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2014 No 020653/01

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 AN APPLICATION BY FR,
A MINOR BY HIS FATHER AND NEXT FRIEND

AND IN THE MATTER OF DECISIONS OF ST JOSEPH'S COLLEGE, ENNISKILLEN

AND IN THE MATTER OF A DECISION OF THE SCHOOLS EXPULSION APPEALS TRIBUNAL DATED 9 SEPTEMBER 2013

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O'HARA J

Introduction

[1] In this application for judicial review the applicant challenges three areas of decision-making arising out of events between March and September 2013. At the relevant time he was 15 years old and was a 4th year pupil at St Joseph's College, Enniskillen. The areas under scrutiny are his initial suspension from school on 13 March and the subsequent renewals of that suspension, his expulsion from the school by the Board of Governors on 30 April 2013 and the dismissal of his appeal against that expulsion by the Schools Expulsion Appeals Tribunal (the Tribunal) on 9 September 2013.

[2] The applicant was represented by Mr D Hutton. For the respondents Mr B Mulqueen represented the principal and the Board of Governors of the school and Mr P McLaughlin represented the Tribunal. I am grateful to all counsel for their helpful and focussed submissions.

Statutory Scheme for Suspensions and Expulsions

[3] Article 49 of the Education and Libraries (NI) Order 1986 provides that education and library boards and the Council for Catholic Maintained Schools (CCMS) are to prepare schemes specifying the procedures to be followed in relation to the suspension and expulsion of pupils from schools under their management. It also provides for an appeal tribunal to be established to hear appeals against expulsions. Article 49(8) provides that the tribunal's power would be either to allow the appeal and direct that the pupil be re-admitted to the school or dismiss the appeal. Since St Joseph's is a Catholic Maintained School the scheme relevant to it is the scheme adopted by the CCMS.

[4] The Schools (Suspension and Expulsion of Pupils) Regulations (NI) 1995 provide in some more detail for the contents of the relevant schemes. The Regulations include requirements that provision is made for various matters including:

- An initial period of suspension which is not to exceed 5 days.
- On suspension the principal is to give written notification of the reasons for that suspension and invite the parent to the school to discuss it.
- A pupil may only be expelled after consultation about his expulsion involving (for the present case) the principal, a parent, the Chairman of the Board of Governors, a representative of CCMS and a representative of the Western Education and Library Board (the WELB).
- This consultative meeting is to include consultation about the future provision of suitable education.

[5] The Schools (Expulsion of Pupils) (Appeal Tribunals) Regulations (NI) 1994 provide for the constitution of and procedures to be followed by Appeal Tribunals. Schedule 2 in dealing with procedure allows for representation at appeal hearings and for representations to be made both by the appellant and by the Board of Governors. They then provide as follows at paragraph 7:

"In considering the appeal, the appeal tribunal shall have regard in particular to –

(a) any representations made to it under paragraph 4 or 5;

(b) whether the procedures in relation to the expulsion of pupils from the school were properly followed; and

(c) the interests of other pupils and teachers in the school."

[6] The CCMS scheme, revised in May 2002, is detailed and specific, being more than 40 pages long. I highlight a number of its provisions:

- Section 1 sets out fundamental principles including the principle that "the expulsion of a pupil is the most serious disciplinary action that can be applied and in normal circumstances will be considered only after all reasonable courses of action have been explored".

- Section 3 which deals with suspension provides that suspension "is a severe sanction which can only be proposed where the pupil's behaviour is presenting serious difficulties to the school and where suspension is considered to be in the best interests of the school/pupil." It also provides that "there will be times when the principal has no alternative but to suspend or recommend the expulsion of a pupil."

- Section 6 which deals with suspension states at paragraph 6.2 that "schools that do not follow the procedures in the scheme are acting illegally …".

- Section 8 which sets out "some considerations before implementing the scheme for suspension and expulsion of pupils" states that it is good practice to do a number of things including "consider fully the circumstances which led to the behaviour and whether any effective alternative approach to suspension/expulsion is possible". It also suggests a number of factors which might impact on decision-making. These include the degree of severity of the behaviour and whether the incident was perpetrated by the pupil on his own or as part of a group. Paragraph 8.6 provides that "in normal circumstances suspension should only be considered after reasonable attempts have been made to modify the pupil's behaviour in the school."

- Section 10 which provides for expulsions states that a decision on whether or not to expel a pupil should only be made after "consultation has taken place between the principal, parent/guardian of the pupil, the chairperson of the Board of Governors of the school….., a duly authorised officer of CCMS and a duly authorised representative of the relevant Education and Library Board. These consultations shall include consideration of the future provision of suitable education for the pupil concerned …"

- Section 11 which deals with procedures for considering future education provision then states that there is to be a consultative meeting which "shall consider the future provision of suitable education for the pupil concerned together with the possibility of expulsion from the school." That provision also gives very specific guidance to schools and to parents/guardians about what is involved in these consultative meetings.

- Section 13 provides that expulsions usually occur for one of two reasons – a single major incident involving gross misconduct or a "last resort" where the school has taken all reasonable steps to avoid expelling a pupil.

- Section 14 which provides that where a single major incident occurs, the pupil is suspended and a consultative meeting and a meeting of the Board of Governors "must be arranged as soon as is practicably possible." It goes on to provide that detailed records of events leading to the suspension or expulsion must be kept. This includes keeping a log of incidents including details of how the school responded and "where possible obtain first-hand accounts from pupils and witnesses. All such statements must be signed, dated and witnessed by a teacher. These statements should normally be made available to the parent/guardian at the consultative meeting."

Background

[7] There has been some dispute on the documents and affidavits as to the relevant facts surrounding the events on 13 March 2013 and what followed afterwards. My findings will be set out in the following paragraphs. There was however no dispute about the fact that the applicant (FR) has special educational needs due to learning difficulties as a result of which a statement of his needs was made by the WELB in 2010. This showed that at the age of 11½ he was 3-4 years behind the normal expected level of attainment for a boy of that age. In addition he was diagnosed with ADHD and Social Emotional and Behaviour Difficulty (SEBD). The school had provided various levels of support for him in terms of literacy and social skills. He was also referred to a behavioural support team and to "Action for children". Some of these problems were tied in with abuse which he had suffered outside the family some years previously. The ADHD was treated with medication which started in November 2011, 16 months before the relevant events. While the school had clearly provided supports, the father was critical in various submissions of the extent to which this had been done. In particular he complained that while educational support had been provided, behavioural support had not been. It is fairer to say that some such support had been given rather than none at all.

[8] FR's conduct in school was more than troublesome. He was suspended in January 2010, three times in 2011 and again in January 2012. There were extensive records of indiscipline from November 2009 to March 2013 showing aggression, disruption and a general disregard for teachers and fellow pupils. It was submitted by Mr Hutton that his behaviours had improved since his medication started in November 2011 but the evidence to support that proposition was limited.

[9] On 13 March 2013 as an afternoon class was coming to an end an incident took place involving FR and another boy, E. What exactly happened and how it started was not entirely clear. In itself that is not unexpected since there is so often a dispute about who hit who first and what happened next. What is clear is that the end result was that while FR was uninjured E was bleeding from his mouth and nose

and that his nose was broken. The incident was reported to the principal, Mr Jackson-Ware, who contacted E's parents. E was taken to hospital. When the father arrived to collect FR at the end of the school day, as he normally did, he was met by the principal who took him and FR to his office.

[10] There was a dispute about what happened during that meeting. It was alleged by the father that the principal said that FR was going to be expelled and that he was told that FR would be suspended for 10 days despite the fact that he was not given any opportunity to explain his side of the story. In fact it is clear that FR was invited to say what happened because Ms McDaid, a senior teacher who was present, made a note the following day of what had been said. This note showed that FR had given two rather different versions of what had happened with the second one being that he had punched E's arm just "messing", that E had hit him back and that the fight broke out. The note continues:

> "Mr Jackson-Ware pointed out that FR had been involved in so many incidents and that this was the most serious of all. The father agreed that FR had been in the office too many times and had been given many chances to redeem himself."

[11] This significant note was not discovered until its absence was noted by the Tribunal after its hearing on 20 June 2013. When the Tribunal sought that note it was traced and was sent to the solicitors for the family at whose request the hearing was reconvened. At that point the father, with legal representation, challenged only an earlier paragraph which read:

> "The father was very annoyed with FR and said during the meeting that FR had brought all this on himself, that he had been given so many chances, but did not take them."

The father did not challenge the paragraph cited at paragraph [10] above.

[12] Taking the note as substantially accurate, I accept that FR had every opportunity to explain his side of the story, that his father acknowledged his unacceptable record and that the suspension was not controversial but rather inevitable. It is correct to say that the principal had not by that stage gathered any written statements from others who saw what happened but he had spoken to E and the class teacher Miss Sproule. Her account was that she saw the fight after it had started, that both boys were throwing punches and that she saw one punch by FR land on E's face. It appears that the fighting stopped when she intervened.

[13] The father's allegations that he was told that FR would be suspended for 10 days is supported by the fact that after the meeting a letter to that effect was sent by the principal. That letter was irregular because the maximum permissible period for

an initial suspension is 5 days. It was suggested by Mr Hutton on behalf of the applicant that the fact that such a letter was sent establishes that the father's recollection of the meeting is accurate and that the principal had predetermined expulsion from the very start. I do not accept that any such conclusion can be drawn and I do not find that Mr Jackson-Ware said the words about expulsion attributed to him by the father.

[14] In the event the irregular 10 day suspension was corrected immediately and a second letter setting out an appropriate 5 day suspension was sent the same day. No issue is taken by the applicant on that point. However, the applicant contends that in the absence of written statements on 13 March from any witness and in the absence of any satisfactory investigation of what exactly had happened the suspension was unlawful as were its subsequent extensions. Written statements were taken from Miss Sproule the teacher and from other students in the following days. They were made available to the father at the consultative meeting on 16 April as required by the scheme at Section 14.2.

[15] The initial suspension on 13 March was renewed at regular intervals until the consultative meeting and then until the meeting on 30 April at which the Board of Governors decided to expel FR. No challenge is made to those ongoing suspensions save that it is contended that if the initial decision to suspend was wrong and unlawful because of failures to comply with scheme, the ongoing suspensions must also be unlawful.

[16] The father was advised of the consultative meeting to be held on 16 April by a letter dated 20 March from the principal. He was informed that the meeting had been convened to consider the future provision of suitable education for FR and that the meeting "may also consider the possibility of expulsion …". Attached to the letter was a copy of the guidance notes set out at appendix 7 of the CCMS scheme. The father would have seen from them who was to attend and that he was free to raise any points he considered important. He would also have seen that it was crucial that he did so. The document included examples of possible outcomes such as a return to school, a return to school on a discipline contract and other options up and including expulsion.

[17] It is agreed that the father and FR attended the consultative meeting on 16 April. Others present included the principal, the chairman of the Board of the Governors (Mr C McGettigan) and representatives of the WELB and CCMS. Mrs Deirdre Quinn the school's learning support co-ordinator was also there. The minutes state that the father described her as the only teacher who had been fair to FR. The principal took those present through a list of incidents in which FR had been involved since 2009. I am satisfied that like others present the father had this very long list in front of him. In fact he is recorded as having intervened to make points on four occasions. When they reached the 13 March 2013 incident the minutes record that the father asked the Principal to read a statement from another pupil "a second time". I conclude that this shows the father's ability and willingness

to intervene in the meeting if he wanted to do so. FR then gave his version of what had happened that day in which he explained that E had hit him first so he hit E "about 4 times hard".

[18] The minutes continue with various references being made, by the father amongst others, to the supports which had been put in place for FR including medication, a learning assistant and behavioural support. There was discussion about whether FR could attend a skills training centre while he was suspended. The minutes then continued:

> "FR enquired as to what was going to happen to him, as he was bored here.
>
> The father indicated that he would take FR out of school in September, adding that he agreed that FR's behaviour was outrageous but since he went on to medication his behaviour was not as bad.
>
> The father was asked if he was happy with the level of support given to FR and replied that he had tried for years to get something done about FR's behaviour and it was only in the last few months that the WELB did anything and felt that it would be harsh to expel him."

[19] Notes were also made by Miss Arlene Wright who was present on behalf of the WELB where she was a senior educational welfare officer. Her notes largely mirror those of the school but they include one detail about FR's option as follows:

> "Could apply to other schools – EIC [Erne Integrated College]/Dev College [Devenish College]/St Marys)."

I take this note to establish that there had been a discussion about what other schools or colleges FR could apply to in order to continue his education.

[20] Mr McGettigan's notes on the pro-forma issued under Appendix 10 of the CCMS Scheme state only the following:

> "Details of future educational provisions (summary of discussions):
>
> Considerations set out as per para 4 of the agenda."

This is a reference back to a pro-forma agenda provided as part of the scheme which includes "return to school", discipline contract, "outreach and/or counselling services to support a phased return" etc.

[21] In an affidavit sworn for these proceedings Mr Ciaran McKenna who represented CCMS at the meeting averred that he recalled a discussion about options in the locality if the father wanted to consider sending FR to another CCMS school in the event of a decision to expel him. This note broadly tallies with Miss Wright's notes but confirms to me that there was no discussion about which options short of expulsion might or might not work. I do not accept that such discussions are implicit in the records of the exchanges.

[22] There was an issue between the parties about whether the meeting was fair to the extent that the father only saw documents including witness statements and the school's records of FR's misconduct and the support which had been provided for him over a number of years at the meeting. I accept that this information was only provided to him in writing at the meeting and that he was not allowed to take these documents away. That is consistent with the scheme which does not require more than that to be done given the limited purpose of the consultative meeting. I do not regard it as unfair that the documents were not provided in advance or that he was not allowed to keep them any longer than the duration of the meeting.

[23] On 17 April Mr McGettigan wrote to the father to advise that following the previous evening's consultative meeting he had decided to recommend FR's expulsion to the full Board of Governors. This led to a meeting of the Governors on 30 April, attended by the father. Documents had been made available to the father the day before that meeting. He himself presented a written submission of just over two pages on his son's behalf. In that document he set out FR's version of events, he complained that FR was not asked for his account on 13 March (which in fact he was), he set FR's behaviour in context, he referred to the limited level of support which FR had received and he complained that the decision to expel had been pre-determined by the principal on day one with the process then being adapted to suit that outcome.

[24] The Principal recommended to the Governors that FR be expelled due to "the accumulation of serious incidents and behaviours" throughout his time at the college, culminating in the major incident on 13 March 2013. The minutes record points being made backwards and forwards between Mr McGettigan and the father with some dispute about the level of support which the school had provided over the years. After the father left the meeting, Mr McGettigan made a statement which was criticised in this hearing by Mr Hutton. That statement as recorded in the minutes was:

> "Mr McGettigan referred to FR's medication prescribed in 2010 and the 48 red flag comments received since then, indicating that the medication had not made a huge difference although the number of violent incidents had been reduced by a small amount."

On the evidence I accept that the medication was not in fact prescribed until late in 2011 and not in 2010 as suggested by Mr McGettigan. I also accept that there had not been 48 red flag incidents since the medication was prescribed. However, the reduction in the rate of adverse incidents after November 2011 was limited.

[25] The Governors decided unanimously to expel FR. Before doing so they were advised by the principal that if he was expelled it would be the responsibility of the WELB to make alternative arrangements for him. Mr McGettigan also made the entirely legitimate point that all other students in the school had to be considered.

[26] The appeal against expulsion was heard by the Tribunal on 21 June 2013. The Tribunal was chaired by Mr Peter Duffy and was attended by the father accompanied by his solicitor. It is apparent that a major issue developed as to whether the principal had asked FR for his version of events prior to suspending him on 13 March or at any time prior to the consultative meeting on 16 April. Had he not done so, a significant failure in the procedure and in basic standards of fairness might have been exposed. It was when the tribunal was going through the papers after the appeal hearing that it identified the fact of the missing note to which I have already referred at paragraph 10 above. When they called for and received the record made by Ms McDaid they agreed to reconvene the appeal hearing and to have Ms McDaid attend. At the reconvened hearing on 5 September 2013 she was questioned by the father's solicitor about her role. The solicitor and the father are then recorded as accepting "that FR had been given an opportunity to give his account of the incident" on 13 March. The only dispute about the contents was as recorded at paragraphs 10 and 11 above. I do not believe that Ms McDaid got the disputed part of the note wrong. On the contrary, I believe that it is entirely probable that the father did express his frustration with FR's conduct and that he accepted that FR "had been given so many chances but did not take them".

[27] The tribunal concluded its analysis of the appeal and set out its reasoning in a letter dated 9 September 2013 which concluded as follows:

> "The tribunal accepted that Mr Jackson and his staff in the college had implemented strategies and introduced procedures for FR which they had hoped would assist him and that his behaviour would improve.
>
> Some examples of these strategies and procedures were: he had continual support from the special education behaviour disorders; at the end of year 9 he had help from the behavioural support team and he was referred to Action for Children and received support from Emma Donnelly, one hour per week for six weeks.
>
> Therefore, on the basis of all the evidence presented, both oral and written and in the health and welfare interests of

other pupils and staff in the college and of FR himself, the tribunal concluded that the decision to expel FR was a correct one."

[28] Mr Hutton criticised the second of these three paragraphs as painting an inaccurate picture of the support which the school had provided for FR. Mr Duffy's affidavit contains his response to that proposition in that he accepts that in trying to summarise what the school had done they made an error but the analysis was broadly correct. I accept Mr Duffy's contentions. The summary is imperfect but not fundamentally wrong in any way.

[29] The tribunal is entitled to significant credit for its detailed consideration and review of the decision to expel FR. It clearly approached its task conscientiously and fairly, especially by reconvening after the summer to explore the sequence of events on 13 March. That still leaves however one issue for it to address. Part of its function as set out in Regulation 7(b) of the 1994 Regulations was to have regard to "whether the procedures in relation to the expulsion of pupils from the school were properly followed …". Obviously it did so to the extent that it explored what happened on the meeting on 13 March. It did not however identify the fact that at the consultative meeting on 16 April there was no discussion about sanctions or steps short of expulsion and provided for in the scheme. Mr McLaughlin suggested that this was somehow implicit in its minutes and in Mr Duffy's affidavit. I reject that contention – I conclude that the tribunal missed the gap in compliance with the procedure at the consultative stage. I further conclude that this was an issue which was not raised before the tribunal and was not identified by the father or by his solicitor in advance of or at the appeal hearing.

Submissions

[30] In addition to the issues which have already been referred to above, Mr Hutton advanced the following arguments:

(i) That as a principle of fairness and in order to meet the demands of the statutory scheme the principal was obliged on 13 March to take written statements from the teacher, from other pupils and from FR himself, and then to share all of them with FR and the father before reaching any decision to suspend.

(ii) That in the absence of these written and signed statements the suspension was ultra vires as were the renewals of the suspension which followed.

(iii) That FR did not physically assault E as required by the school's own discipline code but was instead involved in a fight with E which is not contrary to the school's code.

(iv) That the requisite standard of proof in a case such as this is proof beyond a reasonable doubt, not proof on the balance of probabilities.

(v) That alternatives to and short of expulsion were not considered as a part of the consultative process.

(vi) That since the expulsion was based on both the history of serious incidents and a final major incident, the applicant's claim must succeed if he is able to disprove either of those propositions.

(vii) That at no time did the principal or the governors establish to any acceptable standard what happened on 13 March in terms of who the aggressor was, whether FR acted in self-defence and whether FR was guilty only of over-reacting after he had been assaulted.

(viii) That the tribunal failed to identify these failings, failed to consider it as self-defence and got basic facts wrong apart entirely from the consultative process deficiency.

[31] For the Principal and Board of Governors, Mr McQueen submitted:

(i) The long list of misconduct on FR's part is relevant as are the prolonged efforts of the school and others to support and assist him.

(ii) The standard of proof is on the balance of probabilities, not beyond reasonable doubt.

(iii) There was an adequate investigation on 13 March and that nowhere does the scheme require schools to obtain signed and written statements prior to suspension.

(iv) In any event FR admitted at the consultative meeting on 16 April that he "hit E about four times hard".

(v) On any view the over-reaction by FR, breaking E's nose while he was uninjured, shows sufficient violence to amount to assault.

(vi) The consultative meeting should be taken to have considered future education provision other than expulsion in a sense that the history showed what steps had been taken in the past and how ineffective these had turned out to be.

(vii) The School Discipline Code sets out a non-exhaustive list of misconduct within which this final act by FR sits in that it was clearly serious indiscipline, which, when added to his history, points inevitably to expulsion.

[32] For the Tribunal Mr McLaughlin submitted:

(i) The tribunal's obligation was only to have regard to whether the procedures were properly followed. It does not follow that it had to quash a decision which came after any deficit at the consultative stage (though no deficit was accepted).

(ii) The tribunal's only two options are to allow the appeal and order re-admission or dismiss the appeal. The failure at the consultative stage was of limited consequence in the context of the circumstances of this stage and was not even raised at the appeal when the father had the benefit of legal representation.

(iii) Since any unfairness at the suspension or expulsion stage can be cured at the appeal stage, it would clearly be wrong to decide that a failing at the consultative stage which was not even identified at the appeal stage must inevitably lead to the decision to expel being quashed.

(iv) The appropriate standard of proof is proof on the balance of probabilities.

(v) On any of FR's version of events, his conduct on 13 March and his response to E was excessive and could not amount only to self-defence, even taking account of his limitations and problems.

(vi) This fact, taken with his long and unhappy history in the school, made it fair for the governors to expel him and for the tribunal to dismiss his appeal.

(vii) The fact that there was legal representation on behalf of the family at the appeal and that specific issues were advanced at that hearing reduced any obligation on the tribunal to be pro-active in considering each procedural aspect of the earlier process.

Discussion

[33] On the question of standard of proof, the applicant's proposition that the relevant standard is proof beyond a reasonable doubt rests on the finding of the Court of Appeal in England and Wales in *The Queen (On the application of S) v the Governing Body of YP School* [2003] EWCA Civ 1306. That finding was itself based on a concession made by school governors who had applied a balance of probabilities test when a boy was suspended for stealing a guitar. The court accepted that concession by reference to the decision of the House of Lords in *R (McCann) v Manchester Crown Court* [2003] 1 AC 787. A number of points need to be made:

(i) The McCann decision was to the effect that since anti-social behaviour orders may have penal consequences if they are breached, the appropriate standard

of proof to be achieved before an ASBO is made is proof beyond a reasonable doubt. There are no penal consequences in suspension/expulsion cases.

(ii) Since *Re S* and *McCann* the Supreme Court has made it clear that there is no longer any intermediate standard of proof lying somewhere between balance of probabilities and proof beyond a reasonable doubt – see *Re B* (Children) (Care Proceedings: Standard of Proof) [2009] AC 11.

(iii) The House of Lords decided in *Re CD* [2008] NI 292 that in a case involving the revocation of the licence of a convicted prisoner the appropriate standard of proof to be applied by the Life Sentence Commissioners was the balance of probabilities, even though the liberty of the individual was involved.

(iv) Subsequently the High Court in England and Wales in *Re LG* [2010] EWCA Civ 1306 has declined to follow *Re S* and has instead applied the balance of probabilities in a school expulsion case.

[34] I have no doubt that the appropriate standard of proof in any case involving the suspension or expulsion of children from schools is the balance of probabilities. While the issues involved are serious, there is no basis for following the line taken by the Court of Appeal in England and Wales in *Re S*. I accordingly, reject the applicant's contention on this issue.

[35] I conclude that the procedures followed by the school in this case were detailed and fair and satisfied the considerable requirements of the CCMS Scheme save in one respect. There was a failure at the consultative meeting on 16 April to consider options short of dismissal. My finding is based on the absence of any reference to this issue in the school's minutes, in Ms Wright's notes and in any affidavit. This failure is significant. FR was not expelled because of a single major incident but rather as a last resort where the school considered that it had taken all reasonable steps to avoid expelling him. The Scheme makes it clear that expulsion can only be considered "after all reasonable courses of action have been explored". That must be especially the case when the pupil is as limited and troubled as FR, even if he himself caused so much trouble to others. I am entirely satisfied that considerable efforts had been made to support and help FR. It may well have been that an entirely reasonable view was formed that he had to be expelled but the Scheme requires some expression of alternatives to expulsion and why they are not sufficient.

[36] If the applicant's case is correct, that finding alone is enough to have the decisions of the Board and Governors and tribunal quashed because an unfair procedure was followed. Indeed, Mr Hutton submitted that even if this issue had been raised at the Tribunal hearing it would have led, and could only have led, to a direction to the school to re-admit FR pursuant to Article 49(8)(a) of the 1986 Order. That is so, he submitted, because that failure was incapable of being corrected by the tribunal. The fact that the tribunal itself missed the decision must lead, he

submitted, to its decision too being quashed. I do not accept the extent of that submission. If it is correct a tribunal which identifies a procedural failing of any significance can only allow the appeal and cannot cure it. That suggestion goes much too far.

[37] In emphasising the importance of adhering to fair procedures Mr Hutton relied in part on decisions such as those in Girvan LJ in *Re M* [2004] NIQB 6 and Coghlin LJ in *Re Kean's Application* [1997] NIJB 109. These are examples of procedural unfairness which led to the quashing of suspensions but the question is whether and how they impact on the present case. I do not accept in this case that the investigation on 13 March or subsequently was flawed in any significant way. On the contrary the inconsistent versions advanced by FR himself on 13 March, and varied again later, are an entirely reasonable premise for concluding that his conduct towards E was entirely unacceptable. Worse than that, it came against a long disruptive history of unacceptable challenging behaviour.

[38] The respondents have relied on a decision of the Court of Appeal in England and Wales in *Re DR* [2002] EWCA Civ 1827. This decision involves two cases about the expulsion of pupils, one for firing pellets from a gun at a fellow pupil and the other for an indecent assault on a fellow pupil. As appears from paragraph 4 of the judgment of Simon Brown LJ the issued raised was as follows:

> "Both appeals have been heard together since both raise the same question of principle, a question of some general importance. There are various ways of formulating it. Postulate unfairness in the proceedings before the governing body or (perhaps, the Head Teacher) but a fair hearing before the IAP. Is the earlier unfairness 'cured' on appeal? Or, to put it differently will the court on a subsequent judicial review challenge quash a fair appeal hearing as well as the previous unfair determination so as to ensure that the pupil obtains a fair decision at each stage of the process? …"

[39] These cases were obviously considered against the statutory framework which applies in England and Wales. That is similar but not identical to the one in this jurisdiction. Appeals against expulsion are heard by an Independent Appeal Tribunal (IAP) similar to the one which exists here. The governing bodies and IAP are obliged by statute to "have regard to any guidance given from time to time by the Secretary of State". This is an equivalent of the CCMS Scheme. That guidance is found in a circular which includes the following:

> "If, when they review an exclusion, the discipline committee or the independent appeal panel consider that the guidance in this section and Annex D was not followed, they should normally direct re-instatement."

[40] The court's conclusion on the issue which it identified is found at paragraph 37 of the judgment:

> "The true position is this: the court's task in cases like the present is to examine and construe the statutory scheme as a whole so as to discern from it Parliament's intention. The effect of the 1998 Act is to establish, in contested cases of permanent exclusion, a three stage procedure: decisions successively by the head teacher, the governing body and the IAP (although the first two stages can sensibly be regarded as a single process given that any case of permanent exclusion is automatically referred to the governing body). Plainly Parliament did not intend either hearing (or, indeed, the head teacher's initial decision) to be unfair. But that is by no means to say that Parliament intended a pupil aggrieved by the head teacher's or governing body's decision then to invoke the court's supervisory jurisdiction rather than proceed to appeal. It is, on the contrary, clear that Parliament intended the aggrieved pupil to seek his remedy before the IAP. In one sense, of course, he then obtains no redress for the earlier unfairness, but what he does obtain is a fresh and fair decision on the merits of the case by a statutory body custom built for the purpose. The IAP is a tribunal entirely independent of the head teacher and the governing body. It has expertise in the matter of school discipline – is, indeed, trained for the purpose … . It entertains the appeal on a de novo basis to the extent of hearing all the evidence for itself. It enjoys full powers such as to enable it to make a final decision to re-instate which is then binding on all parties. And it operates within an appropriately tight timetable."

[41] That decision has been considered and approved by Horner J in *Re NM* [2014] NIQB 10. In that case leave to apply for judicial review was refused because it was "pointless" given the hearing which had taken place before the Appeal Tribunal.

[42] On this basis, the respondents submitted that the careful extended hearing conduct by the Tribunal, chaired by Mr Duffy, should be taken as having cured any deficiencies earlier in the process, including any deficiency at the consultative meeting stage despite the fact that this deficiency was not recognised by the father or his solicitor or the tribunal itself. It is likely that there are some cases where that would be so but I do not accept that contention when the issue which was not addressed in any way was whether some step short of expulsion along the lines set out in the Scheme would have been appropriate in this case. I conclude that the

failure to follow this aspect of the Scheme is so significant that it could not be remedied by implication or inference by a Tribunal which did not itself identify the point or have it drawn to its attention.

[43] I have therefore concluded that there was a deficiency of significance in the way in which the Scheme was followed by the principal and the chairman of the Board of Governors at the consultative meeting on 16 April. That deficiency was not corrected or cured at the meeting on 30 April conducted by the full Board of Governors nor was it corrected or cured by the Tribunal when it considered the appeal in June and September 2013. For this reason, and only for this reason, I make the following findings:

(i) I declare that the failure of the principal and chairman of the Board of Governors at the consultative meeting on 16 April 2013 to consider alternative measures short of expulsion was contrary to the requirements of the statutory scheme.

(ii) I further declare that the tribunal failed to have regard to the fact that the Scheme was not properly followed and was therefore in breach of its obligations under paragraph 7(b) of Schedule 2 of the 1994 Regulations.

(iii) I make an Order of Certiorari to quash the expulsion of FR from St Joseph's College, Enniskillen.

[44] No application for an order for mandamus has been made on behalf of the applicant so I make no further order. If the application had been to order FR's readmission to the school I would have ordered the Tribunal to reconsider the appeal, taking account of the procedural failing and reach whatever decision seemed to it to be appropriate. I do not accept that the only course open to it would have been to allow the appeal and direct readmission to the school.