Neutral Citation No: [2021] NIQB 103	*Ref:* SCO11681
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:* 21/052303/01
	Delivered: 24/11/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF APPLICATION BY 'OV' (A MINOR) ACTING BY HIS MOTHER AND NEXT FRIEND 'BV' FOR JUDICIAL REVIEW

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

Ronan Lavery QC and Colm Fegan (instructed by Paul Campbell, solicitors) for the applicant
Peter Coll QC and Philip Henry (instructed by Lewis Silkin (NI) LLP, solicitors) for the respondent
Roisín McCartan (instructed by the Education Authority Solicitors) for the Education Authority as notice party
Tony McGleenan QC and Philip McAteer (instructed by the Departmental Solicitor's Office) for the Department of Education as notice party

---

SCOFFIELD J

Introduction

[1] These proceedings have had a somewhat unusual procedural history. They concern a challenge on the part of the applicant to the admissions criteria adopted, and a related admissions decision made, by the Board of Governors ("the respondent Board") of the Abbey Christian Brothers' Grammar School ("the respondent school" or "the Abbey"). The initial challenge was heard by me, by way of a 'rolled up' hearing, during the Long Vacation in light of the urgency of the matter at that time. I previously gave judgment in respect of the application ([2021] NIQB 78 – "my earlier judgment"), refusing leave to apply for judicial review on the ground of delay but explaining that, had the application been brought within time, I would have found the applicant's challenge to have been made out on two related grounds. The reasons for taking that unusual course are set out at paragraph [34] of

my earlier judgment. This judgment should be read alongside my earlier judgment in these proceedings for ease of understanding.

[2] The result of my conclusion on the delay issue was that leave to apply for judicial review was refused. The applicant appealed against that conclusion and the Court of Appeal by its decision of 22 October 2021 ([2021] NICA 58) agreed that the proceedings had been brought out of time and that an extension of time was required; but concluded that an extension of time ought to be granted in this case. Accordingly, the Court of Appeal extended time pursuant to Order 53, rule 4 and granted leave to apply for judicial review. In light of the fact, however, that this court had not considered the question of remedy or made a final order on the basis of leave having been granted, the Court of Appeal remitted the matter back to the High Court for further consideration of these issues.

[3] From the applicant's perspective, this was thought to essentially be a tidying up exercise. The respondent had other ideas and, as it was quite entitled to do, invited the court to revisit its earlier conclusion in relation to indirect discrimination and to now conclude either that there was no such discrimination at all or that any discrimination was justified. In the alternative, the court was invited to grant no relief to the applicant on a variety of bases. A further hearing was therefore necessary to consider these issues. That hearing was convened towards the end of last week and I have endeavoured to provide a prompt ruling in recognition of the ongoing urgency of the case from the applicant's perspective, since his ultimate goal is still to achieve admission to the respondent school and to do so as early as possible in this academic year.

Indirect discrimination

[4] The respondent has urged the court to depart from and reverse the conclusions expressed on the merits of the case in my earlier judgment. Those conclusions were (as I expressed in that judgment: see paragraph [33](b)) necessarily *obiter*. Nonetheless they were reached (as I also expressed at the time: see paragraph [33](a)) after substantial argument. There were only two new features raised in the recent argument which had not been features of the previous consideration. First, there was an additional short affidavit filed on behalf of the respondent (sworn by the principal of the respondent school, Mr Sloan) in the course of the proceedings before the Court of Appeal, which deals principally with the practical difficulties of the Abbey having to accept a significant number of new Year 8 pupils joining at this stage of the school year. Second, the respondent has now raised a new argument about the appropriate comparator to be used in the case. The evidence remains the same in relation to the question of justification of any discriminatory effect; but the respondent nonetheless asked me to revisit my conclusion on that issue also. There was no attempt to re-open or re-argue the other objections previously raised by the respondent (dealt with at paragraphs [34]-[43] of my earlier judgment); nor did the applicant seek to resurrect any of its grounds which I had considered to lack merit.

The comparator

[5] In the respondent's further argument, issue is taken with the comparator referred to in paragraph [79] of my earlier judgement. The respondent reminds me again that in Article 3(3) of the Race Relations (Northern Ireland) Order 1997 a comparison of the case of a person of a particular racial group with that of a person not of that group for the purposes of the analysis required by the Order "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

[6] The respondent contends that, as between the applicant and the comparator to be used, every other circumstance should be the same save that the protected characteristic should be 'swapped out.' On this basis, the respondent submits that the appropriate comparison in this case is as between a candidate with Northern Irish origins whose father did not attend the respondent school and a candidate with non-Northern Irish origins whose father also did not attend the respondent school.

[7] As a general approach in direct discrimination cases, there may be merit in the approach which has been suggested by the respondent. In trying to ascertain the reason why the claimant has been treated less favourably than others, a direct comparison where the only circumstance which is altered is the possession of the relevant protected characteristic may often be helpful and appropriate. However, the required analysis is not always quite so simple. The court must ensure that the *relevant* circumstances as between the claimant and the appropriate comparator are the same, or at least not *materially* different; but what is relevant and material in each case may require a measure of judgement. Thus, choosing a comparator is a question of fact and degree.

[8] In my judgment, the respondent's proposed comparison cannot possibly be the correct approach in the present case. That is because, in an indirect discrimination case such as this, the purpose of the comparison is to seek to determine for the purposes of Article 3(1A) of the Race Relations Order whether the particular criterion adopted puts persons of different race (or ethnic or national origins) at a particular disadvantage when compared with others. The comparison is designed to assist the court in concluding whether the apparently neutral provision, criterion or practice which has been applied is discriminatory in effect (by giving rise to a particular disadvantage for those with protected characteristics). However, what the respondent's proposed analysis does is to build in non-compliance with the impugned criterion as a relevant circumstance *on each side* of the comparison. In so doing, there could never be an advantage or disadvantage arising from the application of the relevant criterion on either side of the comparison: in each case it is taken as a given that the candidate's father did not attend the respondent school. This cannot therefore assist in determining whether the criterion itself gives rise to a particular disadvantage on racial grounds – because everyone being compared will have failed to comply with the very criterion the discriminatory effect of which the comparison is seeking to assess.

[9] I remain of the view that the comparison used in my earlier judgment, namely 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, is appropriate. In the context of justification of any discriminatory effect (discussed further below), Mr Coll QC also urged me to consider the position of other post-primary transferring pupils living throughout Northern Ireland. Looking at that group as a whole, he contended that the disadvantage to those with non-Northern Irish national origins was limited, since many children living throughout Northern Ireland (indeed, by far the majority) would not have had a father who attended the respondent school. In my view, however, that is also not the correct analysis and would represent a highly artificial, rather than a common sense, approach. Those who wish to attend the Abbey are overwhelmingly likely to live within its catchment, in and around the Newry area, as the applicant does. I remain of the view that the appropriate comparison is between a child living in that area wishing to attend the school who has Northern Irish national origins and a child living in that area wishing to attend the school who has non-Northern Irish national origins. For the reasons given in my earlier judgment, I further remain of the view that the requirement within criterion (iv) that one's father should have attended the school puts the second category of candidate (in which the applicant falls) at a particular disadvantage, so requiring the discriminatory effect of the measure to be justified.

Justification

[10] The respondent also renewed its case that any discriminatory effect is in fact justified. It accepts, consistently with the principles set out by the EAT in *MacCulloch v ICI* [2008] IRLR 846, that it bears the burden of establishing justification; that the measure adopted must correspond to a real need, be appropriate to achieving the objective pursued and be necessary to that end; that, in turn, this requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the respondent; and that this involves the court making its own assessment of the appropriate balance.

[11] The respondent maintains its case that the need to preserve a core element of the school's ethos and character clearly represents a pressing need for the school. Otherwise, the school would lose its ethos and character – the very things which make it successful and attract would-be pupils such as the applicant. In broad terms, I accept that this is validly considered to be a pressing need by the school. However, difficulties arise when one seeks to analyse more precisely what is meant by the aim of the school to retain its ethos. What is the ethos of the Abbey? This is a question I put to its senior counsel, to which no clear answer was provided in my view. That is no doubt because it is difficult to define pithily the ethos of such an institution. The Abbey is obviously a school with a Roman Catholic ethos, influenced strongly by the Edmund Rice Charter, and which prides itself on academic excellence. Its ethos is plainly not simply that of a 'family school', although family links are clearly

important to it. As I observed in my previous judgment, it has described itself in the preamble to its admissions criteria as a school which "serves the local community." It might therefore be said to be a community school – but a family link with the school is neither necessary nor sufficient for a child to be part of the local community. The key aim of the critical impugned criterion, on the school's case, seems to be to reinforce "a sense of community", which in turn gives rise to advantages in terms of pastoral care and ongoing links with the local community. Nonetheless, the school's own Charter, on which it placed heavy reliance in its evidence and which ought to define its ethos, does not support the restrictive approach to community which its admissions criteria adopt (see paragraph [91] of my earlier judgment).

[12] I continue to have doubts, therefore, as to whether the impugned criterion really does pursue a pressing need since – even accepting that the preservation of the school's ethos is such a need – family ties are but one strand of the ethos of the school which (on its own case and having regard to its Charter) is much more complex. I assume this issue in favour of the school, however, taking account of Mr Coll's submission, which I accept, that some margin of discretion ought to be given to the views and analysis of the respondent Board itself, in light of its experience and expertise in this field.

[13] Nonetheless, I am unmoved from my view that the discriminatory effect of the impugned criterion is disproportionate in the circumstances for the reasons expressed in my earlier judgment, supplemented by those given below.

[14] The respondent's recent submissions focused heavily on what it describes as "the modest impact of the familial criteria laid against the domineering impact of the eldest child criterion." The thrust of this argument is that the familial criteria only bite towards the end of the selection process and that their effect is far outweighed by the criterion favouring the eldest child of the family which by some margin dominates the distribution of school places. There are a number of reasons why I find this argument unconvincing on the question of justification.

[15] In the first instance, in the year with which the applicant's case is concerned, the familial criteria had a much greater effect than usual. As explained in my earlier judgment (see paragraphs [92]-[94]), when the primary criterion used to distribute available places is academic selection, the effect of the additional criteria, which are effectively used only as sub-criteria, is limited. This year, however, the Board determined that these criteria would themselves be used as the primary means of distributing the available places between applicants. In short, the familial criteria had a much greater effect this year than in previous years and were adopted in the knowledge that this was likely to be the case. It is simply not possible, in my view, to contend that they had only a very limited effect in the distribution of available places. Each of the familial criteria which the applicant challenged in these proceedings operated in priority to the 'first boy of the family' criterion and the respondent's own evidence indicates that it displaced some 15 applicants for

admission (some 12% of the number actually admitted) who would otherwise have been successful.

[16] In any event, the respondent's submission that the familial criteria usually have only a marginal effect on admissions, and also did so this year, also appears to me to undermine a core element of its case. If there is such a pressing need to maintain family connections, to the exclusion of the admission of others who do not have a prior family connection to the school, one would have expected the familial criteria to have been given greater priority in the admissions criteria as a whole – particularly in a 'normal' year. The suggestion that maintaining family connections is central to the school's identity is undermined by the simultaneous suggestion that it is a minor or tail-end consideration in practice.

[17] On a related point, the respondent also contends that the more limited the impact of the impugned measure, the more easily the test of justification can be satisfied. On this basis, the respondent asserts that, because criterion (iv) had effect in respect of a limited number of candidates only, it may be more easily justified. However, one must also bear in mind the impact of the impugned criterion on any child actually affected. The difference between admission and non-admission is binary. The present case is an example of one where the operation of the criterion results in the child not being admitted to the school. In the context of the admissions process, this is a significant impact: indeed it is wholly determinative of the admission application; and possibly determinative of the school which the child disadvantaged by the criterion will attend for the next five or seven years of his education. In short, even assuming the number of affected boys was limited, the effect on each of them is potentially significant.

[18] The respondent further submitted that the court had no evidence to form the basis for the observation at paragraph [82] of my earlier judgment that, although there may well be benefits to pastoral care through community links, the preservation of historic family links to a school did not appear to be necessary in order for a school to excel in both those areas. I do not consider that there needed to be a detailed evidential basis for this observation. However in any event, the respondent's critique in this regard misses the point. That is because it is for the respondent to establish the justification for any discriminatory condition adopted. I previously held that the respondent's evidence relating to the concrete benefits of its approach – or, put another way, to clearly link its admissions policy to the benefits it claims – was "fairly elusive" (see paragraph [89] of my earlier judgment). No additional evidence has been provided in that regard. I simply have not been persuaded by the respondent that the benefits it contends arise from the familial criteria are sufficiently connected to those criteria to justify their discriminatory effect. That is an issue on which the burden lies upon the respondent; and which is ultimately subject to an objective assessment by the court. Although I accept that the respondent's own views must be accorded some level of deference, they cannot of themselves be determinative.

[19] The respondent's additional submissions have also done nothing to dilute the concern expressed in paragraphs [84]-[86] of my earlier judgment to the effect that, since it did not recognise the discriminatory effect of the impugned criterion (and still does not), the school has never itself properly grappled with the question of whether this effect was justified. That is a further basis on which Mr Lavery can legitimately contend that the weight to be accorded to the respondent's views should be reduced: the submissions on their behalf still maintain that there is no discrimination on prohibited grounds.

[20] Considering all of the above in the round, I maintain the view expressed in my earlier judgment that the school's admission criterion (iv) was unlawful in that it represented unjustified indirect discrimination contrary to Article 18 of the Race Relations (Northern Ireland) Order 1997. I reach this view for the reasons set out in paragraphs [69]-[95] of my earlier ruling, supplemented by the reasoning above. Even assuming that the maintenance of family links is part of the preservation of the school's ethos which is a pressing need for the school, the discriminatory effect of criterion (iv) on racial grounds is not justified in pursuit of that end in all of the circumstances.

The withholding of relief

[21] Finally, the respondent submitted that, if the court was unpersuaded by its submissions on the merits, it should nonetheless exercise its discretion to refuse any substantive relief. The submission was advanced on two bases, namely on the grounds of delay and impact on the respondent and third parties.

Delay

[22] I can deal with the issue of delay briefly. The Court of Appeal having extended time for the applicant to bring these proceedings and having granted leave on that basis means that there is a limited foundation on which to hold the issue of delay against the applicant. Necessarily, the Court of Appeal has accepted that there is a proper basis for extending time. That does not mean that any delay in issuing the proceedings may not be a factor relevant to the exercise of the court's discretion as to the grant of relief. However, the exercise of my discretion ought to be guided by the approach of the Court of Appeal to the issue of delay. Its judgment must be taken to have 'set the tone' on this issue; and it is clear that a central factor in the Court of Appeal's consideration was that, if the applicant's case was meritorious, it would be wrong for him to be shut out from a possible remedy on the basis of the delay which had arisen in this case (see paragraphs [26]-[28] of Keegan LCJ's judgment).

[23] I do not consider there has been any material prejudice to the respondent *in its defence* of these proceedings which has arisen as a result of the applicant's delay in bringing these proceedings. As to the prejudice of granting a remedy at this time, the late stage at which these proceedings are now reaching a resolution may in fact

operate to the advantage of the respondent. In any event, the issue of prejudice and inconvenience is effectively a freestanding objection to the grant of relief which is discussed below.

[24] The respondent has also asserted that the applicant "failed to issue her proceedings in time." Of course, strictly speaking, the applicant in these proceedings is the child who sought admission to the respondent school. Albeit he acts through his mother as next friend, it is difficult to impute to him any default.

[25] On the basis of the above considerations, I would not consider the issue of delay in bringing the proceedings alone to warrant the withholding of relief. The more difficult question is whether granting a remedy at this stage would undermine the principle of legal certainty or affect third party interests to such a degree as to warrant the withholding of relief.

The respondent's case on inconvenience and uncertainty

[26] The general rule is that where illegality has been found which has had some practical effect on an applicant for judicial review, a practical and effective remedy will follow: see, for instance, Fordham, *Judicial Review Handbook* (7th edition, 2020, Hart) ("*Fordham*") at sections 24.3.2 and 24.3.14. That is the case as a matter of domestic public law and also where, as here, violation of a Convention right is in play (see paragraph [96] of my earlier judgment in relation to Article 14 ECHR). It is for this reason that I have approached the question as being one of whether the respondent has convincingly established in this case that a remedy should be withheld.

[27] The respondent continues to rely on a range of suggested consequences which would give rise to disruption and inconvenience if relief is granted in this case. I considered a number of such arguments in my earlier judgment: see [30]-[31]. I note that the Court of Appeal, in paragraph [26] of its judgment, agreed with the view that some of the opposition raised by the respondent in relation to potential prejudice was overblown. Nonetheless, legitimate issues have been raised as to whether, if relief is granted in this case, others may seek to capitalise on that, or may otherwise be entitled to benefit from it, in a way which results in significant inconvenience and prejudice to third parties.

[28] Mr Coll was careful to point out on behalf of his client that its objection on this score was not primarily, or indeed at all, in relation to the respondent school seeking to avoid inconvenience. Rather, its concern was in relation to knock-on effects on the admissions system as a whole, including on other schools who had used similar admissions criteria, and, more immediately, on other children within the Abbey's current Year 8 cohort, who may be adversely affected if, at this stage, the school had to cope with a significant additional number of pupils joining that form group.

[29] The school's evidence was that if criterion (iv) was quashed, 15 pupils will have been admitted to the school who would not otherwise have gained a place (i.e. who would not have secured admission had the school's admissions criteria not included criterion (iv) but otherwise remained the same). The school no longer contends that there is any risk that the grant of relief will require any of those pupils to give up their place. It is concerned, however, that up to 15 other pupils (inclusive of the applicant) may now seek to secure a place at the school. In addition, the applicant is still placed sixth on the school's rank order (at number 133, with boys ranked 128 to 132 still ahead of him on the application of the school's criteria). There are then the additional nine boys who, like the applicant, would have gained a place if the impugned criterion had not been used.

[30] Mr Sloan's evidence is that the admission of one further pupil would not have a significant effect on the year group. However, the admission of 15 new pupils would require 1.5 new teaching staff (at a cost of around £78,000 per annum) and that the budget for the year has already been allocated and could not accommodate this additional financial burden. Mr Coll also outlined a range of additional difficulties which would arise should a significant number of new pupils be admitted into the present Year 8. For instance, there would be no funding for these pupils until the next school census was taken, which will be next year. Depending on numbers, a new and additional form class may need to be created and pupils re-distributed from the existing form classes in which they are settled. A new timetable may also then require to be prepared, which is no small undertaking.

The possible routes to admission for the applicant

[31] To some degree, the ripple effects (if any) of a remedy which is designed to secure the applicant's ultimate admission to the school depend upon which of a variety of approaches is selected in an effort to secure that end. There were three possible options mooted in the course of the further argument before me:

(1) At one point, Mr Lavery suggested that it would be open to the court, in the exercise of its jurisdiction under section 91(1) of the Judicature Act (Northern Ireland) 1978, simply on the basis that it was considered just and convenient to do so, to grant a mandatory injunction requiring the respondent school to admit the applicant. I am not persuaded that this would be an appropriate exercise of the court's coercive powers or that it would be a practical or just remedy. That is principally on the basis that the school is constrained in the number of pupils it admits by its admissions number set under Article 12 of the Education (Northern Ireland) Order 1997 ('the 1997 Order'); which is in turn related to the school's overall enrolment number set out under Article 11, the school's accommodation and limits on class sizes. Put simply, there is presently no spare place in Year 8 which the school can fill by means of the applicant's admission, whether or not it is ordered to do so. By virtue of Article 10(2)(a) of the 1997 Order, it should not admit a child in excess of its admissions number. It should plainly not be ordered to do

something which would be unlawful. Rather, a means should be found – if the applicant is now to be admitted to the respondent school – by which its admissions number can be increased.

(2) The applicant's primary suggestion in relation to remedy – to which I return below – is that the court should grant relief in relation to the legality of the impugned criterion (either by way of *certiorari* or declaration) so that, armed with this, the applicant can return to the Admissions Appeal Tribunal ("the Tribunal") and invite it to conclude that the school did not properly apply its admissions criteria. That is one of the bases on which an admissions appeal may be allowed under Article 15(4) of the 1997 Order. If the applicant was successful in his appeal on that basis, the issue with the school's admissions number does not arise. That is because the Tribunal has power to direct the admission of the child whose parent has successfully appealed and, by virtue of Article 10(3) of the 1997 Order, in calculating for the purposes of an assessment of whether a Board of Governors has admitted a number of children which exceeds the school's admissions number for that school year, no account is to be taken of any child admitted in compliance with a direction of the Tribunal. That is why children admitted upon direction of an Admissions Appeal Tribunal are sometimes referred to as 'supernumerary.'

(3) Alternatively, a suggestion appears to have emerged in the course of the Court of Appeal hearing that the Department could increase the respondent school's admissions number, as a matter of its discretion, for the purpose of securing the applicant's admission in the event that he was successful in his application for judicial review. The Department can vary a school's admissions number for a school year at any time under Article 12(3) of the 1997 Order, after consultation.

[32] In light of the possible involvement of the Department at (or after) the remedies stage in these proceedings, it was put on notice of the application and appeared as a notice party. A number of practical difficulties with the third option identified above were highlighted; but they essentially amounted to the proposition that the Department would be unable to create a place specifically for the applicant. That is because the respondent school was (pursuant to Article 13 of the 1997 Order) bound to fill its available places through the application of its criteria and, having done so, has established a rank order on which the applicant is still not the first in line. As noted above, there are five other boys who, on the basis of the rank order, would be entitled to admission in preference to the applicant. Accordingly, an increase in the admissions number by the Department would not avail the applicant unless six additional places were created at the school (unless, of course, some of those above the applicant in the rank order decided they would no longer wish to take up a place at the Abbey even if offered one).

[33] The Department also contended that it would not be at liberty to exercise its power of direction under section 101 of the Education and Libraries

(Northern Ireland) Order 1986 to simply direct the respondent Board to admit the applicant in preference to all others. That is because that power to give directions, albeit expressed in very broad terms, is a power to direct that a power or duty be exercised in a particular way; and it is not open to the Department to direct a Board of Governors to exercise their power in a way which (absent the direction) would be unlawful and in contravention of the statutory scheme. Without having heard detailed argument on the issue, that appears to me to be a correct analysis. In summary, the Department, although willing in principle to assist, could see no easy way of securing admission for the applicant only, without at least offering some five additional boys a place at the Abbey. This process would be time consuming and, in the event that several of the boys ahead of the applicant in the rank order took up the offer of a place, may give rise to a number of the practical difficulties about which the respondent is concerned.

[34] Accordingly, Mr Lavery's submissions on remedy focused on what has always been his client's intended route to ultimately securing a place at the respondent school, if successful. That is to return to the Tribunal (which has presently adjourned his admissions appeal) and ask it to allow his appeal in light of the judgment of the court in these proceedings. That is a mechanism which was mooted as being appropriate in principle in the *Anderson* litigation.

[35] In particular, Weatherup J giving the judgment at first instance in the *Anderson* case explicitly recognised this route as one of potential utility to the applicant there in the event that he had considered any of the relevant criteria to be unlawful. He made the following observations in this regard:

> "If the criteria applied are found by the Court to be unlawful then they ought not to have been applied by the Board of Governors and therefore the Tribunal, if reconsidering the matter on the direction of the court, would find that the criteria to be applied were not correctly applied because they took account of unlawful criteria. In those circumstances, if the matter were referred back to the Tribunal with directions that the criteria were unlawful and that the matter should be considered without regard to the unlawful criteria, Articles 15(5) and (6) [of the 1997 Order] would apply.
>
> …
>
> That scheme seems to me to allow the Tribunal to determine whether, in the event that the criteria had been applied correctly ie without reference to the offending criteria, the child would have been granted or refused admission, and the Tribunal shall allow or dismiss the appeal accordingly. In the present case, if one were to

> disregard the offending criteria, it is possible to determine whether or not these children would have been admitted … This is not to suggest that the Tribunal should become judges of the criteria as this would only arise on a reference back to the Tribunal by the Court with appropriate directions. I am not so attracted by the alternative to this approach, which would have been to quash the decision of the Board of Governors and allow them to reconsider the matter in the light of the remaining criteria, because they cannot increase the admissions number to the school. I was informed by Counsel that had the sub criteria been found to be unlawful the school would reassess all the children who had been introduced under the unlawful criteria. I do not believe that such an approach would have been necessary and I would not have considered making any order which would have had that effect. The solution in the present case, had I decided that these criteria were unlawful, would have been to refer the matter back to the Tribunal with appropriate directions…"

[36] Carswell LCJ also addressed this issue, albeit in less detail, in his judgment on appeal from Weatherup J, in the following terms:

> "Another, and possibly more fruitful, possibility would be for the court to remit the case to the tribunal to proceed in accordance with its decision. It appears possible that it could then decide that the governors had not applied their criteria correctly, in that they had applied invalid criteria instead of proceeding to the next ones down the list. In such case it might direct the admission of the pupils concerned in the appeals, but a serious issue would then arise how to treat the other incorrectly rejected candidates whose parents had not appealed.
>
> It is clear that there is no simple or obvious answer to the question of finding the appropriate remedy if criteria are found to be invalid, and it seems to us that urgent legislative attention is required."

[37] The respondent rightly observes that Weatherup J commented that the remedial route he discussed – referral back to the Tribunal in light of the court's judgment on the illegality of certain of the criteria which had been applied – would not be appropriate in every case; and also that the *Anderson* case was different from the present case in that the judicial review challenge in that case was to the decision of the Tribunal itself (so that the court could remit the matter back to the Tribunal

with detailed directions as to how it should reconsider the appeal under RCJ Order 53, rule 9(4)). It further observes that Carswell LCJ highlighted that there would be a serious issue about how to treat others who, like the applicant, had not secured admission to the school but who *would* have done had the unlawful criterion not been required. I return to these issues below.

[38] For present purposes, however, I am satisfied that there is a possibility of the applicant securing admission to the school through the second of the three potential options set out at paragraph [31] above; and that this is by far a more attractive option than the third. It is a mechanism which has been contemplated as both viable and appropriate (albeit not without complication) by both the High Court and the Court of Appeal in the *Anderson* case. Moreover, as a matter of principle, it is the most appropriate means of securing a practical outcome for the applicant, since recourse to the Admissions Appeal Tribunal is the remedy specifically set out in statute for a disappointed applicant who, after the event, challenges the propriety of an admissions decision in his or her case. The statutory disapplication of the constraint of the school's admissions number for a pupil successfully so admitted illustrates that this is the statutorily bespoke solution where a pupil seeks admission to a school year which is otherwise full.

Conclusion on remedy

[39] In light of the above discussion, how should the court resolve the issue of the remedy, if any, to be granted? As noted above, the respondent opposes the grant of any relief at this stage, principally on the basis that it may lead to significant disruption to those already enrolled in Year 8. The evidence in this regard was predicated upon there being a significant influx of students at this point: either up to 15 boys (since 15 applicants who did not gain admission would have been successful in their admissions application if criterion (iv) had not been included in the school's criteria) or 6 boys (the number who would be admitted if the Department increased the school's admissions number and all those still above the applicant in the rank order wished to avail of a newly created place).

[40] I accept the school's case that, if there were to be a significant number of new admissions to its Year 8 at this point, this would cause a considerable amount of disruption. For the reasons given below, however, I do not consider that this outcome is at all likely; and, furthermore, I consider that the prospect of it materialising can be decreased further by the remedy granted by the court being specifically tailored to this case.

[41] Mr Sloan's affidavit confirms that the respondent school was involved in 23 appeals this year (which was significantly more than previous years) but that the applicant's appeal is the only appeal outstanding. I was also told that five of those appeals raised concerns in relation to criterion (iv). Mr Sloan goes on to say that, "If any of the impugned criterion [*sic*] is quashed or declared unlawful, I am uncertain what effect that will have on those earlier appeals and what course the hitherto

unsuccessful appellants might take, such as challenging the appeal tribunal decision or challenging the Abbey's decision not to offer them places." As can be seen from this averment, the opposition to the grant of relief is based on a speculative fear of what may happen in terms of others seeking to 'piggy-back' on the applicant's success in these proceedings.

[42] Given the current stage of the school year, there may be a natural disincentive to parents seeking to move their children between schools if their child has now settled in their new school for a period of some three months. That is not to underestimate the determination on behalf of some parents, and no doubt also some pupils, to seek to change school to another school which they would prefer or perceive as a better school. However, the legal impediments to seeking to do so at this stage are considerable. Any challenge to the respondent school's admissions decision, or those of other schools given that decision notifications were sent on 12 June 2021, would clearly be out of time.

[43] Given that the Court of Appeal in these proceedings has made clear that a 'wait and see' approach is not generally appropriate in such cases, I find it hard to see how a disappointed applicant to the respondent school could now mount a successful application for an extension of time to bring judicial review proceedings – not even on the basis of awaiting a decision on their case but, rather, on the basis that they had been awaiting the outcome of a legal challenge brought by someone else. The grounds of challenge will have first arisen for the purpose of the judicial review time limit, as the Court of Appeal has held, when the relevant criteria were published; *not* from the date of knowledge that someone else has been successful in a judicial review challenge.

[44] A particular feature of the applicant's case, adverted to by the Court of Appeal at paragraph [14] of its judgment, was that it had at least been brought extremely promptly after the admissions decision was known. In contrast, there is currently no other judicial review challenge of which I or the parties were aware to similar criteria on the part of any other school; and any such challenge initiated at this stage would appear to me to be irredeemably out of time.

[45] There is also no other child with an extant admissions appeal, let alone an admissions appeal relating to the respondent school or another school which applied similar criteria. The respondent's fear therefore must be centred on those applicants who did bring an appeal seeking to reopen the result of that appeal in light of the court's judgment in this case. However, even those who brought admissions appeals and had them determined are likely to be out of time to challenge the admissions appeal decision in many, if not all, cases at the present time.

[46] For my part, I would also consider the applicant's case to be in a different category from anyone who sought to mount a challenge only now. The applicant did so shortly after he became aware of the admissions decision in his case and pressed the case on for an early hearing. He has been to the Court of Appeal and

back. An applicant seeking to initiate proceedings only now is not in a comparable position in my view either in terms of any possible application for extension of time or in terms of any perceived injustice in this applicant securing a practical remedy and others not.

[47] Taking all of the above into account, I would consider that, at this late stage, the respondent's concerns about significant inconvenience and uncertainty should carry little weight. However, I also consider that they can be reduced yet further by the form of relief which the court might grant, which can be designed to make clear that it is to meet the justice of the present case and is not intended to be of any wider application. I return to this issue below.

[48] As to the suggestion that the grant of relief in this case will or may encourage a relaxed attitude to the question of delay on the part of prospective applicants for judicial review in future, I also do not consider that objection sustainable. In paragraph [20] of its judgment in this case, the Court of Appeal stated as follows:

> "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 to have the potential to disrupt school 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."

[49] This guidance is clear. The present case is an exceptional one, brought in circumstances where the Court of Appeal has recognised that the decision in *Re Anderson* [2001] NICA 48, which had encouraged the bringing of challenges to schools admissions criteria only after the result of an admissions application was known, required to be clarified. The correct approach has now been explained in some detail in the Court of Appeal's ruling in this case. It is fanciful to suggest that the grant of relief to the present applicant (to whom an extension of time has exceptionally been granted) would in some way undermine the Court of Appeal's clear statements on this issue (see also the Court of Appeal's observations at paragraph [18] of its judgment).

[50] Finally, on the question of possible inconvenience and disruption, at least insofar as the respondent school itself is concerned, a strong point to be made against the respondent's position is that it adopted its criteria against Departmental

guidance and in full knowledge of the Department's warning that this would give rise to increased legal risk: see paragraphs [56] and [57] of my earlier judgment. It was of course open to the respondent Board to depart from the Departmental guidance for good reason (subject always to anti-discrimination provisions) but, in doing so, it must be taken to have accepted the increased legal risk which such a course entailed. For the reasons given above and below, I hope and expect that the remedy granted to the applicant will not cause any undue disruption to the respondent school (or any other school), much less any of their pupils; but, to some degree, if that occurs in the case of the respondent school, it will simply have to deal with the consequences as best it can.

The relief to be granted and its effect

[51] I have concluded that the most appropriate remedy – to meet the justice of the applicant's case as I have found it and in order to seek to minimise the potential 'ripple' effects of any remedy for the school and others – is to grant a declaration, rather than an order of *certiorari*. The effect of a declaration in appropriate terms and of a quashing order are sometimes indistinguishable, particularly where the declaration is to the effect that, as a matter of law, a decision or action is void. The key benefit of the declaratory order, however, is its flexibility. As McCloskey J commented at paragraph [125] of his judgment in *Re Hawthorne and Another's Application* [2018] NIQB 5, "Versatility and adaptability are the hallmarks of the declaration."

[52] In *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 19, at 26-27, Lord Slynn of Hadley stated that:

> "I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants. The European Court of Justice, though cautiously and infrequently, has restricted the effect of its ruling to the particular claimant in the case before it and to those who had begun proceedings before the date of its judgment. Those who had not sought to challenge the legality of acts perhaps done years before could only rely on the ruling prospectively. Such a course avoided unscrambling transactions perhaps long since over and doing injustice to defendants."
>
> [underlined emphasis added]

[53] Although the precise issue did not require to be addressed in that case, Lord Slynn raised the prospect that it would be open to the court to grant a declaration with limited effect either temporally (prospective only) or in terms of the beneficiary. That is consistent with authority which emphasises the flexibility and

versatility of a declaration as a remedy. Other members of the House did not share Lord Slynn's view on the question of a remedy which was prospective only; but their objection was on the basis that it could not be consistent with the court's constitutional role to grant a remedy to others and not the party who had actually established the illegality in the proceedings before it. That issue does not arise in the present case where the concern is not to deprive the applicant of an effective remedy to the benefit of others; but to grant the applicant – the only party who has vindicated his rights before the court – with an effective remedy to the exclusion of others, in the public interest. The flexibility of the declaration as a remedy is also continuing to develop: see, for instance, Lewis, *Judicial Remedies in Public Law* (6th edition, 2021, Sweet & Maxwell) at paragraph 7-074 ("There are clear signs of further developments in the use of the declaration"); and the cases cited in *Fordham* at section 24.2.6.

[54] In this case, I was invited by Ms McCartan for the Education Authority (which took no formal position on any of the issues argued), if granting relief, to ensure that the order was very specific and clear. Mr Lavery for the applicant also submitted that the remedy granted could be "as narrow as possible" provided that its effect was ultimately to secure his client's admission to the respondent school. In view of the foregoing discussion, I propose to grant a declaration in the following terms:

> "In the circumstances of the applicant's case, the adoption and use of criterion (iv) in the respondent's admissions criteria for admission to Year 8 in the 2021/22 academic was unlawful, void and of no force or effect.
>
> Accordingly, as a matter of law, criterion (iv) should not have been applied in the course of consideration of the applicant's application for admission to the Abbey Grammar School."

[55] It is a matter for the Admissions Appeal Tribunal how it deals substantively with the applicant's outstanding appeal to it in light of this declaration. Having said that, I was invited by Ms McCartan for the Education Authority to set out as clearly as possible, for the assistance of the Tribunal, my intention in respect of the effect of any relief granted. I do so as follows:

(i) In light of the declaration granted above, I consider that the question whether the respondent correctly applied its admissions criteria should be answered in the negative. That is because, as a matter of fact, it applied a criterion which has now been declared to be unlawful and of no force or effect. For the purposes of the applicant's appeal, it should be assumed as a matter of law that criterion (iv) did not exist. Although this was described by some parties in the course of argument as a "legal fiction", it is the intended effect in law of the declaration set out at paragraph [54] above. This approach is also entirely

consistent with that envisaged by both the High Court and Court of Appeal in the *Anderson* case (see paragraphs [35]-[36] above), whereby it was envisaged that a tribunal considering an appeal with the benefit of a court ruling invalidating a criterion which had been applied in practice could and should therefore conclude that the school in question had not applied its criteria correctly. It would have applied a criterion which, as a matter of law, was an irrelevance.

(ii) In then determining whether the applicant would have secured admission to the respondent school if the criteria had been applied correctly (that is to say if, for the purposes of the applicant's application for admission, the admissions process overall is assessed as having operated without reference to the criterion which has now been declared void) the evidence provided by the respondent in this case suggests that the applicant *would* then have secured admission.

[56] In light of the above, if I was applying the test which the Tribunal is charged with applying under Article 15 of the 1997 Order, I would be content to allow the applicant's appeal and would consider it appropriate to do so.

[57] For the avoidance of doubt, the use of the phrase "in the circumstances of the applicant's case" in the declaration set out at paragraph [54] above is designed to restrict the benefit of the declaration to the applicant's case alone, insofar as permitted by law. Even if (contrary to my view) it were not permissible to restrict the effect of the declaration in this way, I would in any event have granted a declaration with wider effect (although limited, obviously, to the impugned criterion in the respondent school's admissions criteria only). That is because, barring some wholly exceptional circumstance, any other unsuccessful applicant for admission at the start of this academic year who now sought to raise a similar case (in relation to an admissions decision of the respondent or another school using a similar criterion) would, in my view, be hopelessly out of time to do so. The Admissions Appeal Tribunal has no power in law to invalidate a criterion and, therefore, any further challenge would have to be brought against the school which adopted the criterion, with time running from the time when the impugned criterion was published. Moreover, any attempt to rely upon this judgment in doing so, notwithstanding the difficulties involved in mounting such a case at this stage which are highlighted above, may, if leave to apply for judicial review was to be refused, represent one of the limited circumstances where it would be appropriate to award costs against the unsuccessful applicant at the leave stage.

Conclusion

[58] Mr Coll was quite properly anxious to emphasise on behalf of the respondent school that it had "no axe to grind" against the particular applicant in this case. He also emphasised that the position the Board of Governors had adopted on the substance of the claim was because of its genuine belief that the criteria it had used

were to the benefit of all who attend the school; and that the position it had adopted on the question of remedy was because it found itself in a difficult and unusual situation in light of the applicant's challenge having been permitted to proceed at this stage of the admissions process. I can readily accept each of those propositions.

[59] Nonetheless, I consider that the school's admissions criterion (iv), although formulated in neutral terms, works to the disadvantage of far more children of non-Northern Irish origins than those of Northern Irish origins in the relevant group of children wishing to attend the school; and that the disadvantage to which that has given rise (and which does not ever appear to have been fully appreciated or considered by the school) has not been shown to be a proportionate means of achieving the legitimate aim identified. In light of the Court of Appeal's judgment granting the applicant leave to apply for judicial review and my own view on the substance of his claim, I consider it appropriate to grant the applicant relief. The form of the relief to be granted, which is outlined above, is designed to both secure an effective remedy for the applicant and minimise the (already modest) risk of the significant disruption which the respondent fears.

[60] Subject to any further appeal on the part of the respondent in relation to the merits of the applicant's claim, I would anticipate the relief which has been granted by this court to lead ultimately and hopefully shortly, via the intercession of the Admissions Appeal Tribunal, to the applicant being admitted as a pupil of the Abbey. Indeed, even if the respondent wishes to appeal the substance of the case further, consideration might be given to a means of doing so which would not stand in the way of the applicant's admission to the school in the meantime. That would seem to me both to be consistent with the respondent's position referred to at paragraph [58] above and to be in the applicant's best interests, given the uncertainty as to his position which he has already endured. In any event, I wish the applicant well in his continued education.