me to be a matter of common sense. Whilst it is conceivable that a father who is not from Northern Ireland originally may have moved here and attended the respondent school in his youth, having a father who is not from Northern Ireland makes this very considerably less likely than having a father who is from Northern Ireland.

[75] Although there are no detailed statistics addressing the effect of criterion (iv) on children whose parents are foreign nationals (since the respondent has not sought or kept such information), these are not required to establish indirect discrimination under Article 3(1A) of the Race Relations Order (*cf.* the species of indirect discrimination under Article 3(1)(b) which requires a comparison of the proportion of persons who can comply with the criterion). In *Homer* v *Chief Constable of West Yorkshire Police* [2012] UKSC 15, Lady Hale made clear that the type of indirect discrimination on which the applicant relies does not require detailed statistical analysis: see paragraph [14] of her judgment. There is also no requirement that the criterion in question put every member of the group sharing the protected characteristic at a particular disadvantage: see Lady Hale again in *Essop (and others) v Home Office* [2017] UKSC 27, at paragraph [27].

[76] I am also fortified in my conclusion that there is a case of indirect discrimination which requires to be justified by the respondent by the guidance published by the Equality Commission, and relied upon by the applicant in this case, entitled 'Types of Discrimination; Types of Discrimination in schools; Indirect discrimination.' An example given by the Commission – which clearly warns of the

risk of indirect discrimination on racial grounds if a criterion is adopted favouring those whose parents attended a school in the past – is as follows:

> "You give preference to a child whose parent has in the past attended the school. While this criterion is applied equally to all potential pupils, it could put the children of Irish Travellers or migrant workers at a disadvantage because they are less likely than local people to be able to meet it. The criterion is, therefore, potentially indirectly discriminatory on grounds of race and will be unlawful unless it can be objectively justified."

[77] I do not consider that the applicant has raised a *prima facie* case of discrimination on racial grounds in relation to the other impugned criteria, namely criteria (i) and (iii). As to criterion (i), if an 11 year old boy is seeking admission to the school, it is likely that he lives within travelling distance of the school. The opportunity exists for his parents or guardians to work there, in any of the relevant capacities (as a member of the teaching, administrative or ancillary staff). The fact that the family is perhaps not from Northern Ireland is neither here nor there if they have relocated to Northern Ireland, since the relevant employment for the purpose of criterion (i) is *current* employment, not employment at some distance in the past. Although this may go to the question of justification if discriminatory effect was required to be justified, where a child attends a school at which their parent works (or which their sibling currently attends), this also results in obvious convenience for the family and, conversely, reduces disruption to everyday family life. Although the position in relation to having a brother who *previously* attended at the school for the purposes of criterion (iii), rather than a brother who *currently* attends the school for the purposes of criterion (ii) is less clear-cut, I do not consider this to be so obviously disadvantageous on grounds of national origin as the 'parent criterion.' Once a family has relocated, an older brother might well have attended the school – and criterion (iii) does not require that prior attendance to have been for the older brother's full secondary schooling. It may well have been these factors which led the applicant in this case to submit, realistically, that "Criterion (iv) in particular is an issue."

[78] The respondent's submission that there is no particular disadvantage to those with national origins outside Northern Ireland when one considers the correct comparator – namely, a family new to the Newry area from some other part of Northern Ireland – is superficially attractive. Mr Henry was right to point to out that Article 3(3) of the Race Relations Order requires, as do many other anti-discrimination codes, that the comparison used "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other." He submits, therefore, that the applicant's comparator must be a pupil whose family has moved to Newry from (for example) Fermanagh.

[79] However, it seems to me that, ultimately, the school's proposed comparator is not appropriate and would be an unduly artificial comparator for several reasons. First, a claimant relying on national origins which are not Northern Irish (where they or their parents have moved from another country) necessarily relies on the effects of their or their family's migration between countries at some point. That is part and parcel of the protected characteristic. To select as a comparator a national of the country in which the discrimination is alleged to have taken place with no element of international migration would seem to me to significantly reduce the protection afforded by the Order, at least in circumstances of a case such as the present, in a manner which is contrary to the purpose and intention of the statutory scheme. It is the type of artificial comparison which the House of Lords was keen to avoid in the *Orphanos* case, mentioned above. Moving within a country, particularly a country of the modest size of this jurisdiction, is also materially different from moving between countries. In addition, it still remains more likely that a child who has moved from a different part of Northern Ireland to the Newry area will have had a father who attended the respondent school, especially in light of the school's reliance (in rejecting any criteria based on geographical features) on its "very wide catchment area." In my judgment, Mr Lavery was right to urge the use of a much more straightforward comparison between two pupils now living in the school's catchment area who wish to attend it, one of whom has Northern Irish national origins and the other of whom does not.

[80] I would hold, therefore, that criterion (iv) *is* a criterion which, although applied equally to all applicants, puts those (such as the applicant) who are not of Northern Irish national origin at a particular disadvantage. It is therefore for the respondent to show that this criterion is a proportionate means of achieving a legitimate aim.

[81] Using the approach to justification set out by Lord Mance at paragraph [97] in *R (E) v Governing Body of JFS* [2009] UKSC 15 – which was also a case involving alleged discrimination on racial grounds in relation to a school's admissions policy – it is for the respondent to show, in the circumstances, that its aim or objective corresponds to a real need and that the means used are appropriate and necessary to achieving that aim (weighing the need against the seriousness of the detriment to the disadvantaged group).

[82] I have already discussed above the authorities which establish, as a matter of domestic public law, that seeking to preserve the character and ethos of the school (or, one might suggest, the school community) is a rational consideration which may be taken into consideration in the framing of school admissions criteria. I have doubts as to whether this might also constitute a legitimate aim for the purpose of justifying indirectly discriminatory provisions. There may well be benefits to pastoral care and community links but the preservation of historic family links to a school does not appear to me to be necessary in order for a school to excel in both of these areas. In light of the authorities referred to above, I proceed on the basis that

the aim pursued by the school is legitimate, contrary to the applicant's submissions. Nonetheless, it does not appear to me to be a particularly pressing need.

[83] Even assuming the school's objective is capable in principle of justifying the indirectly discriminatory effect of criterion (iv), the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the relevant criterion and the needs of the respondent. It is for the court to make this assessment on an objective basis.

[84] In its affidavit evidence, the school has stated that it "does not and would not discriminate against [children whose parents are foreign nationals] and rejects any suggestion that it has done so, even inadvertently or indirectly." A similar denial is contained, in categoric terms, in the respondent's response to pre-action correspondence. In light of this, the applicant contends that it is extremely difficult, if not impossible, for the respondent to justify the discriminatory effect of criterion (iv) because it has at all times failed to recognise that discriminatory effect and weigh it properly against the aim being pursued by that criterion. In doing so he relied, for instance, on the observations of Mummery LJ in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, at paragraphs [128]-[133]. I do not accept the applicant's suggestion, insofar as it is made, that the respondent is now entirely hamstrung in providing justification for any indirect discrimination, merely because it did not recognise this effect at the time the criteria were adopted and maintained in these proceedings that no discrimination arose. Provided that, in substance, the criterion pursues a legitimate aim which justifies its discriminatory effect it is capable of being justified in law.

[85] That said, as a matter of both common sense and legal principle, it is more difficult, both evidentially in presentationally, for an alleged discriminator to justify the discriminatory effect of a criterion it has adopted in circumstances where it has not previously recognised that effect and consciously grappled with the reasons for permitting it. In the respondent's favour is the fact that the 'community aspect' on which it now relies was recorded in the contemporaneous minutes of the relevant sub-committee of the respondent Board and that it is reflected in the preamble to the school's admissions criteria. Although the reasoning for its approach has now been fleshed out in the school's affidavit evidence, it is an elucidation of prior reasoning rather than an obvious attempt at *ex post facto* rationalisation.

[86] I should make entirely clear that there is no suggestion whatever of any intention to discriminate on grounds prohibited by the Race Relations Order. It is clear, however, that at no point did the school consider that it required to justify discrimination on such grounds. Some consideration was given to the effect of the proposed criteria on families who were new to the area – and it was considered that preservation of the school's community ethos ought to take priority over their interests – but the respondent's evidence candidly accepts that this issue was not addressed through the prism of nationality or national origins.

[87] Rather, the respondent's evidence is that, along with academic excellence, "family connections" are "at the forefront of the school's ethos." The Board believes that family links help in school life in two particular identified respects. First, they assist pupils from a pastoral perspective; and, second, they help maintain and further develop the school's valuable links with the local community. As to the first of these, the respondent points to its pastoral care provision having been described as outstanding by the Education and Training Inspectorate (ETI); and says that the school's experience is that pastoral care is improved when a pupil's family has a clear understanding of and support for the philosophy, tradition and ethos of the school.

[88] Whilst I can see why preserving the school's ethos by maintaining links with the children of those who previously attended may be attractive to the Board, I would not consider that to be sufficient to justify the discriminatory effect of the school's criterion giving priority to those whose fathers attended as pupils, for the reasons discussed below.

[89] First, as noted above, I do not consider the aim being pursued to amount to a particularly pressing need on the part of the school. Even accepting that it is a legitimate aim, I have doubts whether the school's objective is sufficiently important to provide justification for indirect discrimination. Although the school has sought to identify concrete benefits arising from its emphasis on community, the evidence in this regard has been fairly elusive. Reference has been made to benefits in terms of pastoral care. It is true that the school's pastoral care has been assessed as being excellent by the ETI; but there is no suggestion on the ETI's part that this is in any way linked to the impugned criterion or the attendance of students whose fathers attended the school. The school could equally provide excellent pastoral care to students whose parents did not attend, and no doubt does so.

[90] Although there are also obvious advantages to past pupils continuing to take an interest in the school and provide assistance to present pupils (through offering work experience and matters of that nature), any suggestion that past pupils will only do so if their children attend the school, or that parents who did not attend the school will not do so when their children are pupils there, lacks any clear evidential basis. In addition, the evidence suggests that there is already a vibrant association of past pupils and friends of the school which can provide an important link between past pupils and the school and facilitate the type of community spirit and common interest which the impugned criterion is said to preserve. In this regard, the respondent's evidence notes that a particularly successful example of past pupil involvement is that of the Past Pupils and Friends Association, which helps with fundraising, celebrating the past pupils, and assisting in inspiring current pupils in a variety of ways.

[91] Although the respondent has placed some emphasis on the importance of links with the *local* community, in fact, the impugned criterion does not clearly contribute to this objective. It advantages the children of past pupils wherever they

may now live; and disadvantages some children such as the applicant who live locally. Understood properly in terms of its effect, the community aspect which the impugned criteria promote is a community of people or families with pre-existing links to the school. Whilst some may view this as seeking to retain the ethos of the school, others may equally view it as an attempt to insulate the school from change by way of fair access to all from the local community. In its evidence the school, an Edmund Rice school, has relied strongly upon the Edmund Rice Charter ('the Charter'). However, the Charter speaks, *inter alia*, of seeking to build community and collaborating and interacting with a variety of communities (plural). It also indicates that an Edmund Rice School will celebrate diversity and value difference; and embody the principles of inclusiveness, including reaching out to those who may feel excluded. The Charter's focus on community does not appear to be as restrictive as that pursued by the impugned criteria.

[92] A key feature of the respondent's evidence was also that maintaining its previous admissions criteria, with the absence of academic selection this year, was a means of "attempting to maintain consistency with previous years in respect of pupil intake, thereby maintaining consistency with the school's ethos, despite the absence of normal academic selection methods." I find this justification difficult to understand. It remained open to the respondent to use some form of academically selective criterion in its admissions criteria for this school year. Although I accept that, in the absence of the usual AQE and PPTC testing arrangements, the use of academic selection was more difficult, there were means by which academically selective criteria could be used. The respondent school decided, along with many other grammar schools, to forgo academic selection for this school year in the unusual circumstances of the pandemic. That was, of course, perfectly lawful. However, when the primary criterion in previous years was academic achievement, with the criteria which are impugned in these proceedings only previously operating as sub-criteria which were subordinate to academic merit, it is unrealistic to expect that the use of those criteria now as primary criteria can in some way maintain consistency with previous years intakes. That is apparent when one considers that each of the impugned criteria in these proceedings operates entirely independently of any assessment of the academic ability of a boy who will benefit from them.

[93] The difference in approach this year, with the relinquishment of academic selection as the primary criterion, perhaps also goes some way to explain why the criteria which have been used this year have not been challenged in previous years despite having been used in the school's admissions criteria (a matter relied upon by the respondent). The absence of challenge in previous years is neither here nor there as a matter of law. However, it is perhaps unsurprising that there has been no challenge to this particular criterion in previous years given its much more limited operation and effect. As the Departmental guidance pointed out, there has also been at least one challenge to similar criteria in recent times (see paragraph [57] above).

[94] In 'normal' years, the advantage provided to those whose fathers attended the school in the past would be more marginal. This year, however, the respondent

chose to make use of such a criterion, in the face of concerns which had been raised about equality of access, both knowing and intending it to have a significant effect in seeking to preserve consistency with previous intakes. Potentially less discriminatory means of pursuing the objective – by varying the order of the criteria or through the use of quotas for a variety of different criteria – were also rejected. Although the school's evidence indicates that the sub-committee of the Board "considered that any potential disadvantage to applicants from families that were new to the area was sufficiently mitigated by the short-term nature of the arrangement" (that is to say, that these criteria would only be applied for this one year), that is irrelevant to the question which the court is required to address – or would have been required to address had these proceedings been brought within time – namely, whether any indirect discrimination in the criteria for Year 8 admission *this year* is justified. Put bluntly, those such as the applicant seeking admission to Year 8 for the forthcoming academic year will have little interest in whether the criteria may be more advantageous to them next year.

[95] Taking these considerations together, I do not consider that the school has provided a sufficiently cogent justification for the discriminatory effect of the criterion providing priority to children of those whose father attended the school. Had the challenge relying on the Race Relations Order been brought at the appropriate time, my conclusion is likely to have been that the school had not shown criterion (iv) to be a proportionate means of achieving a legitimate aim, such that it amounted to unlawful discrimination.

The applicant's Convention grounds

[96] I would have been inclined to reach a similar view in respect of the applicant's claim based on indirect discrimination (on grounds of national origin) under Article 14 ECHR to that which I have suggested in respect of his reliance on the Race Relations Order. The *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252 indicates that Article 14 may apply within the ambit of A2P1 rights to prohibit discriminatory entrance requirements for educational establishments. The protected characteristic here is one identified in Article 14 and is a suspect ground in respect of which indirect discrimination cannot readily be justified.

[97] Without requiring to consider this is in any great detail in light of the discussion above, I would not have been inclined to find for the applicant in his claim of direct discrimination on the grounds of 'other status' under Article 14. The other status relied upon was 'a child with no immediate familial links with the Abbey.' Assuming that is a characteristic which is capable of protection within the 'other status' rubric of Article 14, it would be at the outer edge of the concentric circles of protected characteristics identified by Lord Walker in *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311. In light of the increased ease with which such discrimination could be justified under Article 14, and the authorities discussed at paragraphs [63]-[65], without reaching any firm view on this, it seems to me that the school would have had a much greater prospect of justifying this alleged

discrimination under Article 14. Nor do I consider that the applicant's case grounded on a substantive obligation of non-discrimination within A2P1 itself was well-founded; but this adds little to Article 14 in this context in any event.

Conclusion

[98] In light of the discussion above, my conclusions may be summarised as follows:

(a) The applicant's claim is essentially a challenge to the respondent Board's adoption of admissions criteria which were published in early February 2021. He is out of time to mount such a challenge and there is no good reason to grant an extension of time. Leave to apply for judicial review should therefore be refused.

(b) Had the applicant brought his proceedings within time, in my view:

(i) The respondent's further preliminary objections under articles 54(2) and 54(5) of the Race Relations Order – which relate only to those parts of the applicant's grounds which rely on article 18 of that Order – would have been no reason for refusing the grant of leave or refusing substantive relief.

(ii) The applicant's challenge that the respondent Board had not complied with its obligation to have regard to the relevant Departmental guidance would not have been successful.

(iii) The applicant's challenge to criterion (iv) of the school's admission criteria would have been successful on the ground that it is indirectly discriminatory on the ground of his national origins and the school has failed to justify its discriminatory effect in the circumstances of this case.

(iv) The applicant's challenge to criteria (i) and (iii) would have been dismissed on its merits.

[99] In light of my conclusion on the delay issue, leave to apply for judicial review is refused.

[100] Subject to any further submissions on the issue of costs, I provisionally propose to make no order as to costs between the parties; and to order legal aid taxation of the applicant's costs.