

## **XY's application [2015] NIQB 75**

### **A Judicial Review brought in the name of a child**

#### **Introduction**

The High Court recently gave judgement in a Judicial Review matter relating to the proposed closure of a primary school. The judgement was delivered by Mr Justice Stephens on 28<sup>th</sup> August 2015 and is referred to as XY's application, with a neutral citation of [2015] NIQB 75. This case highlights a number of very pertinent issues in relation to the bringing of Judicial Reviews in the name of children and young people and offers excellent guidance to practitioners. In this article I hope to distil this guidance further and to reflect on same through the lens of the United Nations Convention on the Rights of the Child (hereafter "UNCRC").

#### **Background**

The applicant in the case is a 10 year old pupil of Avoniel Primary School (hereafter "Avoniel") who has special educational needs. The case was brought by his mother and next friend. The applicant wished to challenge the legality of the Minister's decision on 15<sup>th</sup> May 2015 to close Avoniel which would result in him having to transfer to another local school. The respondent was the Department of Education, represented by the Attorney General, and the Education Authority (formerly the Education and Library Board) were a notice party who were represented by solicitor and counsel. The parties agreed that the leave and substantive hearings should be heard together as a rolled up hearing and the case proceeded as such.

The applicant had various grounds under which he sought to challenge the decision to close the school. These primarily focused on perceived deficiencies in the consultation process which had taken place in advance of the impugned Ministerial decision to close the school.

While the factual matrix and the legal arguments in relation to the substantive aspects of the case are interesting in itself, in terms of the duty to consult, the key aspects of this case that we wish to highlight in this article are the preliminary issues around the bringing of the case. We believe the Judge's comments offer salutary guidance to practitioners who are commencing or engaging in litigation for or on behalf of children and young people.

## Anonymity

The first preliminary issue relates to the anonymity of the applicant. The applicant brought the proceedings by his mother and next friend. An application was made for an anonymity order prohibiting publication of the name and address of the applicant and his family and requiring that all court documentation would refer to the applicant as “XY”. The application was made under Article 170(7) of the Children (NI) Order 1995. An order was initially granted pending the hearing of the application, although the order did not prohibit the identification of the applicant’s school.

In determining whether the anonymity order should extend to the substantive hearing the Court had regard to an English Court of Appeal case *JXMX v Dartford and Gravesham NHS Trust* [2015] ECWA Civ. 96. That case considered anonymity orders in the context of a hearing for approval of a settlement for a child or protected party. The judge in that case highlighted the tension between the principles of open justice and the right to freedom of expression with the right to privacy. The judge further drew on principles of general application which had been identified by Lord Neuberger MR in *JIH v Newsgroup newspapers Limited* [2001] EWCA Civ. 42. These principles are:

*“1. An order for anonymity should not be made simply because parties consent to it.*

*The Court should consider carefully whether some restriction on publication is necessary at all, and, if it is, whether adequate protection can be provided by a less extensive order than that which is sought.*

*If the application were made on the basis that publication would infringe the rights of the party himself or members of his family under article 8 of the Convention, it must consider whether there is sufficient general, public interests in publishing a report of the proceedings which identifies the parties concerned to justify any resulting curtailment of his right and his family’s right to respect for their private and family life.”*

Mr Justice Stephens considered that XY’s Article 8 rights were engaged in this case and that if he were known to be the applicant in these proceedings then that might negatively impact on his ability to integrate into a new school should the case be unsuccessful. He concluded that these factors were “of considerable importance in relation to the question of anonymity.” He further considered that the identities of the individuals involved on both

sides, and their characteristics (insofar as they are relevant to the dispute) would ordinarily be a necessary aspect of open justice and the Article 10 rights of others. However having balanced Article 8 and 10 he determined that it was necessary for the court to grant a derogation from open justice and he made an anonymity order accordingly.

NICCY are of the view that this decision by the Judge is clearly in compliance with Article 3 of the UNCRC which requires, inter alia, Courts to ensure that the best interests of the child are a primary consideration. While the Judge did not specifically address best interests in his deliberations, it is clear that this was at the forefront of his mind when this decision was made, given the potential negative impact on the child's integration into an alternative school should the case be unsuccessful. Further the decision echoes Article 16 of the UNCRC which seeks to protect a child's privacy. Again, while the Judge did not address Article 16 in his deliberations it can be inferred that the protection of the privacy rights of the child was uppermost in his mind when making this decision.

### **Standing**

The Attorney General, on behalf of the Minister for Education, submitted that XY did not have sufficient interest to bring these proceedings but rather that the parents were the appropriate applicants. He pointed out that Article 15(5A) of the Education and Libraries (NI) Order 1985 required the Department of Education to consult with the parents of registered pupils and not the pupils themselves when they were proposing to discontinue a controlled school (hereinafter "the statutory scheme").

The Attorney General further made reference to the law surrounding school admissions, which relies on a statutory scheme which gives the rights of complaint and appeal to parents, and the associated case law that holds that generally parents and not pupils are therefore the proper applicants in such cases. Mr Justice Stephens agreed with this interpretation in cases around admissions.

The Judge went further to say that notwithstanding the statutory scheme, another aspect of the legislative framework is the Human Rights Act 1998, which incorporates Article 8 into domestic law.

The question then arose as to whether XY could establish that Article 8 was engaged in this matter. The applicant's argument ran that XY's Article 8 rights were engaged because the meaning of "private life" covers physical and psychological integrity of the person and a

right to personal development and to establish and develop relationships with other human beings in the outside world. Further, that as a result of XY's disabilities his ability to develop his psychological integrity was emphasised and had greater significance than in relation to other pupils.

The Attorney General argued that the relevant Convention right in respect of education is Article 2 of Protocol 1 and Article 8 arguments should not be used to bolster the strict education rights. He further argued that the seriousness of any potential breach of Article 8 was insufficient to engage that Article. He suggested that there was insufficient evidence to support the proposition that the applicant's relationships with his school friends would be seriously disrupted by the closure of Avoniel as many of them would transfer to the alternative school that was proposed for XY.

The Judge considered the matter of R (on the application of B and another) v Leeds School Organisation Committee [2002] EWHC 1927 which also related to a challenge to a decision to close a school. In that case the argument from the decision maker was that for children rather than their parents to bring proceedings was an abuse of process and that the claim was in reality that of the parents and not the child. This argument further suggested that children were being put forward as applicants as they were more likely to be eligible for public funding than their parents.

Mr Justice Stephens determined that it was not necessary for him to resolve this issue due to the decision in the Leeds School case (that both children and parents have sufficient interest to bring such cases) but he did comment that he "*entertained reservations about the proposition that the closure of a school does not give standing to the pupils at that school under Article 8 given that children have a fundamental right to have their basic needs fulfilled, not out of benevolence on the part of their parents or the authorities but as a result of their own status as separate human persons.*"

He went further and stated that "*Children can no longer simply be seen as the object of proceedings but as active participants and actors in their own right.*" NICCY welcome this very strong indication of the importance of the voice of the child in proceedings which affect them. This is in keeping with the duties under Article 12 of the UNCRC which require State Parties to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child with the views of the child being given due weight in accordance with the age and maturity of the child. Further

Article 12 requires that the child be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### **Verifying Affidavit**

A preliminary issue arose as the grounding affidavit in this case had been sworn by the applicant's mother as next friend and not the applicant himself. The Judge indicated that due to the applicant's age and personal circumstances he would not expect a detailed affidavit from XY but that there could have been a short affidavit filed by XY supporting the application. The judge opined that this would have ensured that the applicant's legal advisors had satisfied themselves that the case was being brought on XY's instructions and not at the instigation of others. He concluded that the fact there was no affidavit sworn by the applicant is not in accordance with best practice but is not a requirement.

Again, NICCY welcome the recognition that the Court gave to the requirement that the child client be an active participant in the conduct of the proceedings, even when taken via a next friend, as required by Article 12 of the UNCRC, rather than merely a passenger in proceedings.

### **Is the application in fact the application of XY?**

The Attorney General submitted that as a result of the failure of the applicant to swear any affidavit along with other features in the case that there was a concern that in reality this was not an application by the child but by his parent at the instigation of a Concerned Parents group.

Herein, the Judge commented that there was nothing in the mother's affidavit that confirmed that the child had agreed to bring the proceedings, further there was no reference to the solicitor taking instructions *from* the child rather than *about* the child or satisfying himself that the proceedings were in accordance with the wishes and feelings of XY. However, the Judge was prepared to accept the mother's assurances that she had spoken to XY and that he supported them. The Judge then gave some salutary advice to all practitioners who seek to bring cases on behalf of a child when he said "*I make it clear that those professionals bringing cases on behalf of a child have to satisfy themselves, in accordance with the age and maturity of the child, that the child wishes to bring the case*

*rather than the child is being put forward by others irrespective of the child's wishes and feelings."*

Again, NICCY welcomes this advice to practitioners regarding children's participation for the reasons set out above.

### **Outcome of the case**

Having agreed that the case could proceed in the name of XY the Judge then considered the substantive arguments regarding the applicant's allegations that the statutory consultation process was deficient, rendering the Minister's decision incorrect in law. The Judge found that the consultation process was carried out in accordance with the statutory scheme and therefore that the Minister's decision making process was not flawed. The Judge was critical of the delay in bringing the application as the applicant had waited until the Ministerial decision had been announced, whereupon teachers had been redeployed and pupils had been registered in the alternative schools for September 2015. He concluded

*"I do not consider that there is any reasonable objective cause for applying late. I consider that if the court were to grant the relief sought by the applicant at this stage this would present very substantial difficulties which I have set out to educational provision and would not be in the interests of good administration or those third parties (principally parents, teachers and other staff) who have already made arrangements on the basis of the Ministerial decision. Furthermore I consider that there are no public interest considerations which outweigh the very considerable potential prejudice so as to justify the grant of any relief."*

While NICCY accept the Judge's view on this point, we feel that Article 3 of the UNCRC regarding an assessment of the best interests of the child could have been deployed in support of the Judge's contention regarding third parties, specifically other pupils who would be impacted by this decision, either positively or negatively.

Based on all of the above the Judge found that there was a sufficient case to grant leave to apply but all grounds of challenge were dismissed.

NICCY are heartened to see the echoes of the UNCRC through this judgement specifically in regard to the recognition of UNCRC based principles regarding the voice of child and

importance of their true participation in Court processes, albeit without the UNCRC being specifically referenced. The Judgement also gives sage practical advice to practitioners who seek to bring cases in the name of children and young people which will ensure that, as far as possible, the true voice of the child is heard in proceedings.