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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **15/05/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY DRUMRAGH INTEGRATED COLLEGE FOR JUDICIAL REVIEW

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

TREACY J

Introduction

[1] This is a challenge to a decision of the Department of Education of 12 October 2012 by which the Department refused a development proposal submitted by the applicant to increase enrolment at the school over a five year period from 580 pupils to 750 pupils from 1 September 2013.

[2] The applicant also seeks relief arising from the policy created and implemented by the respondent in the form of the 'needs model' and associated area planning policy.

Relief Sought

[3] The Applicant seeks the following relief:

(a) An order of *certiorari* to quash the impugned decision and/or the policy [in so far as the latter is declared to be unlawful].

(b) An order of *Mandamus* to compel the respondent to reconsider the development and/or the policy in accordance with any judgment, order or direction of the court.

(c) A declaration that the impugned decision was unlawful, *ultra vires* and of no force or effect.

(d) A declaration that the policy was unlawful, *ultra vires* and of no force or effect.

Grounds upon which Relief is Sought

[4] The relief is sought on the following grounds:

The Impugned Decision

(a) The impugned decision was unlawful as *ultra vires* Article 64(1) of the Education Reform (Northern Ireland) Order 1989 in so far as the respondent has:

(i) failed to encourage and facilitate the development of integrated education, contrary to the statutory duty imposed under Article 64(1);

(ii) in particular has failed to give proper weight and consideration to this duty when making the impugned decision; and

(iii) has also acted in contravention of article 64(1) by the way it has adopted, interpreted and applied their own *'needs model'* area planning policy when making the impugned decision.

(b) The impugned decision was unlawful as the Minister unlawfully fettered his discretion by the adoption of an inflexible policy regarding capital expenditure in respect of schools in and around Omagh and within the WELB area. In particular the Ministerial comments of 29 February 2013 in the NI assembly in respect of the Lisanelly development reveal this inflexible policy.

The Policy Challenge

(c) The policy was unlawful as *ultra vires* article 64(1) of the Education Reform (Northern Ireland) Order 1989 in so far as, *inter alia,* the policy failed to take into account adequately or at all this statutory duty, make's children's educational needs subservient to institutional demands, ignores the importance of parental choice, creates a presumption in favour of the status quo i.e. segregated education and places control of growth in the

integrated sector in the hands of the ELBs in conjunction with the CCMS and now the ESA.

Factual Background / Sequence of Events

[5] Drumragh Integrated College submitted a development proposal on or about 16 March 2012. The proposal was to increase the long term enrolment figure from 580 to 750 over a five year period.

[6] The Department of Education Area Planning Policy Team considered the proposal and on 7 September 2012 provided a report on it to the Minister. The report recommended that the Minister refuse the proposal.

[7] On 12 October 2012 the Minister released a press statement rejecting the proposal. A letter confirming this decision was sent to the school on 15 October 2012.

[8] On 18 October 2012 a freedom of Information request was made by the Integrated Education fund to the Department of Education. This was responded to on the 23 November 2012.

[9] On 14 January 2013 pre-action protocol correspondence was entered into.

[10] A leave hearing was listed for 7 October 2013. On 2 October 2013 the Department Solicitor indicated that the Minister had decided to retake the decision. The leave hearing proceeded on the basis that there were issues raised that were in the public interest.

Statutory Framework

[11] **Article 64 of The Education Reform (Northern Ireland) Order 1989**

General functions of Department and boards in relation to integrated education

64. - (1) It shall be the duty of the Department to encourage and facilitate the development of integrated education, that is to say the education together at school of Protestant and Roman Catholic pupils.

[12] **Article 66 of The Education Reform (Northern Ireland) Order 1989**

Management of grant-maintained integrated schools

66.(1) Each grant maintained integrated school shall be under the control and management of a Board of Governors constituted in accordance with the provisions of Schedule 5.

(2) The scheme of management for a grant maintained integrated school shall require the Board of Governors to use its best endeavours, in exercising its functions under the Education Orders, to ensure that the management, control and ethos of the school are such as are likely to attract to the school reasonable numbers of both Protestant and Roman Catholic pupils.

Arguments

Applicant's Arguments

[13] The applicant argues that the respondent manifestly failed to even consider the Article 64(1) duty in its decision.

[14] The applicant argues that the duty should have been a primary consideration in the decision.

[15] The applicant argues that the Article 64(1) duty is meant to have practical consequences and legislative significance. In real terms, it is argued that this means that the respondent may be required to make decisions in favour of integrated education proposals that they would not have done for schools within the maintained or controlled sectors by taking positive steps or removing obstacles which inhibit the statutory objective.

[16] The applicant argues that the Article 64(1) duty must be read to give effect to the United Kingdom's other domestic and international law obligations in particular article 2 of the first protocol, Article 8, Article 9 and Article 14 ECHR along with Articles 28 to 3 UNCRC and relevant provisions of the ICSECR and the ICERD, as well as the Belfast Agreement's commitment at part IV paragraph [13].

[17] The applicant argues that the statutory concept of 'integrated education' amounts to a 'philosophical conviction' for the purposes of A21p and therefore this right is enshrined and protected by the A64 duty.

[18] The applicant argues that in considering and applying the duty to encourage and facilitate the development of integrated education the Department must also recognise that the State is also under a related duty to respect the right of parents who wish for their children to be educated at an integrated school by virtue of A21P. The applicant further argues that this related duty was not considered when arriving at the impugned decision.

[19] The applicant argues that there is a legal obligation or de facto presumption to treat integrated schools more favourably than the other main education sectors in Northern Ireland. The applicant submits that primacy of importance should be accorded to the A64 duty when making decisions about integrated education and that this duty should only be abrogated when there are countervailing reasons of considerable force to justify such an abrogation.

[20] The applicant argues that the A64 duty applies only to those schools formally recognised as integrated schools by the department and it does not apply accordingly to any school where Protestant and Catholic pupils are educated together.

[21] The applicant argues that the 'needs model' was not 'peripheral' to the consideration of the development proposal (as argued by the Respondent) but was in fact of considerable importance in coming to the impugned decision.

[22] The applicant argues that the 'zero sum situation' whereby growth in the integrated sector must be accompanied by an equivalent contraction in the maintained and controlled sectors works to inhibit growth which is in direct contradiction to the Article 64 duty which requires the department to facilitate the development of integrated education.

[23] Additionally, the applicant argues that the conclusion that expansion on other post-primary schools in the Omagh area was made when the Minister was aware that no agreement had been reached on how the overall planning figures would accommodate the changes required by the applicant's development proposal, further the minister was aware that there was no evidence of the proposal having been adequately assessed in the overall context of a declining demographic and further that the minister was aware that the WLB area plan did not, at the time of the impugned decision, deal adequately with the future needs of the integrated sector. For all of these reasons the applicant argues that the conclusion reached was irrational.

[24] The applicant argues that the needs model and the area planning policy do not enshrine the Article 64 duty throughout the process and instead the duty is only considered when it comes to consider a particular development proposal however at that stage there will inevitably be adverse impacts associated with the DP.

[25] The applicant argues that the ministers comments of 29 February 2013 by which he evidences a policy that the only capital development in Omagh for the foreseeable future shall be at the Lisanelly site means that any DP requiring capital investment by any school not allied to the Lisanelly project will, irrespective of merit, be refused without proper consideration. The applicant argues that in adopting this approach the respondent is adopting a policy which is either intrinsically inflexible, or if it does admit of exceptions has been applied too rigorously in that there has been a lack of preparedness on the part of the respondent to entertain any exceptions to it. If the latter is the case then there ought to be rigorous inquiry by the Minister to include a scrupulous consideration of whether the applicant's circumstances warrant a departure from the normal rule.

Respondent's Argument

The Article 64 Issue

[26] The Respondent submits that there is no utility in the Court conducting a forensic examination of how the Respondent took a decision that it no longer stands over.

[27] The Respondent accepts that it is under an article 64 duty to encourage and facilitate integrated education in Northern Ireland and that this duty has practical consequences and legislative significance which includes taking positive steps or removing obstacles which inhibit the statutory objective. The Minister has now set out a guidance note for senior officials as to how he expects the Respondent to approach decisions having regard to the Respondent's duty under Article 64. The applicant does not challenge the content of this guidance note.

[28] The Respondent does not accept that article 64 requires the introduction of a positive bias or discrimination.

[29] The Respondent argues that the provisions does not mandate any specific action in respect of 'the integrated sector'. Article 64 imposes an obligation in respect of the development of 'the education together at school of Protestant and Roman Catholic pupils', not an obligation 'in favour of the integrated sector'.

[30] The Respondent does not accept the Applicant's contention that the Article 64 duty must be a primary factor in any decisions when it is engaged. The Respondent submits that there is no basis for a differentiation between primary and secondary factors that require consideration. The public law obligation upon the Minister is to consider all material factors in the exercise of any discretion. As the Minister's guidance

to officials states, the Article 64 duty is part of a broader statutory framework that also imposes obligations upon the Minister to avoid, for example, unreasonable public expenditure. The Applicant's attempt to impose a test requiring the duty to be adhered to save where there are 'countervailing reasons of considerable force' finds no basis in the statutory language and invites the imposition of the type of fetter upon the discretion that is complained about elsewhere in this application.

[31] The Respondent argues that there is nothing in the Minister's approach to the present case that breaches Article 2 of the First Protocol.

[32] The Respondent argues that the contention that there has been, in some way a breach of A1P1 is not one of the permitted grounds of challenge.

[33] The Respondent argues that Article 64 requires to be read in accordance with section 15 and the express reservation. The Respondent notes that the reservation is echoed in Article 44 of the 1986 Order and that provision is highlighted as one of the material factors that must be weighed in the recent guidance by the Minister.

[34] The Respondent argues that the Court is not well placed to analyse the argument that A2P1 has been breached on the basis that integrated education is akin to a philosophical belief. This is because there is no decision purporting to have such effect and there is no victim whose Article 2 rights can be said to have been breached. As a result there is no basis upon which the argument can be evaluated.

[35] In relation to the applicant's argument that the discharge of the A64 duty is informed by the requirements of international law, the Respondent argues that there is no specific suggestion that the Respondent has acted in a manner contrary to any international laws.

[36] The Respondent does not accept the applicant's argument that the A64 duty applies only to schools which are formally recognised as 'integrated schools'. The Respondent argues that the Article 64 obligation is not directed to a particular sector.

[37] In relation to the applicant's argument that the Respondent failed to give proper weight and consideration to the Article 64 duty when making its decision, the Respondent submits that this was the concession made by the Respondent. In the circumstances, the Respondent further submits, it would be a pointless exercise to embark on a painstaking investigation into what weight if any was in fact given to the Article 64 duty. The concession that the Applicant asked for has been made in the terms in which it was sought.

[38] In relation to the applicant's invitation to provide guidance as to the nature and extent of the Article 64 duty, the Respondent argues that the limits of the Court's supervisory jurisdiction prevent it from issuing general advisory judgments in the absence of a concrete factual dispute.

The Policy Challenge and Article 64

[39] In relation to the applicant's first analysis under this heading the Respondent submits that in making this argument the Applicant has made no acknowledgement of the Respondent's decision to retake the decision and what the Respondent has now set out in its replying affidavit as the basis on which it is intended that the impugned decision be revisited (and by analogy similar future DPs).

[40] Where the applicant argues that an integrated school 'cannot grow unless they are able to secure a reduction in the number of places within the two main sectors' which means that it 'would have to secure a change at the area based planning level'. The 'arbiters of growth for a school' therefore become 'its competitor schools' with the controlled and maintained sectors 'having a de facto veto on growth in the integrated sector'. The Respondent argues that this belief is wrong and that the Respondents position is that 'When considering proposals in the future it is recognised that consent of other sectors is not a prerequisite. If approval is given for an increase in the enrolment at a school it is up to the relevant ELB working in conjunction with the relevant managing authorities to manage the resultant impact on other sectors as part of the area planning process. Therefore lack of agreement in the area plan does not preclude proposals being brought forward in any sector'. Therefore competitor schools are not arbiters of growth nor is there any de facto veto on the part of other sectors. Therefore there is no inhibition on growth of the integrated sector and no conflict with the Respondent's Article 64 duty as alleged.

[41] In relation to the applicant's alternative analysis the Respondent submits that this too is based on an approach that the Respondent has already disavowed. The Courts consideration should be on the way in which the DP will be reconsidered not how the impugned decision was reached.

[42] The Respondent argues that the merit of analysing an earlier approach which the Applicant has accepted to be subject to a legal flaw must be open to doubt. As the Respondent has agreed to retake the impugned decision the only matter of public interest for the Court to examine is how such decisions will be taken in the future.

[43] In relation to the Applicant's argument that there is circularity in the Respondent's position that if it grants a proposal in the absence of cross-sectoral agreement it will be up to the ELB to manage the impact as part of the area planning

process the Respondent argues that no such circularity arises. Instead, if the DP is approved the school will enjoy any consequential increase in enrolment numbers in the normal way. It is for the ELB to manage the resultant impact.

[44] The Respondent argues that no policy which will be applied by the Respondent in considering development proposals from integrated schools is inconsistent with its Article 64 duty.

Fettering of Discretion

[45] The Respondent argues that the comments relied upon by the applicant were unscripted comments in the context of an assembly debate. They were not a formal expression of policy and did not form part of a considered ministerial statement.

[46] The Respondent argues that there is nothing in the submission or the reasons for the decision that could reasonably be construed as a fettering of discretion.

[47] The Respondent argues that there is no reasonable foundation for the assertion that 'the Minister has decided that the only capital development that will take place in Omagh for the foreseeable future will be on the Lisanelly site ... This means that any development proposal by any school not allied to the Lisanelly project will – irrespective of the merits – be refused without proper consideration.

[48] The Respondent argues that no rigorous inquiry as contended for by the applicant is necessary because there is no intrinsically inflexible approach adopted by the Minister only admitting of limited exceptions.

[49] The Respondent argues that the agreement to retake the decision is the ultimate evidence that there is no fetter upon the Minister's discretion. The Minister has set out the policy basis upon which he intends to retake the decision and the Applicant has advanced no challenge to that approach. There is clearly no policy fettering the Minister's discretion in the manner alleged.

Discussion

To whom is the A64 duty owed?

[50] On first glance it would seem that the Art 64 duty is capable of being owed to any school in which Protestant and Roman Catholic children are educated together. However, upon analysis I consider that 'Integrated Education' is a standalone concept and the second part of the sentence i.e. 'that is to say the education together at school of Protestant and Roman Catholic Pupils' clarifies the type of integrated education that is to be supported, i.e. integration between Protestant and Catholic Pupils as opposed to

integration within school of any other distinct sets of pupils. The provision plainly envisages education together at the same school.

[51] The term 'integrated' is defined in the dictionary (as far as relevant) as follows: 'having, including, or serving members of different ... religious groups ... as equals'. Education is defined as 'the act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment, and generally of preparing oneself or others intellectually for mature life'. Taken together, integrated education must be the service of imparting knowledge to young people from all backgrounds as equals.'

[52] A school which has a predominantly catholic or predominantly protestant ethos which is reflected through the religious events celebrated, the religious symbolism present throughout the school, the manner of worship engaged in at the school cannot be said to be delivering integrated education (i.e. serving members of different religious groups equally) because, as part of its constitution as an institution it is fundamentally oriented to one religious cannon over another. Therefore, the minority faith in any denominational school is not receiving 'equal' exposure to its faith as the majority faith. There is nothing wrong in that. To be clear, I am not saying that the minority faith in a denominational school is not being respected equally, nor am I saying that the minority faith is being discriminated against, but by necessity the majority faith receives more attention and focus than the minority faith. The school will most likely accept and respect diversity and strive to be equal in all other things but it would go against the faith based constitution of the school to represent both faiths equally in all things.

[53] As against this, an integrated school strives to achieve an equal balance in relation to worship, celebration and exposure to both faiths. This is reflected in its constitution and the board must strive in its ethos to achieve this. For these reasons it must be the case that the integrated education referred to in the article is education that is integrated throughout and not education that is delivered by a partisan board.

[54] The second part of the sentence then clarifies in the first instance the communities which are sought to be integrated, and secondly what integration education should, at a minimum look like.

The Needs Model

[55] The Bain report in 2006 examined and reported upon the funding of education, in particular the strategic planning and organisation of the schools estate taking account of curriculum changes and demographic trends. Its key terms of reference were to consider:

(a) financial issues;

(b) strategic planning of the schools estate; and

(c) integrating education and improving collaboration. Key issues at that time were the overprovision of places in schools and a much lower demand for those places due to demographic changes.

[56] The report recommended a sustainable schools policy. A sustainable schools policy has been developed with the aim of there being a network of sustainable schools. An important development towards achieving this goal is the development of 'area based planning' which aims to secure this network of sustainable schools by first working out what the annual demand for school places is likely to be based on current sectoral take-up and projecting forward each year until 2025 using information about the school age demographic. The area plan then allows decisions to be made about the management of the school estate to provide appropriately and efficiently for future needs and reducing the number of excess places. At page 17 of 'Schools for the Future: A Policy for Sustainable Schools' it states:

> 'Developments at one school may have significant impacts on other schools in its area, including their sustainability. This underlines the importance of examining provision on an area basis as recommended by the Bain Report, taking account of the overall projected need for provision in the area.'

[57] At its core then, area planning is the strategic planning of the schools estate into the future. Area plans will be a guide for making decisions about the development of individual schools and any such development will be assessed against the objectives for the area as outlined in the relevant area plan. The 'needs model' is a *'mechanism to determine long term enrolment projections'* (P10 Department of Education Area Planning Guidance 14th February 2012). It says on P10 of the same document that the needs model *'will be considered, agreed and adopted by all boards'*. On the basis of this it is assumed that the needs model used in the BELB area plan represents the agreed methodology. According to this methodology the needs model takes the current school age population, and breaks this into the current demand by sector. It is assumed that the current levels of proportionate demand will carry forward. On the basis of current demand by sector the annual need is then projected based on changes in the total school age population taken from NISRA (Northern Ireland Statistics and Research Agency) data.

[58] The needs model assumes no growth in the integrated sector. There is scope for amending the area plan if demand changes, however it is observed that 'any change in

one sector has an impact on the overall provision in the area'. Then 'it is a matter for the school planning authorities to work within the control totals to ensure that the sum of the parts (i.e. the subsets) does not exceed the total'.

[59] The needs model itself is just an analytical tool, but the results of the analysis feed into a plan which will underscore all strategic decisions in relation to the provision of education in a given area. It is intended that all dynamic, day to day decisions about educational provision in the area will be assessed against this (comparatively static) long range plan. It will be easier for dynamic decisions which are in line with long range plan (i.e. where sectoral take up remains proportionately the same) to be approved than dynamic decisions which are out of line with the long range plan (i.e. growth of one sector which has not been projected). It is by no means the case that these kinds of decisions will be impossible, but there will be an additional friction impeding their progress as compared to decisions in line with the long term plan. The creation of an additional difficulty is the opposite of encouraging and facilitating.

[60] Using an analytical tool to plan for an area is of course acceptable and necessary, however the inflexibility of the projections used will have the effect of making it difficult to accommodate the A64 duty in future day to day decisions. The department need to be alive to the A64 duty at all levels, including the strategic level.

Fettering of Discretion

[61] The relevant content of the Minister's comments, upon which the applicants rely to argue that the Minister fettered his discretion are as follows:

> 'Ahead of the statement on area planning, I will confirm again that there is only one show in town in Omagh – the Lisanelly site. Until I complete the Lisanelly site and until I ensure that those schools that wish to move onto the Lisanelly site are completed, I do not envisage moving forward with any other capital project in Omagh.
>
> ...
>
> I am in a position to say that the Lisanelly project will be confirmed as part of area planning. Capital investment in Omagh will be on the Lisanelly site for those schools that choose to go onto it. After we have completed that, those schools that do not wish to go onto the Lisanelly site will be considered for future funding, if funding is available at that time.

> ... the only capital development that will take place in Omagh over the next number of years will be on the Lisanelly site. I am not looking at building any individual schools in Omagh ahead of Lisanelly. I cannot be any clearer than that.'

[62] If the statement of 29 February 2013 in fact represented the policy of the Minister it would clearly be a fettering of discretion. The advice to the Minister does note that investment in Drumragh may have 'implications ... for those schools involved in the Lisanelly project' and later that 'It would seem illogical to give priority to spending further large amounts to extend Drumragh when the Department is currently committed to the development of the Lisanelly site'.

[63] Despite these comments in relation to the Lisanelly site it is clear that the plans around the Lisanelly site are only one of several considerations and it is by no means clear that there is any policy at work in the advice to the minister whereby 'any development proposal [requiring capital development/investment] by any school not allied to the Lisanelly project will - irrespective of the merits - be refused without proper consideration'.

Conclusion

[64] I will hear the parties as to what relief, if any, is now required.