[2019] IEHC 738

**THE HIGH COURT**
**JUDICIAL REVIEW**

**[2019 No. 624 J.R.]**

**BETWEEN**

**THE BOARD OF MANAGEMENT OF B. NATIONAL SCHOOL**

**APPLICANT**

**AND**

**THE SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SKILLS, JIM HAYES, BREDA QUEALY AND ALAN MCCORMACK**

**RESPONDENTS**

**AND**

**S.B.**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 21st day of October, 2019**

1. The child whose conduct is in issue in the present case is now an eight year old boy who at the material time was a student in the applicant school. He is on the autistic spectrum. A witness called by the mother at the appeal hearing under s. 29 of the Education Act 1998 said that the child was on the child protection list due to the mother's mental health. The education welfare officer gave evidence that the child was on that list due to neglect, and met the threshold for being taken into care. The school's concern in relation to the child involved a very large number of incidents, mostly of violence, of which there were approximately 37 between September, 2018 and April, 2019.

2. Unhappily, despite the school going to some lengths to manage the child's behaviour, the child's mother made a complaint to the Garda Síochána that the child allegedly had been put in a bathroom at one point. One would certainly not conclude from the material on the papers that the teachers or the SNAs acted inappropriately in relation to the child; and given that the fact that the child assaulted teachers and SNAs on numerous occasions, a complaint to the Gardaí is not necessarily the most satisfactory way of thanking them for their efforts.

3. The child assaulted not only teachers but also other students on numerous occasions and this series of attacks culminated in a major incident on 3rd April, 2019. The class teacher stated in a memorandum to the appeal hearing that *"on the morning of the incident in question [C] had made it very clear to me that he had a plan to get us into trouble and was mentioning a 'plan' numerous times".* A note of the incident by an SNA exhibited by the respondents noted that according to her *"on the bus [C] was saying* 'my mum is cross with the school I'm gonna get this school into trouble'".

4. In the course of that incident the child assaulted five staff members. One was punched in the face and one struck with a hurley. Two of those staff members required hospital treatment and were absent from work for a period of time. Considerable damage was also caused to the school.

5. The school board convened that evening. The mother attended and an interim suspension was imposed. The principal was to be asked later at the appeal hearing why

someone did not just take hold of the child. She replied that there was an incident in 2017 when a child was restrained and it was reported to TUSLA. The advice then was that nobody should restrain a child unless trained to do so, but the staff were against a restraint policy "*as they are concerned about allegations being made against them*". That is a sad commentary on the Irish educational system. Allegations of that kind are easy to make and can be hard to disprove and certainly are potentially enormously disruptive for those at the receiving end. It is unacceptable that teachers in very difficult situations can be left exposed in the manner highlighted here.

6. The school has in accordance with s. 15 of the 1998 Act and s. 73 of the Education (Welfare) Act 2000 published a number of policies and codes including a code of behaviour. The code of behaviour relevant to the present case recognises that misbehaving conduct can be minor, serious or gross, and that gross misbehaviour includes assault on a member of staff or a pupil. The code itself recognises the need to protect other children in the school. The National Education and Welfare Board published guidelines in 2008 under s. 23(3) of the 2000 Act relating to expulsion and I will return to those later.

7. A further hearing of the Board took place on 10th April, 2019. The mother was written to and invited to attend and be represented. The Board met again on 23rd April, 2019 and 28th May, 2019 and decided to exclude the child permanently from the school. On 16th June, 2019 the mother exercised her right of appeal under s. 29(1) of the 1998 Act. The notice of appeal does not really address the core statutory issues. The applicant's solicitor states that at the appeal hearing the chair *"made it clear that the appeal was to be conducted… without legal representatives" and that "I did attempt to intervene on two occasions. I was quickly rebuked by the chairperson and reminded that I was present as an observer only and not entitled to make representations or address the committee*".

8. According to counsel for the respondents, solicitors in the past have on occasion been permitted to make submissions but more generally they were allowed to be present to advise, but anything further was not encouraged. The inference seemed to clearly be that solicitors were not allowed to make submissions except on exceptional occasions, but counsel didn't seem to want to say that expressly. One can observe *obiter* that if such a policy was adopted, it would be an extraordinary approach by the appeals committee that would be fundamentally disrespectful of the constitutional right of the school to fair procedures and legal representation: see *O'Brien v. PIAB* [2005] IEHC 101 (MacMenamin J., 11th March, 2005); [2008] IESC 71. I do not need to make any finding however because that question was not a ground for relief on these pleadings.

9. On 21st August, 2019 the appeal committee upheld the appeal and the Secretary General of the Department of Education and Science decided to require the school to readmit the child. The recommendation of the appeal committee was that the student be re-enrolled on limited hours, although the direction of the Secretary General makes no reference to limited hours, for some unexplained reason. I granted leave on 4th September, 2019,

the primary relief sought being *certiorari* of the decisions of the appeal committee and the Minister.

10. I have now received helpful submissions from Mr. Feichín McDonagh S.C. (with Mr. Joe Jeffers B.L.) for the Board of Management, from Mr. Conor Power S.C. (with Mr. Tony McGillicuddy B.L.) for the respondents and from Ms. S.B., the mother of the pupil, who appeared in person. On 25th September, 2019 I gave an *ex tempore* ruling granting relief, on 18th October, 2019 I granted a partial stay on the order made, and I now take the opportunity to give a formal written judgment.

**Failure to address the committee's actual statutory task**

11. The concluding statement of the principal to the appeal hearing summarised in one sentence what the case is really about. According to the solicitor's note, "*In response the principal stated that the school had a duty of care to everyone in the school*". That is the core point. Almost incredibly, that fundamental point is not engaged with by the appeals committee. Not even a hint.

12. In fairness to decision-makers in this area, if one turns to s. 29 of the 1998 Act to find an express test for expulsion, it is not there. To that extent the statute is unsatisfactorily drafted. One has to find the test in caselaw. The applicant's written submissions at para. 2 correctly summarised that caselaw by saying that *"the task of the appointed appeal committee is not a complex one. They are required to first consider the school's code of behaviour and/or policy relating to the expulsion of students and then apply that policy to the behaviour of the student in question"*. The function of the appeals committee is not to impugn the policy but to apply it: see *Lucan Educate Together National School v Secretary General of the Department of Education & Science (Ó'Ceallaigh) and Others* [2011] IEHC 86 (Unreported, O'Keeffe J., 27th January, 2011), *Board of Management of Presentation College Athenry v. Secretary General of the Department of Education and Skills* [2017] IEHC 521 (Unreported, Ní Raifeartaigh J., 26th July, 2017); and the *ex tempore* judgment of a strong Court of Appeal in *Board of Management of Presentation College Athenry v. Secretary General of the Department of Education and Skills* (Unreported, 10th August, 2017), per Ryan P., Kelly P. and Irvine J. concurring at para. 11.

13. Indeed that principle is accepted by Mr. Power for the respondents here. In *City of Waterford VEC v. Department of Education and Science* [2011] IEHC 278 (Unreported, High Court, 27th July, 2011) at para. 16, Charleton J. summarised the test by saying that the issue was "*whether the behaviour of the pupil, taken within the proper context, warrants the expulsion*". Allen J. noted in *F.D. (a minor) v. Minster for Education and Science* [2019] IEHC 643 (Unreported, High Court, 13th September, 2019) at para. 64 that the consideration of the context does not extend to an inquiry into the quality of the services available, or the responsibility of the school, or its contribution to the misbehaviour due to any alleged deficiency in the service provided. It is true that Allen J. also said at para. 63 that factors to be taken into account would include attempts by the school at diverting, checking or correcting the behaviour. That seems to be a reference to an *obiter* comment by Charleton J. at para. 17 of the *Waterford V.E.C.* case, as well as

something to the same effect at para. 65. However, the efforts of the school are primarily to be taken into account as a contextual matter. The reference to those efforts is not the conferral of a jurisdiction on the committee to make an evaluation of those efforts. That is clear in para. 64 of Allen J.'s judgment. Mr. Power read para. 64 as referable purely to the resources of the school. I don't read it so narrowly. Whether the school's handling of the child's behaviour is good, bad or indifferent is irrelevant to the substantive issue, which is whether the child's behaviour warrants expulsion in the light of the school's code of behaviour or policy.

14. Ní Raifeartaigh J. in *S.C. (a minor) v. Secretary General of the Department of Education and Skills* [2017] IEHC 847 (Unreported, High Court, 30th June, 2017) also referred to the need for the committee to find the relevant facts. She also referred to the age and maturity of the child although that is only really relevant substantively insofar as the increased age and maturity since the incident means there will be no repetition. Otherwise it is normally only contextual.

15. Applying the law to the facts here, it is clear that there were a whole series of fundamental failures by the appeals committee. Firstly, they failed to consider the school's code of behaviour. Astonishingly there is no reference whatsoever to that code of behaviour in the decision. Lamely, a member of the committee, Mr. Alan McCormack, tried to justify this by saying that "*reference was made to the code of behaviour during the course of the hearing and we were aware of its contents"*. That is not remotely a substitute for engaging, within the terms of the actual decision, with the code on which the jurisdiction of the committee was founded. A court, for example, would not be regarded as dealing competently with a matter if it declined to engage with its fundamental jurisdictional parameters in a judgment merely on the basis that they were mentioned at the hearing.

16. Secondly, the decision failed to identify expressly the behaviour. Rationally, the committee could only have upheld the school's case as to behaviour because there was no contest, at least as regards the behaviour on the 3rd April, 2019. The earlier behaviour however was also highly relevant. Mr. McDonagh very legitimately described the 3rd April, 2019 as the straw that broke the camel's back. But one can say on reflection that most of the earlier behaviour would have justified expulsion in itself. That didn't become irrelevant just because the school didn't act at that earlier point.

17. Mr. McCormack at para. 29 says in effect that the behaviour was not mentioned because it was not contested. That is certainly not an adequate engagement with the totality of the facts. The decision minimises if not completely side-lines the behaviour before 3rd April, 2019 and it fails to particularise either the previous behaviour or the culmination of it in the most serious incident concerned.

18. Thirdly, the decision failed to apply the code to the behaviour. Indeed it failed to apply the code at all.

19. Fourthly, it failed to consider the effects of the behaviour on staff and students. That was the core point made by the principal in her admirably succinct summation at the end of the hearing. In that context the appeals committee failed to consider the likelihood of recurrence. No reasonable decision-maker could have said that there was no risk of repetition given the history of behaviour by the child in question. Indeed Mr. Power accepted that he was not submitting that a reasonable person could have concluded that there was no risk of repetition. That concession it seems to me is fatal to any suggestion that this decision can be rationally supported. It can't.

20. The committee failed at the most elementary level to carry out its clear remit and its approach was wholly unlawful. The attempt made on behalf of the respondents to pass off the appeals committee's fundamentally flawed approach as merely stating context lacks intellectual credibility. That is for two major reasons. Firstly, these matters were not stated to be contextual. The matters considered by the committee were stated to be *"the following reasons"*. Secondly, this was not just a case of introducing irrelevancies. The core issues were not dealt with. One of the fundamental reasons why the core issues need to be dealt with and expressly articulated is that such a process ensures that the decision-maker addresses its mind to the correct statutory test. Both the school's code of behaviour and the actual decision made by the school come well within the guidelines issued by the NEWB permitting expulsion. All of the elements potentially justifying expulsion set out in the NEWB guidelines apply here: a significant disruption to other students, threat to safety, damage to property, violence and assault.

21. It is remarkable – one might add by way of postscript almost unbelievable - that there is no reference to health and safety in the appeal committee's decision. At the level of principle, it would be wrong to consider expulsion merely as a sanction or to adopt a purely "offender-centred" view of the process. Expulsion is primarily a mechanism to vindicate the rights of others, both other students and staff members. The point was made classically by John Rawls in *A Theory of Justice* (Harvard University Press, 1971). One is not entitled to unlimited rights - only to the greatest liberty equal to that of others. A person cannot exercise a right (for example to education) in a way that even through no fault of his or her own (due to illness or disability) interferes with the corresponding rights of others or the right to bodily integrity of any other person (in this context, either students or staff, or indeed both). The appeals committee or a school does not have the right to permit or require a student to be present in that school if that presence is in breach of the rights of others, whether students or staff, and it would be a breach of the constitutional rights of persons not before the court to allow, still less require, a student to attend the school if that attendance would interfere with the rights of others in that school, whether students or staff, and whether to a right to an education or to bodily integrity.

22. One might contextualise the point by adding by way of postscript that the really toxic feature of the jurisprudence spawned by the Warren Court and its European and Irish imitators (right down to the present) is the way in which it renders marginal, if not constitutionally invisible, the rights and interests of the wider community and of persons

not before the court. The "rights" of the person (alleged to be) behaving in an antisocial way are set up to be worshipped, with no significant acknowledgment of the interests and rights of persons who are voiceless in the specific proceedings. Thus constitutional invisibility was afforded to the rights of victims of crime in *Mapp v. Ohio* 367 U.S. 643 (1961) and *The People (DPP) v. Kenny* [1990] 2 I.R. 110, or to the right of the community to environmental protection in *Wicklow County Council v Fortune* (No 2) [2013] IEHC 255, to take two of the most egregious examples. The present case is comparable insofar as the appeal committee managed to produce a decision that grotesquely rendered irrelevant the real harm inflicted by the child on others and the likelihood if not certainty of future risk of harm on such innocent persons. To treat expulsion as an "offender-centred" process is inherently to load the dice against victims of such behaviour. The core issue is not whether a good plea in mitigation can be launched or whether the school could have done better – it is whether there is or has been a risk to the rights of others. The present case is the *reductio ad absurdum* of the notion that expulsion is a purely disciplinary process that is essentially about the expelled child and his or her rights. Only a conceptual and jurisprudential misunderstanding of that magnitude can explain a decision so radically unhinged from common sense as the one that the appeals committee managed to produce here.

**Consideration of irrelevant matters**

23. The decision of the committee is riddled with irrelevancy. In particular, it states that it is *"noteworthy and significant*" that the student had not incurred any serious infractions in the academic year of 2018 to 2019. That statement is now retrospectively being interpreted as referring to no suspensions and I will deal with that issue later. The decision goes on to refer to alleged "*serious deficiencies in the management of [C's] behaviour",* the alleged "*scope for improvement in responding to [C's] behavioural difficulties" by "lack of clarity regarding the quality of communication between the school and the [relevant area] community mother programme*" and alleged "*lack of clarities around the dissemination of information regarding the change in [C's] medication …and how that might affect his behaviour*", and an allegation that occupational therapy reports have not been consistently followed. All of these are fundamentally irrelevant matters save in terms of context, whereas in the decision they are elevated to being *"the following reasons*" for upholding the appeal. Reference to the student's age and maturity is also made. That is of marginal relevance at best, as I have discussed above. It is hard to see how it is really relevant here and the decision certainly does not explain how it is relevant.

24. It is true that Charleton J. in the *V.E.C*. case at para. 17 and Allen J. in *F.D*. at para. 63 and 65 referred to the efforts of the school but as I have mentioned earlier, that is relevant to the substantive issue only in the limited circumstances where clear steps could be taken which would mean there would be no future risk to others in the school. That has no relevance here. Those judgments should not be read as meaning the school's handling of a student is up for debate in every case. At best those matters are only contextual save perhaps in exceptional cases.

**Breach of fair procedures**

25. If the implementation of the occupational therapists' recommendations had been relevant, which it was not, that was not put to the principal. That does not strictly speaking arise because those recommendations were not relevant; but if I am wrong about that I would have quashed the decision on this ground also. Mr. Power was forced into making the somewhat embarrassing argument that the mother made the complaint in her evidence so that satisfied fair procedures, even though he agreed that it did not appear to have been put to the principal. That is of course an unstateable proposition. If the school is going to be criticised, that has to be put to the school's witness. That is Fair Procedures 101. The point does not arise anyway because the issue was not relevant and was unlawfully elevated by the committee into a "*reason*" for its decision.

**Irrationality**

26. The reasons are manifestly irrational to an almost astonishing extent. No reasonable person could view the child's behaviour as anything other than a serious threat to the rights of other students to an education and the right to bodily integrity of both staff and students. No reasonable appeals committee could allow the appeal on the basis of the evidence which has been put before the court.

27. The decision is also separately irrational in the sense that it said that no serious infractions had occurred in the current academic year. Whether that means no incidents or no suspensions (as the respondents now, I must add by way of postscript, implausibly, contend) does not really matter because the committee failed to draw the necessary conclusions from the student's behaviour. The statement in the decision that the expulsion is disproportionate and did not respond to the needs of the circumstances is totally other-worldly. It is manifest that the presence of the student is likely to be a threat to others and it would be irrational to conclude other than that the decision of the school was both proportional and necessary.

**Lack of reasons**

28. If I am wrong about the decision being irrational and if, which I do not accept, it would be open to a hypothetical appeals committee to consider that expulsion was disproportionate, no adequate reasons are given for the decision that the expulsion is disproportionate here. The decision is quite obscure in any event, although given the other fundamental flaws involved, its opacity is, in fairness, probably not its worst feature.

**Lack of reasons regarding Secretary General's decision**

29. Strictly this complaint does not arise because the decision falls anyway but the complaint is made that the Secretary General departed from the committee's recommendation that the re-engagement of the student should be for limited hours initially. There was no stated reason for that departure so if for no other reason than a lack of articulation of reasons, the decision of the Secretary General is flawed on that basis also.

**Order**

30. Mr. McDonagh asks "*how is this school supposed to be run going forward*" on the basis of the committee's decision. No credible answer has been put forward to the that question.

31. The order made on 25th September, 2019 therefore was that:

(i). the order made at the leave stage that there be a reporting restriction under s. 45 of the Courts (Supplemental Provisions) Act 1961 to prevent publication of matters tending to identify the school, the student or the mother will continue;

(ii). reliefs D1 to 3 in the statement of grounds regarding *certiorari* of the decisions and consequential directions will be granted; and

(iii). costs will be granted to the applicant against the respondents including reserved costs, to be taxed in default of agreement, certifying for two counsel for the leave application.

32. On 18th October, 2019 I granted a stay on the order for costs (which hadn't been applied for by the respondents until then), and a stay on remittal of the matter back to the appeals committee in the event of an appeal, with liberty to apply.