

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY

MOST REVEREND CAHAL B DALY
MOST REVEREND EDWARD DALY
MOST REVEREND FRANCIS G BROOKS
MOST REVEREND JOSEPH DUFFY

FOR JUDICIAL REVIEW AND

IN THE MATTER OF THE EDUCATION REFORM
(NORTHERN IRELAND) ORDER 1989

MacDERMOTT LJ

The Applicants, Bishops of the Roman Catholic Church whose dioceses lie wholly or in part in Northern Ireland, seek a declaration that Chapters I, II and III of Part VI of the Education Reform (Northern Ireland) Order 1989 are unlawful.

That Order ("the 1989 Order") was made on 19th December 1989 by Her Majesty the Queen in exercise of the powers conferred by paragraph 1 of Schedule 1 of the Northern Ireland Act 1974. Such an Order is an "Order in Council" and for the purposes of this application the most relevant provision of Schedule I is paragraph 1(7) which reads:

"References to Measures in any enactment or instrument (whether passed or made before or after the passing of this Act) shall, so far as the context permits, be deemed to include references to Orders in Council under this paragraph."

The significance of that paragraph is that it brings an Order in Council within the restrictions imposed by s 17(1) of the Northern Ireland Constitution Act 1973 which reads:

"Any Measure, any Act of the Parliament of Northern Ireland and any relevant subordinate instrument shall, to the extent that it discriminates against any person or class of persons on the grounds of religious belief or political opinion, be void."

As to the meaning to be attached to "discriminates" s 23(1) provides guidance:

"For the purposes of this Part of this Act a Measure, an Act of the Parliament of Northern Ireland or any other instrument discriminates against any person or class of persons if it treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law for the time being in force in Northern Ireland."

At the heart of the argument of Mr Michael Lavery QC (who appeared with Mr John O'Hara for the Applicants) is the proposition that Chapters I, II and III of Part VI of the 1989 Order which deal with integrated education discriminate against the class which his clients represent and he recognises that to succeed in these proceedings he must satisfy me of three matters:

- (1) That the impugned legislation discriminates against the class which his clients represent;
- (2) That such discrimination, if any, is on the grounds of religious belief or political opinion; and
- (3) That I should exercise my discretion in favour of his clients and make the order sought.

The Applicants represent all those concerned with the continuance and preservation of the Catholic ethos and tradition of education in schools which can best be described as "Catholic schools" - such persons include in addition to the Applicants themselves and other members of the clergy members of the Boards

of Governors of Catholic schools, teachers and parents of children at these schools and all other members of the Catholic community who believe in the preservation of what Bishop Daly at paragraph 19 of his affidavit describes as the "distinctive educational vision and practice" of the Catholic school system. However, as I shall indicate later, the class which Mr Lavery claims has been discriminated against is in fact a wider class than those members of the Catholic community whom the Applicants represent.

Before considering that submission I pause to mention a number of general background matters which really are not in dispute.

1. The welfare of children, which includes their education, is a matter of fundamental concern to any Government and not surprisingly Article 3 of the 1989 Order states:

"3. It shall be the duty of the Department -
(a) to promote the education of the people of Northern Ireland;"

2. This duty must, it would seem, be exercised with regard to Article 44 of the Education and Libraries (Northern Ireland) Order 1986 which recognises the principle that children should be educated in accordance with the wishes of their parents. The Article provides:

"In the exercise and performance of all powers and duties conferred or imposed on them by this Order, the Department and boards shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils shall be educated in accordance with the wishes of their parents."

3. Since Northern Ireland was created in 1921 church leaders and church members of all denominations have been active in the field of education and have made a significant contribution to the high quality of educational facilities presently enjoyed by parents and their children in the Province. In his affidavit Bishop Cahal Daly sets out the part played by the Roman Catholic Church over the years. It is also clear from the affidavits that while ultimate responsibility lies with the Government it has hitherto sought to act on a consensual and amicable basis with the several church bodies.

4. As I have already mentioned Bishop Daly in his affidavit refers to the "Catholic system of education" and the "distinctive educational vision and practice" of his church. At paragraph 19 he emphasises four matters:

- "(i) Catholic schools are not simply schools which happen to be run and attended by Catholics; nor are they simply schools in which Catholic religious instruction happens to be given as one element in the curriculum.
- (ii) The essence of Catholic education in the Catholic schools is that the whole curriculum (that is, the totality of experiences which contribute to the intellectual, cultural and spiritual growth of the person), based as it is on the understanding of the meaning and purpose of human life as revealed by Jesus Christ, aims at an integration of human culture and religious faith, rather than their separate development. There is therefore no area of the curriculum which does not have a religious dimension.
- (iii) The Catholic community's legitimate desire to preserve and realise this faith-centred vision of education is embodied in the Catholic school

system, which is structurally linked to the parish faith-communities. The school is to be understood as an extension of the family and the faith-community, which are the primary locus of the integrated intellectual, cultural, spiritual and religious growth of the person.

- (iv) There are many issues on which committed Christians could take differing views from those which Catholics regard as essential to the moral formation of a child. Examples of these are the Catholic Church's attitude to divorce, contraception and abortion which issues could arise in the course of lessons in subjects other than Religious Instruction."

5. In his skeleton argument Mr Lavery develops this approach and relates it to the concept of integrated education. Rather than attempt a paraphrase I set out paragraphs 6 to 10 of the skeleton argument.

- "6. The Roman Catholic Church attaches very great importance to the role of education in promoting the spiritual welfare of its followers.
7. The Roman Catholic Church regards itself bound where possible to provide schools with a Catholic ethos where what it regards as fundamental truths will be taught and where the entire atmosphere should be conducive to the strengthening of the faith of children and young people.
8. Most Roman Catholics in Northern Ireland regard themselves as bound in conscience to provide and avail of, if they can, such an education for their children.
9. The teaching of the Roman Catholic Church differs from other Christian and non-Christian religions on some serious social matters eg abortion and divorce.
10. An integrated system of education must of necessity be neutral on many of these issues. It will not share the main

objectives of Roman Catholic schools. It will separate religious education from the rest of the curriculum so that in effect the overall curriculum will be deprived of the ethos which the Catholic school seeks to provide. It would not be acceptable to most Roman Catholics in Northern Ireland."

"Integrated education" is described in Article 64(1) of the 1989 Order as "the education together at school of Protestant and Roman Catholic pupils". Over the past decade or so a number of integrated schools have come into being: they are presently 10 in number attended in aggregate by 1871 pupils. As a concept integrated education may have much to commend it. It is not a novel concept. Early in the 19th Century James Doyle, Bishop of Kildare and Leighlin said:

"I do not see how any man, wishing well to the public peace, and who looks to Ireland as his country, can think that peace can ever be permanently established, or the prosperity of the country ever well secured, if children are separated, at the commencement of life, on account of their religious opinions. I do not know any measures which would prepare the way for a better feeling in Ireland than uniting children at an early age, and bringing them up in the same school, leading them to commune with one another, and to form those little intimacies and friendships which often subsist through life."

Recently integrated education has attracted some parental support but the number of pupils participating in integrated education still represents less than 1% of the total in Northern Ireland school population. The comment of Mr Peover, an assistant secretary in the Department of Education, should, however, be borne in mind - he says in paragraph 5 of his affidavit:

"Nevertheless, they represent a rapid rate of growth since the first integrated school was established in 1981 with 28 pupils. This growth has taken place during a period of

decline in pupil numbers overall, and in circumstances where grant-aid from the Department has not been made available to individual schools until they were educationally viable. Consequently, it has been the pattern for the sponsors of integrated schools to set them up as independent schools and this has been represented to the Department as having constituted a serious obstacle to the development of integrated schools."

Apart from what is contained in Mr Peover's affidavit the Government's attitude towards integrated education appears in two consultative papers: Education in Northern Ireland - Proposals for Reform (March 1988) and Education in Northern Ireland - The Way Forward (October 1988). In the latter paper - Part 6 - the Government's attitude is set out at paragraphs 6.1 and 6.2:

"6.1 Against the background of the deep community divisions in Northern Ireland, with children from the two traditions being, for the most part, educated separately, the consultation paper declared the Government's intention to act positively to facilitate the development of integrated education where parents express a desire for it. The Government is therefore especially encouraged by the support which was expressed for the aims of integrated education during the consultation process. A particularly valuable contribution was made to the debate by those who put forward other proposals for consideration in addition to GMIS.

6.2 Accordingly, the Government now intends to put in place a range of measures designed to allow maximum expression of parental wishes for integrated education and to support the establishment of integrated schools, including the following (comment on specific issues is given in later paragraphs):

- provision for schools to opt for grant-maintained integrated status (GMIS);
- the retention of legislation for controlled integrated schools, but in a form which will give

greater recognition to parents' wishes;

- the introduction into legislation of a statutory responsibility on the Department of Education to encourage integrated education - which may be achieved in part through an independent body assisted by public funding;
- means of providing financial help for newly established integrated schools at an early stage in their development; and
- priority to be given to capital projects for the provision of additional pupil places in integrated schools."

Paragraphs 6.7 and 6.8 are also relevant in the light of Mr Lavery's claim that priority in the allocation of at least capital funds will be given to integrated schools.

"6.7 Representations were made during the consultation process that grant-aid should be made available in respect of new integrated schools from an early stage in their development. The Government accepts this proposal and intends to give it effect within the new legislation.

6.8 The consultation paper also indicated the Government's intention the enrolments in grant-maintained integrated schools would not necessarily be constrained by physical capacity. To the extent that this may create accommodation pressures, building projects for the provision of additional pupil places will receive priority within the schools capital programme."

But the Government's attitude on the priority issue must be read in the light of what Mr Peover says at paragraph 24(d) of his affidavit:

"(d) with reference to statements made in paragraphs 23 and 29 of that affidavit, there will be no discrimination against Catholic schools in the allocation of capital funds because of demands arising within the integrated sector. The 1989 Order does not include any provision whatever for determining priorities in the allocation of capital grants to any school. The Government's policy about priority for capital projects for the provision of additional pupil places in integrated schools was announced (in paragraphs 68 of "The Way Forward") in the following terms:

'The consultation paper .. indicated the Government's intention that enrolments in GMI schools would not necessarily be constrained by physical capacity. To the extent that this may create accommodation pressures, building projects for the provision of additional pupil places will receive priority within the schools capital programme.'

The Government regards such a policy as essential if the integrated sector is to be allowed a reasonable opportunity to grow to its full potential. This statement of policy appears, however, to have been misconstrued as meaning that all integrated school projects will be given an absolute priority, at the expense of projects in other school sectors. This is not the case. The position is that in order to respond equitably to the many competing demands on the schools capital programme it is necessary to fix priorities to identify the schemes which will be released. It is policy to give schools a degree of priority over other services, and within the schools programme itself, to give top priority to the provision of school accommodation for all children in an area. This policy will remain. Other school priorities include schools involved in rationalisation schemes, schools with seriously sub-standard accommodation and capital deficiencies affecting the curriculum. Integrated school schemes, in recognition of recent growth patterns within the sector, have merely been added to this group of priority schemes. Each scheme qualifying for consideration within any of these priority areas will be considered entirely on merit. None of the priorities described is absolute.

A major increase in the capital funds available for all school sectors has been secured. Considerable additional financing has also been set aside by Government for the implementation of education reforms as a whole. Such enhancement will secure that there will be no financial detriment to any school sector during the implementation phase of the education reforms;"

No matter how this paragraph is analysed and applied in practice it seems to me that however large the sum allocated as educational resources the amount of that "cake" (as it was referred to in argument) available to all those schools which are not integrated schools may well be reduced by reason of the commitment of the Government to the furtherance of integrated education - a commitment which flows from the duty imposed by Article 64 "to encourage and facilitate the development of integrated education".

The attitude of the Applicants to integrated education is equally clear and has been repeatedly stated when submissions have been made in response to the Department's papers. It is:

"The Catholic Church in every country where it is not impeded provides schools to enable parents to fulfil their right and their duty as stated in Canon Law to have their children educated in a Catholic school. While there is a clear responsibility on us bishops to remind parents of their obligations in this regard, nevertheless the Church does nothing to obstruct or oppose the efforts of people whose sincerity we respect and who feel that this (viz the establishment of integrated schools) is the way forward."

6. THE SCHEME OF PART VI OF THE 1989 ORDER

Up until now integrated schools had to prove themselves before they could receive Government funding. The Government feels that this may have stultified the emergence and growth of

such schools. Perhaps surprisingly the means for encouraging and facilitating integrated education proposed by the 1989 Order does not appear, at least primarily, to be by the simple expedient of funding "ab initio" a new integrated school project despite what was said in paragraph 6.7 of the consultative paper "The Way Forward". The chosen route is to give to parents the power to initiate a change to integrated schooling in an existing school. This power being markedly different to that given by Article 19 of the 1986 Order to Boards of Governors of controlled schools who wished their school to become a controlled integrated school - there the extent of parental interest was that the Board of Governors were under a duty to ascertain the views of parents attending the school which the Board wished to convert into a controlled integrated school. Boards of Governors of schools in the maintained area are also granted the power to initiate a change to integrated education but it would seem unlikely having regard to the ethos prevailing in Catholic schools that the Governors of Catholic schools would initiate such a change. It is clear that what Mr Lavery, and his clients, fear is what might be described as "parent power": it is possible, he argues, that a group of parents (not necessarily a majority) might win a vote under Article 70 of the 1989 Order and given the ~~Departmental~~ duty to encourage and facilitate integrated education approval would follow almost as a matter of course - always assuming that a reasonable number of Protestant pupils would participate. The effect of this decision would be:

1. The school property would be transferred from the existing Trustees to the Board of Governors of the new grant maintained integrated school under Article 75 of the 1989 Order.

2. Provisions would have to be made for the education of pupils of that school whose parents wanted them to enjoy a Catholic education, in some suitable alternative Catholic school.

3. Teachers who did not wish to participate in the new integrated education school would have to be re-deployed elsewhere.

To date no integrated school has arisen from an existing school deciding to become an integrated school and Mr Lavery accepts that at the present time given the traditions and ethos of the Catholic church in regard to education it is unlikely that the Board of Governors or a group of parents in a Catholic school would wish to convert the school to an integrated school. But times are changing, the Department is charged with encouraging and facilitating integrated education and there is, he argues, a "risk" of a group or groups of parents managing, despite the opposition of other parents and the Catholic Church, to initiate successfully a transition to integrated status and as a result a school would be lost to the Catholic system of education. The fear, though not expressed, extends I imagine to other schools following the lead of the first to embrace integrated education. In such an event, Mr Lavery argues, the Catholic school system is by the 1989 Order, because it aims to encourage and facilitate integrated education, being subjected to potentially serious damage and loss.

Against this brief factual paraphrase, the total evidence being found in the affidavits and exhibits before the Court, the question which arises is: do chapters I, II and III of ^{Part} ~~Chapter~~ VI of the 1989 Order discriminate against any person or class of persons on the grounds of religious belief or political opinion? But before seeking to answer that question it is necessary to determine the "class" which the Applicants claim has been discriminated against.

In the course of his argument Mr Lavery's final definition of the relevant class was:

"The class discriminated against is the group of persons (both present and future) whose religious beliefs require them (or may in the future require them) to strive to educate children in schools which reflect the ethos of their religion. This group includes Protestants and Roman Catholics in Northern Ireland. An individual member of the group is also discriminated against."

As a slight variant he suggested that perhaps "lead" should be substituted for "require".

In that he embraced Protestants in the class, Mr Lavery was widening the class beyond that indicated in the original application. The first ground on which relief was sought was stated thus:

"The provisions of Chapters I and II of Part VI of the Education Reform (Northern Ireland) Order 1989 are unreasonable, unfair, discriminatory and contrary to Section 17 of the Northern Ireland Constitution Act 1973 in that their effect is or is likely to be disadvantageous to Catholics and in particular to Catholics who wish to have their children educated in schools with a Catholic character."

This extension was advanced in anticipation of the argument that Protestant schools would be as adversely affected by the

legislation as Catholic schools. Understandably there was no evidence before me as to whether or not in Protestant (meaning non-Catholic) schools there is a similar emphasis on religious ethos as there is with Catholic schools. For my part I would doubt if this were so: very many non-Catholic schools claim to be and pride themselves upon being non-denominational schools.

In my view any consideration of s 17 of the 1973 Act must start with the question: "Who" is being less favourably treated than "whom"? The "whom" can be readily defined as those who favour integrated education. If that be right the "who" would be all who do not favour such education, which is a very wide class. It includes those who are against integrated education, those who are indifferent to or have no views on the subject, those, like the Applicants, who prefer their own system of education and do not wish to see it undermined in any way, and those who would wish to see integrated and non-integrated schooling develop side by side without the one being in any way preferred to the other.

As I have already emphasised the Department is under a duty to encourage and facilitate integrated education and to that extent would favour integrated education, but at the same time I am satisfied the Department recognises that integrated education is only a small part of the whole educational scene.

Such favouritism and the emergence of more integrated schools would lead to fewer pupils being available for teaching in all other schools as the pupil population is a comparatively fixed one and could lead to lesser financial support being available to other schools and to that extent other schools could be said to be disadvantaged.

Therefore Mr Lavery would say that other schools may be less favourably treated by the impugned legislation than integrated schools and so discriminated against.

In reply Mr Coghlin says that any "less favourable treatment" is simply a consequence of Government policy to support integrated education. That policy may damage other schools or may appear unfair or unreasonable but Parliament is sovereign and legislative unfairness, unreasonableness or damage do not attract interference by the Courts - that is elementary constitutional law - unless such discrimination was on the grounds of religious belief or political opinion.

In some cases there could be a very difficult question for decision - namely whether or not one class has in fact been treated less favourably than another by the impugned legislation. Indeed Mr Coghlin argued that before the 1989 Order the disadvantaged class was the integrated school class and that the 1989 Order merely gave them equality of treatment with everyone else. Determination of that issue could involve a very fine and difficult balancing exercise but for the purposes of this case I am prepared to assume that by reason of the existence of the duty to encourage and facilitate integrated education the 1989 Order does treat the non-integrated schools class less favourably than the integrated.

Thus I turn to what Mr Coghlin rightly claimed to be the real point - was such discrimination on the grounds of religious belief or political opinion? I mention political opinion because in the course of his reply Mr Lavery introduced that factor into the case. His argument was that integrated education was favoured

by those (including the Department) who believed that the education of Protestant and Catholic children together would lessen the sectarian tension and bitterness which bedevils the Province and in the course of time would lead to a better understanding between the Protestant and Catholic communities and so lead to a more normal political climate. For my part I do not consider that the Government's attitude towards integrated education is a matter of political opinion - it is founded in what I consider to be the non-political belief that as a matter of educational policy it is in the public interest to support integrated education. Certainly any less favourable treatment suffered by the class which the Applicants represent is not suffered by reason of their political opinion because that class could embrace every possible shade of political opinion. As can be seen from all the documents filed on behalf of the Applicants this was always a case of alleged religious discrimination-political opinion never came into it and in my judgment rightly so.

In the course of argument I was referred to various cases decided under the Fair Employment or Sex Discrimination legislation. At the time it seemed to me that they were of little assistance as the issue in this case is very much a question of fact - have the Applicants been discriminated against on the grounds of religious belief? Since the conclusion of the hearing the decision of the House of Lords in James v Eastleigh Borough Council has been reported - 1990 3 WLR 55. I am prepared to accept that the speeches in that case may help resolve cases under the Sex Discrimination or Fair Employment legislation.

However I find most assistance in the observation of Lord Griffiths at 64C:

"Whether a person treats another less favourably 'on the grounds of sex' is a question that does not permit of much refinement. It means did they do what they did because she was a woman (or a man). It is a question of fact which has to be answered by applying common sense to the facts of the particular case."

If the 1989 Order favours integrated schools to the disadvantage of other schools it is all other schools and those who are associated with them who are disadvantaged. Mr Lavery's formulation is limited to schools and their associates who favour a religious ethos but this group is a sub-class of the primary larger class which includes non-denominational schools and people who either have no religious beliefs or whose beliefs do not require them to send their children to a school having a particular religious ethos as well as those falling within Mr Lavery's class. As any damage caused by the 1989 Order will affect all non-integrated schools the damage suffered by those within the primary class, but not within Mr Lavery's class, will not be sustained on grounds of religious belief. It cannot be said that any damage suffered by Mr Lavery's class has been caused by discrimination on grounds of religious belief because even if they had no such belief they would have suffered the same damage as all others in the primary class. It may be that the Applicants and others falling within Mr Lavery's class are more concerned about the risk of potential damage and its consequences than others within the primary class but such damage is not caused or contributed to by their religious beliefs or political opinions

(whatever they may be) but by reason of the fact that "their" schools are not integrated schools.

My conclusion therefore is that the Applicants have failed to satisfy me that any portion of Part VI of the 1989 Order offends against the provisions of s 17 of the Northern Ireland Constitution Act 1973 and accordingly I dismiss this application.

Before finally parting company with the 1989 Order I would venture to return to a point I mentioned in the course of the hearing. The 1989 Order is in effect a supplement to the 1986 Order. Thus to study current legislation in relation to education reference must be made to both Orders and there may be older Orders and statutes which are still relevant. It may be possible for those in daily contact with educational issues to be familiar with and to understand all the relevant legislation but as parents become increasingly involved in educational matters they as well as teachers and members of Boards of Governors must face a daunting task when they read the various statutory provisions, seek to find what is relevant and then try to understand articles containing numerous paragraphs and sub-paragraphs. Where individual members of the public are expected to participate in the administration of the education system it would seem to me to be desirable that they should only have to refer to one document and that that document should be expressed in crisp and easily understood language. For my part I remain convinced that the concise language of, for instance, the Sale of Goods Act 1889 and or the Larceny Act 1916 remain precedents of the draftsman's art which could helpfully be used today as a precedent in the drafting of current legislation.

As Judge Learned Hand said in a speech in Washington in 1929:

"The language of the law must not be foreign
to the ears of those who are to obey it."

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY

MOST REVEREND CAHAL B DALY
MOST REVEREND EDWARD DALY
MOST REVEREND FRANCIS G BROOKS
MOST REVEREND JOSEPH DUFFY

FOR JUDICIAL REVIEW AND

IN THE MATTER OF THE EDUCATION REFORM
(NORTHERN IRELAND) ORDER 1989

J U D G M E N T

OF

MacDERMOTT LJ
