Neutral Citation No: [2021] NICA 58	*Ref:*	**KEE11645**
	ICOS No:	**21/052303/A01**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**22/10/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY OV (A MINOR FOR JUDICIAL REVIEW)

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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Between:

OV (A MINOR PROCEEDING BY HIS MOTHER AND NEXT FRIEND BV)
Applicant

and

THE BOARD OF GOVERNORS OF THE ABBEY CBS
Respondent

and

THE EDUCATION AUTHORITY
Notice Party

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Before: Keegan LCJ, Maguire LJ and Colton J

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Ronan Lavery QC with Colm Fegan (instructed by Paul Campbell Solicitors) for the Applicant
Peter Coll QC with Philip Henry (instructed by Lewis Silkin (NI) LLP Solicitors) for the Respondent
Roisin McCartan (instructed by the Education Authority) for the Notice Party

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KEEGAN LCJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a decision of Scoffield J delivered on 13 September 2021 dismissing an application for leave to apply for judicial review on the basis that it was out of time and there was no good reason to extend time. The applicant has chosen to appeal pursuant to Order 53 Rule 10(a) of the Rules of the Court of

Judicature (Northern Ireland) 1981("the Rules") rather than renew the application for leave to the Court of Appeal within seven days. In any event, in *Kemper Reinsurance Co v Minister of Finance & Others* [2000] 1 AC 1 the Privy Council found that there is no substantial difference between these two routes.

[2] With conspicuous care and effort the learned trial judge went on to determine that there was some merit in the case made by the applicant before him in the event that the procedural bar was overturned by the Court of Appeal. His *obiter* conclusion was that one ground of challenge was sustainable had the case been brought in time, namely the claim of indirect discrimination on the basis of criteria *(iv)* outlined below. We will return to that later.

Summary of Factual Background

[3] The context of this case is the selection of students for secondary level education. The applicant is an 11 year old boy who has failed to achieve admission to any of the schools he sought during this year's transfer process. Of course this year has been a unique year in educational terms in that there was no transfer test due to the restrictions arising from the Covid-19 pandemic. The school in question in this case made an early and public decision not to apply academic selection via the transfer test but to use admission criteria for selection of pupils. The Board of Governors chose the specific criteria after meeting in December 2020. This course was then formally approved by the Department of Education ("DE") and the criteria were published on 2 February 2021.

[4] The focus in this case was on the criteria for admission which were applied in rank order and which we set out as follows:

(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 admissions to the school in the coming school year.

(iii) 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.

(iv) Boys whose father/guardian attended the school.

[5] On 10 March 2021 the applicant's parents lodged his application on an online portal. The Abbey CBS was the first preference school and three other schools were named as alternatives. In the event, the applicant did not achieve admission to any of the schools. The family were informed of this on 12 June 2021. On 15 June 2021

pre-action protocol correspondence was sent. In that the applicant set out his challenge to the criteria applied by the school specifically criteria *(i) (iii)* and *(iv).* A judicial review application was then lodged and served, dated 28 June 2021.

[6] This child's family background is that he was born in Northern Ireland however his national origins are Lithuanian. His mother, father and grandparents are all Lithuanian although they have lived in Northern Ireland since 2005. The applicant is now in the position where he is in a school but it is not one of the four schools to which he applied in his transfer form and it is not a grammar school.

Legislative Background

[7] The legislative structure is contained in the Education (Northern Ireland) Order 1997 ("the 1997 Order"). By virtue of Article 12 of the 1997 Order the DE sets the admission number for schools. The Board of Governors of schools determine the criteria for admission to their schools and then apply the criteria to all applicants for places so as to determine who should be admitted when there are more applications for admission than places available. This is often the case given the oversubscription of schools which applies here.

[8] By virtue of Article 15 of the 1997 Order an applicant can appeal to a specialist Schools Admissions Appeals Tribunal if refused admission. In this case the applicant has lodged an appeal. As an aside, we were told that this year 800 appeals were lodged and have been dealt with save for the outstanding appeal in this case. That really is a remarkable achievement and a credit to those running the system.

[9] It is important to note that by virtue of the legislation the Admissions Appeals Tribunal can only make a determination in relation to the application of the criteria. It cannot determine the lawfulness of the criteria which is the point at issue here. As a result of this fact it is common case that there is no alternative remedy and the appeal that is currently lodged is stayed pending the determination of this court as to whether or not the criteria are unlawful.

The Substantive Argument

[10] In his judgment the learned trial judge sets out the issues with commendable detail and acumen starting with a recitation of the criteria and a summary of the applicant's challenge. It is clear from the judgment that the applicant's challenge focussed on the question of application of DE guidance and the criteria in particular criterion *(iv)* which relates to boys whose father/guardian attended the school. The applicant argued that going beyond sibling attendance as part of the criteria discriminated against him given his national origins and the inability to achieve this criterion and he maintained that the DE guidance offers some support as it does not recommend the use of this criteria. That is the background to the case but the point at issue that we have been asked to decide on a preliminary basis is whether the

delay in bringing proceedings should result in the refusal of leave and the dismissal of the appeal.

Delay

[11] The issue of delay in judicial review requires the examination of Order 53 Rule 4(1) of the Rules. It is clear that the issue of delay should, where possible, be dealt with at the leave stage. The relevant rule reads as follows:

> "4. - (1) 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."

[12] In order to comply with the rules the application for judicial review must be made within three months from the date the grounds first arose in default of which the court can extend time if there is a good reason. We pause to observe that the current rules do not include the word 'promptly' which previously appeared in the rules, however, it was accepted by all counsel that an application for judicial review particularly in this educational area should also be brought promptly.

Question 1

[13] Has the application been brought within three months from the date when grounds for the application first arose? On this point there was some dispute as to when the grounds for the application first arose. Mr Coll on behalf of the respondent said that it was in December 2020 when the Board of Governors settled the criteria. An alternative argument is that it was 2 February 2021 when the Education Authority actually published the criteria. We consider that the latter date is the more sustainable date because it is only when the criteria were fully signed off by the Department and published that they were capable of being challenged as unlawful. So from February 2021 the time begins to run.

[14] This application for judicial review was only brought after the applicant received notification that he had not gained admission to any of his preferred schools. That was on 12 June 2021. We pause to observe that three days after this notification the applicant's solicitor sent pre-action correspondence and the judicial review application was lodged on 28 June 2021. There is clearly no issue with promptitude from that time. However, the issue is the gap between February and June 2021 and whether that results in a finding that the application is out of time.

[15] We were told that until recently the practice in Northern Ireland has been that applications for judicial review of criteria have only been brought once the admission application is determined. In this case, that would be 12 June 2021 and the application would therefore be in time.

[16] A decision of the Court of Appeal in the case of *Re Anderson (A minor and another's application)* [2001] NICA 48 has been relied on in relation to this submission. That was a case about admission criteria which may have led the applicant in this case and other practitioners to think that the challenge in these types of scenarios should only be brought whenever the applicant is notified of the admission or otherwise of the child. That is because within the body of the decision the court says that "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."

[17] We observe that the circumstances in *Anderson* were different in that there was an academic selection test as part of admissions criteria in that year. But in any event the operative part of the decision bears repeating as it states:

> "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."

[18] We understand that some clarity is required in terms of the application of this decision and so we provide it as follows. Firstly, we consider that the language of the operative paragraph cited above really relates to extension of time in relation to an application given the reference to Order 53 Rule 4, rather than the three month requirement. Thus, in our view this case is not an authority for an argument that parents should wait until there is confirmation of admission or non-admission before bringing a case. We consider that the opposite is true and that this makes sense for the reasons given by the learned trial judge at paragraph [26] of his ruling where he says:

> "It is in the interests of schools, parents and pupils, and in the public interest more generally, that the legality of school's admission 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 admission decisions have been made on the basis of them."

[19] We are not attracted to the argument that a judicial review pre-decision on admission would result in a claim of prematurity on the basis of lack of standing. This is demonstrated by the fact that two judicial review challenges were brought in

February 2021 challenging similar criteria without criticism, see *JR 140* [2021] NIQB 21.

[20] Therefore, we are quite clear that the time to challenge criteria as unlawful is when those criteria are made. We do not consider that *Anderson* is an authority for a contrary view as it essentially deals with extension of time. In the future, parents should be advised of the need to take any necessary action once criteria are known rather than wait until an admissions decision is communicated to them. This should alleviate the trend towards late claims which have the potential to disrupt schools starting term in September each year. If criteria are published early each year, claims can be heard in advance of the selection process to allow for any remedial actions to be taken. That is preferable to a process which takes cases right to the wire with all of the consequent stress for families and children and schools.

[21] In summary, we consider that the criteria are properly made once approved by the Department and circulated. In this case that was in February 2021. At that stage the grounds for the application arose. The applicant has not brought an application promptly from that date or within three months and so it is out of time. Therefore, we turn to the next question.

Question 2

[22] Are there good reasons to extend time? The operative rule is couched in broad terms. It is accepted that the burden is on the applicant to prove good reason. We were somewhat concerned in this case that a fuller affidavit was not before the court specifically explaining why the applicant did not bring proceedings at an earlier stage. We also add that it is quite clear to us that there was not the proper level of argument before the learned trial judge on this issue. We think that is because there was a relaxed attitude taken which the learned trial judge refers to in his judgment at paragraph [22] describing the applicant as thinking that the extension of time would be "there for the asking." Such an approach is erroneous.

[23] The affidavit of the applicant's mother which is dated 25 August 2021 refers to the issue in a number of paragraphs which were developed before us. In the affidavit she states that Russian is her main language. She also states that she did not follow the local news or newspapers which covered academic selection issues or get advice from schools. She states that prior to consulting with her solicitor in June 2021 she did not know what a judicial review was and that she never had to deal with a solicitor before other than when purchasing her home. Particular reliance was placed on paragraph [8] of the affidavit where the applicant avers that:

> "When we were completing the application to transfer to post primary education in late February 2021 or early March 2021, it was then that I read the entrance criteria. I did not appreciate at that time the extent of the

> discriminatory impact the criteria would have on O's application."

[24] Mr Lavery told us that his solicitor had appeared in a previous case and was aware of a potential discrimination issue. He argued that whilst the applicant read the criteria in late February or early March it is reasonable to assume that she did not actually appreciate the significance of it. The learned trial judge did not think that there was a reasonable objective excuse for mounting this application late. However, this core point does not seem to have been articulated in any meaningful way to him and we are more inclined to the view that there is some strength in it.

[25] While the judge's reference to commercial and kindred cases demonstrates that in some fields there is a strong case for the court not extending time easily, in the context of this case the central factors to be considered when examining what good reason entails appear to be the issues of potential prejudice and also the issue of public interest.

[26] Dealing with potential prejudice, the learned judge does, we think, rightly say at paragraph [30] of his judgment that the argument made by the respondent on this issue was "overblown." We recognise that there is a potential impact on other pupils and schools by applications taken after admissions are settled. It is correct that any application of this nature has the potential to disrupt the system. However, it is our view that these potential effects cannot be used to prevent an individual's case from proceeding when an arguable case has been established.

[27] We consider that any public interest consideration must also be looked at in context. This is not a case involving a public interest such as the creation of a road or a large infrastructure project. It does have a public element due to the nature of schooling, however, it is more akin to a private issue albeit within some public parameters. We also consider that the issue of the lawfulness of certain criteria is likely to reoccur, potentially quite soon and so it would be better if a court gave a definitive view on it which is not *obiter* otherwise there is the potential for further litigation in this area.

[28] We consider that given the different way in which the arguments have been made before us and with the luxury of more time and information than the learned trial judge had that time should be extended. We are particularly influenced by the nature of the case before us. This court is uneasy about refusing to extend time in circumstances where there has been a finding of discrimination, albeit *obiter* by the learned trial judge. That finding establishes an arguable case on the basis of indirect discrimination. This is the defining characteristic of this case which makes it exceptional and leads to our conclusion that there is a potentially meritorious claim for judicial review which should not be barred by virtue of the time issue.

Conclusion

[29] Accordingly, we are minded to extend time and grant leave in this case. We will hear from the parties as to the way forward.