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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 THE BOARD OF GOVERNORS OF COLERAINE GRAMMAR SCHOOL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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McCLOSKEY J

Introduction

[1] The Board of Governors of Coleraine Grammar School (hereinafter the "*Board*") challenges a decision of the Expulsion Appeal Tribunal (the "*Tribunal*") dated 31 August 2017, allowing the appeal of a pupil of the school against an expulsion decision of the Board.

Preliminaries

[2] The preliminary issues are the following:

(a) The pupil is permitted to participate in these proceedings as an interested party.

(b) The affidavit evidence of the Tribunal is confined to the contemporaneous notes and records pertaining to the appeal hearing and relevant surrounding written communications.

(c) I grant the pupil concerned the benefit of anonymity. This means that there will be no publication of anything which either identifies or could have the effect of identifying the pupil.

(d) These proceedings have not been initiated promptly (CF RSC Order 53, Rule 4). I shall address this issue *infra*.

The Challenge

[3] The pupil concerned is a male aged 15 years. His status was that of suspended pupil from 25 April 2017 until the expulsion decision on 27 May 2017. The impetus for both decisions was the communication of information by the police to the school that the pupil, on 06 April 2017, had been arrested in a public place –

> "*… on suspicion of attempting to purchase a submachine gun and 100 rounds of live ammunition, was charged with the offence of attempting to possess a firearm and ammunition with intent to endanger life the following day, 07 April 2017, and, on 08 April 2017, was granted bail. Following this, on 27 April 2017 he was interviewed in respect of the suspected offences of making, possessing or controlling an explosive substance with intent to cause an explosion likely to endanger life and attempted possession of Class A and B controlled drugs, each of which is the subject of a report to the Public Prosecution Service for Northern Ireland.*"

All of this information is collated in a letter dated 04 May 2017 from a Detective Sergeant to the school's Vice Principal, which includes the following passage:

> "*Police are very conscious that* [the pupil] *is entitled to the presumption of innocence and therefore wish to avoid saying anything which could potentially prejudice his right to a fair trial …. The following information has been supplied for risk management purposes only.*"

[4] Duly armed with this information, the further enquiries conducted by the Board were essentially confined to the questioning of and reception of oral evidence from the pupil, his father and a Youth Justice Agency representative at a meeting of the Board on 09 May 2017. I have considered the record of this meeting. Its full context takes colour from the unchallenged averments in the affidavit of the school's Headmaster that the pupil had previously engaged in two episodes of high risk behaviour and was the subject of a specially tailored behaviour contract at the material time. The evidence further indicates that the pupil and his parents had been engaging voluntarily with Educational Psychology and the Youth Justice Agency. The purpose of this engagement was to identify and address the pupil's demonstrated tendency to impulsive, high risk behaviour.

[5] The Board's expulsion decision was communicated in a letter dated 26 May 2017 in the following terms:

> "[The pupil] *has a clear history of periodic high risk behaviour which has put himself and others at risk, namely when he brought a knife into school, set fire to an aerosol on a bus and sold fireworks in school …*
>
> *He has also shown a demonstrable inability to conform with school rules and a personal behaviour contract ….*
>
> *This inability is demonstrated by further evidence the Board received that* [the pupil] *was prepared to become involved in high risk behaviour on 06 April 2017 (namely to engage in activity that could be perceived as him wishing to purchase ammunition and a firearm), which had the potential to place himself and others at high risk ….*
>
> *Following the fireworks incident, in April 2016,* [the pupil] *wrote a letter of apology and reassurance regarding his behaviour. His recent high risk behaviour has demonstrated* [his] *inability to maintain the commitments he made in this letter.*"

[6] In allowing the appeal against the expulsion decision the Tribunal, in its decision dated 31 August 2017, stated *inter alia*:

> "*The Tribunal examined carefully the procedures followed in relation to the suspension and expulsion …. and considered that the procedures had been correctly followed …*
>
> *As far as the criminal law is concerned there is a presumption of innocence in relation to* [the] *incident ….*
>
> *Given that there is a presumption of innocence and the PSNI investigation is not complete, the Tribunal is of the view that the circumstances of this incident should not have been referred to in the letter expelling* [the pupil] *and should have been disregarded for the purposes of the current expulsion proceedings.*"

This was, by some measure, the central theme of the Tribunal's decision.

[7] Both the Board and the Tribunal had available to them the formal "Youth Justice Agency Assessment". This measured the risk of the pupil re-offending as 5 out of a possible maximum score of 60 and, in words, as

"*low*", with an emphasis on excluding from consideration the unproven charges of criminal conduct arising out of the episode on 06 April 2017.

[8] While I have considered all of the documentary evidence assembled, I have confined myself to its key aspects above, taking into account in particular that this judgment is being pronounced *ex tempore* in a context where immediate judicial adjudication is required.

Consideration and Conclusions

[9] I have concluded that the Board's challenge to the decision of the Tribunal must be dismissed. Before explaining why, I consider it appropriate to highlight certain considerations. First, it is demonstrably clear that the Board members acted conscientiously, giving anxious consideration to the various facts and factors making up the equation of the decision to be made. Second, the decision was clearly the product of a difficult and delicate balancing exercise. Third, the Board found itself operating in something of a legal minefield. While it acquitted itself admirably in the discharge of one of the key duties in play, namely the requirement of a procedurally fair and transparent decision making process, the error of law which, in my judgement, it committed related to one of the more subtle, complex legal duties in play.

[10] In Re Lappin's Application (unreported, 15 March 2006), which involved an expulsion decision based on the alleged indecent assault of a teacher by the pupil concerned, Girvan J formulated the following three principles, at p 4:

> "*First, those conducting the enquiry have to decide what critical issues of fact they should resolve and what enquiries could reasonably be made to resolve those issues; secondly, they must give careful and even-handed consideration to all the available evidence in relation to those issues; and thirdly, those conducting an enquiry do not need on every occasion to carry out search and enquiries involving the calling of …….. oral evidence.*"

The duty of careful enquiry into the underlying facts and the corresponding duty to resolve key contentious factual issues are also clearly identifiable in R v London Borough of Camden and Governors of the Hampstead School, ex parte H [1996] ELR 360 at pages 10 and 12 especially and R v Roman Catholic Schools, ex parte S [1998] ELR 304. While the decision of the Supreme Court in Re JR 17 [2017] UKSC 27 was also ventilated in argument, it was primarily concerned with the legal status and effect of statutory school suspension schemes and demonstrated breaches of the scheme under scrutiny

and does not, in my view, inform the consideration of the legal duties lying at the heart of this case.

[11] While in the decided cases the critical duties imposed upon the Board in the present case have been couched mainly in the terms of fair procedure and due process, in common with many public law duties they may also be viewed through the prisms of the duty of enquiry, the duty to take all material facts and factors into consideration and the duty to disregard the immaterial.

[12] Ultimately the key factor which motivated the Board's expulsion decision was the information supplied by the police relating to the alleged incident on 06 April 2017. The correct analysis in law is that the pupil faced allegations of criminal conduct arising out of this alleged incident. Furthermore, the pupil was presumptively innocent of any criminal offence. I am satisfied that the Board was alert to this juridical prism. However, the inescapable reality is that the information supplied by the police was couched in bare, unparticularised and unsubstantiated terms, unsupported by any evidence. The duty imposed on the Board in these circumstances was to conduct such enquiry into the allegations as it reasonably could and to make findings to the best of its ability. All critical contentious issues of fact had to be resolved. It is here that the Board fell into error of law. As a minimum, the information provided by the police should have been the subject of a probing response and a request for the provision of such evidence as could be disclosed. However, these steps, neither of them onerous, were not taken. The critical consequence of the deficiencies in the Board's enquiry and deliberations was a failure to resolve the key contentious factual issues. I am satisfied that, in substance, this is the failing which was diagnosed by the Tribunal in allowing the pupil's appeal.

[13] I incline to agree with Mr McLaughlin that one permissible way of analysing the Board's failures to discharge the duties in question is that this led to the Board being actuated by a consideration, namely the underlying allegations against the pupil, which as a matter of law was immaterial.

[14] I acknowledge that the task and corresponding legal duties devolving on the Board in this particular case were challenging and complex mainly by reason of the alleged behaviour having taken place in a non-school context and outside the school premises and given the reticence and deference which the dominant police involvement must have generated. This presented the Board with a difficult and challenging task and the sympathies of the court are engaged in consequence.

[15] Having adopted the "rolled up" mechanism to ensure the swift and expeditious disposal of this challenge, I am satisfied that the threshold of arguability is overcome and, accordingly, leave to apply for judicial review is

granted. However, the application must be dismissed (a) for the reasons set forth above and (b) on the further ground of delay. The judicial review papers were lodged in court 40 days after the Tribunal's decision. I have considered the explanation proffered by affidavit for not acting sooner. In brief compass the Board engaged in deliberations, sought legal advice and then deferred a final decision on proceedings until its annual general meeting had taken place. The Board was certainly not inert or inattentive during the 40 day period. However, the reality is that the requirement of promptitude in a case of this kind means that absent some compelling explanation or justification the court will normally expect proceedings to be initiated within a period of approximately two to three weeks maximum dating from the decision under challenge. The reasons why speed and finality are so important in cases of this *genre* require no elaboration. There is simply too much at stake for both the pupil concerned and the school as a whole to countenance dilatory resort to legal action.

Order

[16] This has the following components:

(i) Leave to apply for judicial review is granted.

(ii) The application for judicial review is dismissed.

(iii) The Applicant (Board) and Respondent (Tribunal) will bear their legal costs and outlays respectively, no application for costs having been made by the former against the latter.

(iv) I refuse the interested party's application for costs against the Board. While fairness required that the court afford the pupil the status of interested party, this did not necessarily have to result in legal costs being incurred and it is no answer to point out that, by agreement with the Respondent, the issue of delay was addressed in the submissions of Ms Gillen (of counsel) on behalf of the pupil. The fact sensitive costs order made in Re Turkington's Application [2014] NIQB 58 does not assist the interested party's quest for an order for costs against the Applicant. The starting point is that a costs order of this nature will not normally be made. While I take into account that the court is not making an order for costs in favour of the Respondent against the Applicant this does not, in my view, tip the balance in favour of the interested party securing such an order. Ultimately, both the Respondent and the interested party shared the same core interest, namely that of upholding the Tribunal's decision. This did not require double representation and while Ms Gillen's submissions on certain other purely

factual issues relating to the pupil's circumstances were informative, they were some way removed from the centre ground of the litigation. I exercise my discretion by declining to make an order for costs in favour of the interested party against the Applicant.

(v) The costs of the interested party will be taxed as an assisted person.

(vi) Liberty to apply.