Neutral Citation No: [2022] NIQB 54	*Ref:* **COL11900**
	ICOS No: **2020/57498/01** **2020/59503/01** **2020/59504/01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **15/07/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY JR154, JR155 AND JR156 (ALL MINORS) AND THEIR NEXT FRIENDS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr Michael Ward (instructed by Kathryn Stevenson, Solicitor, Children's Law Centre) for the Applicants
Mr Michael Neeson (instructed by Departmental Solicitor's Office) for the Proposed Respondent

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COLTON J

Introduction

[1] Each of the applicants has complex special educational needs and disabilities. As a result each of them is entitled to the provision of educational placement in special schools.

[2] There is no doubting the needs of any of the applicants or the commitment of their parents to their care.

[3] These applications were triggered by the issuing of what are known as Temporary Modification of Educational Duty Notices pursuant to the Coronavirus Act 2020 which conferred upon the Department of Education ("the Department") the power to disapply or modify the educational duties owed to each of the applicants.

[4] By these proceedings the applicants seek leave to challenge a series of such notices issued by the Department.

The Statutory Framework

Coronavirus Act 2020 Temporary Notices

[5] The Coronavirus Act 2020 (section 38(3)(c), paragraph 17(1), (2)(b) and (d) and (7) of Schedule 17) conferred powers on the Department to issue notices disapplying or modifying any one or more of the statutory duties contained within the Education (Northern Ireland) Order 1996 and the Education (Special Educational Needs) Regulations (Northern Ireland) 2005 for a specified period of time.

[6] The Department subsequently issued the Temporary Modification of Educational Duties (No.2) Notice (Northern Ireland) 2020 on 2 April 2020. That notice modified the statutory duties in relation to the assessment of special educational needs in Articles 2-21B of the Education (Northern Ireland) Order 1996 and regulations 5-22 of the Education (Special Educational Needs) Regulations (Northern Ireland) 2005.

[7] A series of further similar notices were issued which continued to dilute the duties owed by the Department to children with special educational needs and disabilities. In effect, the notices under challenge in this application are Notices No. 2, 3 (although this was issued to rectify a typographical error in Notice No.2), No.5, No.7, No.9 and No.10. The effect of these notices was to replace the original duty owed by the Department to each of the applicants with a "best endeavours duty" in circumstances where an inability to comply with that original duty was attributable to the temporary closure of schools in Northern Ireland or the reallocation of Education Authority or health and social care resources to meet other essential services arising from restrictions imposed as a result of the outbreak of the coronavirus in Northern Ireland. In practical terms this meant that special schools were closed on 20 March 2020 until restrictions were gradually eased from June 2020 onwards. Each notice was for a limited period of 28 days.

[8] The relevant dates of issue were as follows:

Notice No.2	3 April 2020
Notice No.5	7 May 2020
Notice No.7	4 June 2020
Notice No.9	2 July 2020
Notice No.10	30 July 2020

[9] Notice No.10 was cancelled on 24 August 2020. There are no notices in place and none are currently contemplated.

History of the proceedings

[10] The Children's Law Centre issued pre-action protocol letters on behalf of the applicants on 2 June 2020, 3 June 2020 and 10 June 2020. At that stage the relevant

modification notice in force was No.5. The correspondence set out an exhaustive challenge to the issuing of the notice and alleged that the Department was in breach of its legal obligations. There was a particular focus on the purported disproportionate and potentially discriminatory impacts upon vulnerable children and young people with special educational needs and disabilities. In particular, it was alleged that the Department was in breach of its duties under section 75 of the Northern Ireland Act 1998 based on its failure to screen the draft legislation, modification notices and policy, to carry out a full Equality Impact Assessment ("EQIA") and undertake mitigations before introducing them. The correspondence also raised issues under the Human Rights Act 1998 and various articles of the United Nations Convention on the Rights of the Child ("UNCRC") and the United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD").

[11] An equally exhaustive and comprehensive response was provided by the Departmental Solicitor's Office on behalf of the Department on 10 June 2020.

[12] In the correspondence the Department set out the background to the measures taken, mitigations that were put in place, screening carried out by the Department and also the extent of engagement with a broad range of stakeholders, including the Children's Commissioner, the Equality Commission and the Northern Ireland Human Rights Commission in addition to parties to the notices including the Education Authority, the Health Authority, Boards of Governors, principals and parents.

[13] The Children's Law Centre received letters putting them on notice of the modifications from No.3 onwards commencing on 15 April 2020.

[14] These proceedings were issued on 28 August 2020 and 1 September 2020. In fact, by that stage the proceedings were rendered largely academic by reason of the easing of Covid-19 restrictions and, in particular, the cancellation notice issued on 24 August 2020, which meant none of the notices were actually in force.

[15] As a result, and for other various reasons, this leave hearing did not take place until 21 June 2022.

The Issues

[16] The main ground of challenge advanced by the applicants concerned the alleged failure of the Department to act in accordance with section 75(1)(c) of the Northern Ireland Act 1998 ("the 1998 Act") when introducing Covid-19 policies which had a disproportionately severe impact on children with special educational needs and disabilities and their families. In particular, the applicants asserted that the Department should have carried out a full EQIA before issuing the notices under challenge.

[17] By way of an amended Order 53 statement served on 16 April 2021 the applicants further relied on a failure by the Department to consult the Northern Ireland Commissioner for Children and Young People ("NICCY") before issuing the challenged notices.

[18] In terms of some of the substantive issues raised the court has only summarised the arguments set out in the pre-action correspondence which does not do justice to the breadth of issues raised by each of the parties. Suffice to say that, as one would expect of the Children's Law Centre, there was an understandable focus on the severe impact the notices had on their vulnerable clients and a determination to ensure that proper consideration was given to any restrictions on the recognised needs of each of the applicants. Leaving aside the procedural issues raised, the Department stressed that all the notices emanated as a direct result of the emerging threat and unprecedented impact of Covid-19. It was argued that the notices were a necessary and proportionate reaction to an extreme health emergency. The inability to comply with the original duty was attributable to the temporary closure of schools in Northern Ireland or the reallocation of education or health and social care resources to meet other essential services as required as a result of the outbreak of Covid-19. It was argued the notices were necessary and proportionate in the evolving circumstances at that time as a response to unprecedented challenges. It was well recognised that the early stages of the pandemic resulted in widespread disruption including premises closing, staff absences and vulnerable staff shielding resulting in services being withdrawn, redeployment of health staff to frontline Covid-19 response and new models of service delivery and staff working from home commencing with little or no notice.

[19] In an early challenge to restrictions imposed in England and Wales arising from the Covid-19 pandemic both the first instance court and the Court of Appeal refused permission to apply for a judicial review save for one ground on vires not applicable in this challenge – see *R(Dolan and others) v Secretary of State for Health and another* [2020] EWCA Civ 1605 and [2020] EWHC 1786 (Admin). That decision made it clear that the courts recognised the challenges faced by the government arising from the pandemic. In this difficult area of policy the courts would be slow to intervene, recognising that difficult issues of judgment were involved. The court also made it clear that it was intolerant of challenges to regulations which were no longer in force.

[20] This leads to the fundamental question in this case, namely are the issues raised academic?

Academic nature of the argument/Salem considerations

[21] Mr Ward realistically conceded to the inevitable in the course of the hearing that the issues raised in the Order 53 statement are academic. There is no longer any ongoing issue inter partes. Indeed, arguably, this was so at the time proceedings were issued, given the cancellation notice a number of days beforehand. Any such

argument is now beyond peradventure as there have been no notices in the intervening two years and none are anticipated.

[22] Notwithstanding their now academic status, Mr Ward argues that the court should proceed to grant leave and deal with these applications.

[23] It is well-established that the courts retain a discretion to hear and determine judicial review proceedings, notwithstanding the fact that they have become academic.

[24] The court is all too familiar with the dicta of Lord Steyn in the case of *R(Salem) v Secretary of State for the Home Department* [1999] 1 AC 450 as follows:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[25] What then is the "good reason in the public interest" identified on behalf of the applicants?

[26] Whilst Mr Ward suggested that the subject matter of these proceedings was so important as to engender a significant public interest having regard to the fact that the notices had a severe impact on one of the most vulnerable groups in our society, his real focus in submissions was on the purported breach of section 75 of the 1998 Act. In particular, he sought to build a case that the court should consider whether in fact the 1998 Act provides a sufficient remedy for alleged breaches of section 75. In support of this case he refers to an affidavit sworn by a Mr Daniel Holder, who is the Deputy Director of the Committee on the Administration of Justice ("CAJ"). He is also a co-convenor of the Equality Coalition, which is a network with over 100 NGOs and Trade Unions which is jointly convened by the CAJ and Unison.

[27] In the course of his work with both the CAJ and the Equality Coalition Mr Holder has worked extensively on issues surrounding equality and, in particular, section 75 of the 1998 Act. In his affidavit he refers to a number of investigations that have been carried out under the 1998 Act in relation to alleged breaches of section 75 and submits in short that the provisions of the Act failed to provide adequate investigative powers and effective enforcement of the section 75 equality duty. As part of his affidavit he exhibits a research report prepared by the Equality Coalition

in January 2018 in which this case is made. He also refers to a number of formal section 75 investigations conducted by the Equality Commission. A particular focus of his critique relates to delays in completion of the investigation of complaints.

[28] Mr Ward suggests that this is an appropriate case for the court to grapple with this issue. In doing so, he anticipates the obvious point that will be made on behalf of the respondents that the judicial review court is not the appropriate forum in which to pursue a complaint of a breach of section 75(1) of the 1998 Act.

[29] Section 75(1) of the 1998 Act provides:

> "(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—
>
> …
>
> (c) between persons with a disability and persons without; …"

[30] Schedule 9 provides for the enforcement of a public authority's duties under section 75 and is given effect by section 75(4). Paragraph 1 of the Schedule outlines the role of the Equality Commission in reviewing the effectiveness of the duties imposed by section 75 and provides for further functions set out in the Schedule.

[31] Paragraph 10 deals with complaints. If the Commission receives a complaint made in accordance with paragraph 10 it must investigate it or give reasons for not doing so. There is no time limit for making a complaint.

[32] The manner in which complaints are to be investigated is provided for in paragraph 11 of Schedule 9.

[33] The Court of Appeal addressed the amenability of complaints under section 75 to judicial review in *Re Neill's Application* [2006] NICA 278 as follows:

> "[27] It is important, we believe, to focus on the context of the present dispute in deciding whether judicial review will lie to challenge the validity of the 2004 Order. At the kernel of this is the avowed failure of NIO to comply with its equality scheme. This is precisely the type of situation that the procedure under Schedule 9 is designed to deal with. Equality schemes must be submitted for the scrutiny and approval of the Commission. It is charged with the duty to investigate complaints that a public authority has not complied with its scheme (or else to explain why it has decided not to investigate) and is given

explicit powers to bring any failure on the part of the authority to the attention of Parliament and the Northern Ireland Assembly.

[28] It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of sections 75 and 76 with contrasting enforcing mechanisms for the respective obligations contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with section 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in section 76.

[29] Mr Larkin suggested that it would be incongruous if the failure to observe section 75 should be immune from judicial review while a failure to observe its precursor, the Policy Appraisal and Fair Treatment guidelines, would render a decision invalid. This argument fails, in our judgment, to recognise the impact of the statutory framework which provides for redress in a different form where an equality scheme has not been complied with. This remedy was not available to deal with failures on the part of public authorities to have regard to the guidelines.

[30] The conclusion that the exclusive remedy available to deal with the complained of failure of NIO to comply with its equality scheme does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Schedule 9 procedure ousts the jurisdiction of the court in all instances of breach of section 75. Mr Allen suggested that none of the hallmarks of an effective ouster clause was to be found in the section and that Schedule 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section. It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's

> failure to observe section 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis."

[34] In *Re Stach* [2020] NICA 4 the Court of Appeal endorsed the argument that the primary enforcement mechanism for section 75 obligations is as outlined in Schedule 9 to the Act.

[35] The only case in this jurisdiction in which the court granted judicial review in respect of a breach of section 75 is the case of *Re Toner* [2017] NIQB 49. As was emphasised in *Toner* the court concentrated on the specific facts of the case before it. In *Toner* the court was dealing with a local council's failure to conduct an equality screening exercise for a policy relating to the impact of the lowering of kerb heights for disabled persons. In that case the failure identified "appears to the court to have been longstanding in nature." The court went on to say at paragraph [163]:

> "Most particularly, when the matter came before the EDC and the Council (twice) in 2014 the opportunity was not taken to rectify the situation notwithstanding that the matter had by this stage become one of high controversy."

[36] The facts of *Toner* can be readily distinguished from the circumstances in this case.

[37] The court considers it is simply unarguable that it could embark on a review of the adequacy or otherwise of the mechanism provided in the 1998 Act in respect of alleged breaches of section 75 obligations. Such an inquiry must be fact specific as is clear from the authorities in which this issue has been considered. It may well be in the future, that a disappointed applicant could challenge what is perceived to be an inadequate outcome to an investigation of a breach of section 75 under Schedule 9 to the 1998 Act but we are a long way from that situation in this case.

[38] In terms of the background to these notices Mr Neeson highlights further considerations which are relevant to the question of whether leave should be granted in the context of a public interest argument. It is acknowledged by the Department that the early notices, namely No.2 and No.5 were not subject to a formal screening exercise pursuant to section 75 of the 1998 Act. However, this had to be seen in the context of the prevalent emergency. Notwithstanding this the Department say they were cognisant of the need to try to maintain as far as possible Special Educational Needs ("SEN") provision within the existing circumstances. Due regard was given to those needs. The process of engagement across key stakeholders in that emergency phase enabled, for example, a prioritisation of the statutory operations and statementing process in the Education Authority and a clear communication from the Department that schools were able to remain open to

vulnerable children and young people from 30 March for supervised learning. This included children with statements of SEN.

[39] More importantly, the subsequent notices No.7, No.9 and No.10 were subjected to formal equality assessments. The equality and human rights impact from the policy screening decision was not to conduct a full EQIA. Although, it was deemed to have a minor impact on one or more of the equality of opportunities (age and disability) and/or good relations categories, mitigation and alternative policies offset these adverse impacts and so a full EQIA was not required.

[40] Whist the applicants do not agree with this assessment the legal test as to whether it is sufficient to comply with the section 75 obligation is whether it was within the range of rational decisions open to the decision maker in all the circumstances – see *JR1* [2011] NIQB 5 [2011], 2 BNIL 103 in which Morgan LCJ held that the decision to deploy tasers by the Chief Constable on a pilot basis before the completion of an EQIA in the circumstances did not constitute a breach of section 75.

[41] Furthermore, the Department points out that the notices in question involved temporary modification and were reviewed every 28 days. During the impugned periods it had engaged with NICCY (3, 28 April, 8 May and 22 June) and with the Children's Law Centre (24 April and 23 June) as well as other key stakeholders. The Equality Commission and the Northern Ireland Human Rights Commission were informed of the Department's intention to issue a notice. The Education Authority, the Health Authority, Boards of Governors, principals and parents were key parties to the notices. The Department has engaged with the Education Authority and the Department of Health was informed of the requirement for making of the notices.

[42] The Department has also pointed out that throughout the currency of the notices it has continued to learn lessons and has worked collaboratively with stakeholders including NICCY.

Supplementary Submissions

[43] The applicants also complain that there was a failure to consult with NICCY. In this regard the applicants cannot point to any statutory obligation to consult nor to any undertaking by which a legitimate expectation to such consultation might arise. In any event it is clear that in fact the NICCY has been consulted as matters progressed.

Conclusion

[44] The court therefore concludes as follows:

(a) The matter between the parties is academic. No inter partes issue arises.

(b) The court cannot identify any good reason in the public interest for granting leave in this case. There are multiple reasons for this conclusion:

(i) The factual matrix upon which the dispute initially arose has long since passed.

(ii) The suggestion that the court should embark on an investigation as to the adequacy of the remedies provided within the 1998 Act in terms of an alleged breach of section 75 is unsustainable. The authorities indicate that whether the Schedule 9 procedure provides an effective alternative remedy to judicial review is fact specific. There has been no complaint made to the Equality Commission under the provisions of the 1998 Act and the court would be speculating as to whether or not such a complaint would provide an effective remedy. If there is merit in the applicants' complaint it is difficult to understand how the statutorily embedded route would not be of benefit, given the absence of any specific relief being sought in respect of the applicants, in light of the changed factual context. An alleged failure to carry out an EQIA is precisely the type of situation that the procedure under Schedule 9 is designed to deal with.

(iii) In any event, it is clear that as matters developed the Department did carry out an equality screening process as argued for by the applicants. The decisions taken pursuant to that screening exercise are, in the court's view, within the rational or reasonable range of options available to the Department.

(iv) In terms of any alleged failure to consult it is clear that again, as matters proceeded, there was consultation with stakeholders. In any event the applicant cannot point to any statutory basis which required consultation or any legal basis for a legitimate expectation of such a consultation.

[45] For all these reasons the court considers that public law proceedings would not serve any useful purpose in this case. There is no utility or good reason in the public interest for granting leave.

[46] Leave for judicial review is therefore refused.