

# Judicial Communications Office

Thursday 15 May 2014

## COURT DELIVERS RULING ON DEPARTMENT OF EDUCATION'S APPROACH TO LONG TERM PLANNING

### Summary of Judgment

Mr Justice Treacy, sitting today in the High Court in Belfast, delivered a ruling on the approach taken by the Department of Education to a development proposal submitted by Drumragh Integrated College in Omagh to increase pupil numbers. The Department initially refused the proposal but later indicated that it would retake its decision. While this meant that the court was not asked to consider whether the decision was unlawful it was accepted that there was merit in the proceedings going ahead as there was a matter of public interest in how such decisions will be taken in the future.

In 2012, Drumragh Integrated College ("the applicant") submitted a development proposal to the Department of Education ("the Department") to increase enrolment at the school over a five year period from 1 September 2013 from 580 pupils to 750 pupils. The Department refused the proposal and on 12 October 2012 the Minister released a press statement confirming this. The College sought a judicial review of the decision and a leave hearing was listed for 7 October 2013. On 2 October the Departmental Solicitor indicated that the Minister had decided to retake the decision but the leave hearing proceeded on the basis that the application raised issues of public interest.

On 29 February 2013 the Education Minister commented in the Assembly that the Lisanelly site in Omagh was "the only show in town". He added that "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 not looking at building any individual schools in Omagh ahead of Lisanelly. I cannot be any clearer than that." The applicant contended that those comments were evidence that any development proposal requiring capital investment by any school not allied to the Lisanelly project would, irrespective of merit, be refused without proper consideration. It was claimed that the Minister was adopting a policy which was either intrinsically inflexible or there had been a lack of preparedness on the part of the Department to entertain any exceptions to it.

Article 64(1) of the Education Reform (NI) Order 1989 ("the 1989 Order") provides a duty on 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". The applicant submitted that the Department had manifestly failed to consider the Article 64(1) duty in its decision. It contended that the duty means that the Department may be required to make decisions in favour of integrated education proposals that they would not

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have done for schools within the maintained or controlled sectors by taking positive steps or removing obstacles which inhibit the statutory objective.

The Department submitted that there was no benefit in the court conducting a forensic examination of how it reached a decision that it no longer stood over. It did not accept that Article 64 of the 1989 Order required the introduction of a positive bias or discrimination but that it imposed 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". It submitted that the public law obligation on the Minister is to consider all material factors and the Article 64 duty is part of a broader statutory framework that also imposed obligations upon the Minister to avoid, for example, unreasonable public expenditure.

Mr Justice Treacy firstly considered the Article 64 duty. He said that on first glance it would seem that the duty is capable of being owed to any school in which Protestant and Roman Catholic children are educated together, however, upon analysis he considered that "integrated education" is a standalone concept and said that the second part of the sentence ("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, ie integration between Protestant and Catholic pupils as opposed to integration within school of any other distinct set of pupils: "the provision plainly envisages education together at the same school ... and not education that is delivered by a partisan Board". The judge commented that the sentence clarifies the communities that are sought to be integrated and what integrated education should, at a minimum, look like.

The judge then went onto consider the "Needs Model". He referred to the Bain Report which was published in 2006 and which examined and reported on the funding of education, in particular the strategic planning and organisation of the schools estate taking account of curriculum changes and demographic trends. He said the Report recommended a sustainable schools policy and that an important development towards achieving this goal was the development of "area based planning". This aims to secure a network of sustainable schools by working out what the annual demand for school places is likely to be based on current uptake and projecting forward each year until 2025 using information about the school age demographic. The area plan allows decisions to be taken about the management of the school estate to provide appropriately and efficiently for future needs and reducing the number of excess spaces.

Mr Justice Treacy said that area plans would serve as a guide for making decisions about the development of individual schools. Any such development should be assessed against the objectives for the area as outlined in the relevant area plan. The judge commented that the needs model assumed no growth in the integrated sector. He said that it was observed that "any change in one sector has an impact on the overall provision in the area" and it is then "a matter for the school planning authorities to work within the control totals to ensure that the sum of the parts does not exceed the total". Mr Justice Treacy considered

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that the needs model was just an analytical tool, but said that 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. He referred to the plan as a “comparatively static long range plan” and said it would be easier for dynamic decisions which are in line with the long range plan to be approved than those which are out of line with the plan (eg where there is growth in a sector that has not been projected). He said that such decisions would create an additional friction impeding their progress as compared to decisions in line with the long term plan and that this is the opposite of encouraging and facilitating:

“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 Article 64 duty in future day to day decisions. The Department needs to be alive to the Article 64 duty at all levels, including the strategic level.”

Mr Justice Treacy then turned to the Minister’s statement of 29 February 2013. He said that if the statement evidenced a policy that the only capital development in Omagh for the foreseeable future is to be at the Lisanelly site, this would mean that any development proposal requiring capital investment by any school not allied to the Lisanelly project would be refused without proper consideration. The judge said that if this did represent the Minister’s policy then it would clearly be a fettering of discretion. He held, however, that despite the Minister’s comments it was 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 other development proposal would be refused without proper consideration.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website ([www.courtsni.gov.uk](http://www.courtsni.gov.uk)).

ENDS

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