Neutral Citation No: [2019] NIQB 107 | *Ref:* **HUD11075**

Judgment: approved by the Court for handing down | *Delivered:* **20/12/2019**
(subject to editorial corrections)*

No. 19/46348/01

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 ELM BY HER MOTHER AND NEXT FRIEND LM FOR JUDICIAL REVIEW

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HUDDLESTON J

Introduction

[1] This is a challenge by ELM ("the Applicant") to the legality of the decision taken by the Education Authority's Expulsion Committee ("the Committee") on 6 March 2019 not to expel a male pupil, anonymised as HD, from the school in question ("the School").

[2] ELM and HD are both pupils at the School. ELM alleged that HD sexually assaulted her during a class on 20 December 2018 – an assault which HD subsequently admitted.

[3] The Board of Governors of the School convened a meeting on 11 February 2019 the outcome of which was a recommendation to the Expulsion Committee ("the Committee") of the Education Authority ("EA") that HD be expelled.

[4] The Committee hearing took place on 6 March 2019. The outcome of that hearing was that the Committee decided that HD should not be expelled. The Committee set out its decision in a letter dated 8 March 2019 which was sent to the School Principal. It is that decision ("the Impugned Decision") which is under challenge by the Applicant.

Relevant Statutory Framework and Legal Principles

[5] Article 49 of the Education and Libraries (NI) Order 1986 ("the 1986 Order") (as amended) provides as follows:

> *"Suspension and expulsion of pupils*

> *49(1) Each board shall prepare a scheme specifying the procedure to be followed in relation to the suspension and expulsion of pupils from controlled schools.*
> …
>
> *(4) The scheme prepared under paragraph (1) shall provide that a pupil may be expelled from a school* ***only by the expelling authority*** *and shall include provision for such other matters as may be prescribed."*

For the purposes of the Order the "*expelling authority*" is the Education Authority in the case of a controlled school.

[6] The Schools (Suspension and Expulsion of Pupils) Regulations (NI) 1995 ("the 1995 Regulations") set out (at Regulation 3) the matters for which provision should be made in schemes which are prepared under the 1986 Order. Pursuant to both Article 49 and Regulation 3 of the 1995 Regulations "The Scheme for Suspension and Expulsion of Pupils in Controlled Schools" ("the Scheme") was introduced. It is important to set out at this stage the more relevant parts of that Scheme – emphasis added in bold.

[7] Paragraph 5.2 of the Scheme provides that:

> *"In relation to controlled schools, the Education Authority is the expelling authority and the decision to expel rests* ***solely*** *with the Education Authority (EA)".*

[8] Paragraph 5.3 provides that:

> *"Controlled schools have the power, through their Board of Governors, to* ***recommend*** *to the EA that a pupil be expelled."*

[9] Paragraph 5.8 of the Scheme provides as follows:

> *"Expulsion should be used only in response to serious breaches of a school's discipline policy and only after a range of alternative strategies to resolve the pupil's disciplinary problems have been tried and proven to have failed and where allowing the pupil to remain in school would be seriously detrimental to the education or welfare of other pupils and staff, or of the pupil himself or herself. However, there may be circumstances where it is appropriate to expel a pupil for a first or 'one-off' offence. These might include serious actual or threatened violence against another pupil or a member of staff; sexual abuse or assault; supplying an illegal drug; or carrying an offensive weapon".*

It is thus acknowledged that in certain circumstances a single but grave incident may be sufficient grounds for immediate expulsion.

[10] Paragraph 7 of the Scheme sets out broadly the procedure which is to be followed by the Expulsion Committee. Paragraph 7.4 provides that where expulsion is being recommended *"the EA will require evidence that all appropriate procedures have been followed"*.

[11] Appendix 4 of the Scheme provides a checklist for Boards of Governors and Appendix 5 sets out the evidence to be considered in cases of potential expulsion. This list is as follows:

> *"**Whilst there will be core evidence to be considered for all pupils the Board of Governors and/or expelling authority should be mindful of the confidential nature of documentation available and its relevance to the individual case.***
>
> - *Detailed records of the pupil's behaviour including the steps taken by the school at each stage.*
> - *A record of the sanctions/strategies adopted to modify behaviour.*
> - *The minute of the consultative meeting.*
> - *Any records from schools previously attended by the pupil (where appropriate); correspondence with parent/guardian; correspondence with other relevant agencies; correspondence with the EA's Education Welfare Service, Education Psychology Service or other applicable EA services.*
> - *Copies of all relevant policies."*

[12] Paragraph 7.8 of the Scheme then provides that:

> *"As part of its deliberations on the case, the EA's Expulsion Committee will:*
>
> *i. Consider all relevant, verbal and written evidence;*
>
> *ii. Determine whether or not proper procedures have been followed;*
>
> *iii. Determine whether expulsion is or is not reasonable taking account of the circumstances of each individual case."*

[13] The court was also referred to a policy circular promulgated by the Department of Education specifically addressed to cases involving inappropriate sexual conduct. The Circular is entitled "Children Who Display Harmful Sexualised

Behaviour". This Circular ("the Circular") purports (as its introduction) to provide "*Guidance to schools and other educational settings on the identification and management of children and young people who display harmful sexualised behaviour with a view to [ensuring] that these children receive an appropriate intervention at an early stage*." It expressly includes as a member of the "Target Audience" to whom it is addressed both the EA and Boards of Governors plus others. Paragraph 13 of the Circular provides as follows:

> *"Whether a child is responsible for harmful sexualised behaviour, is a victim of sexual abuse, or both, it is important to apply principles that remain child centred. Harmful sexualised behaviour displayed by children must be recognised as damaging to* ***both the victim and the child who engages in the abusive behaviour****. A child who engages in abuse of this kind* ***may be suffering****, or be at risk of, significant harm and may be in need of protection …"* [Emphasis added]

[14] Paragraph 14 of the Circular then states that:

> "*In the balance of what is in the child's best interests the needs of the victim must be given priority; and nothing should be done which causes the victim further harm …"*

[15] As against that paragraph 16 provides that:

> *"It must also be borne in mind that harmful sexualised behaviour is primarily a child protection concern and should* ***not*** *be addressed through the school disciplinary procedure".*

Legal Argument

[16] It is against the context of the refusal to expel HD that this case comes before the court. The Applicant was represented by Philip Henry of counsel, the Respondent by Mrs Roisín McCartan BL, the School (as a Notice Party) by Ms Denise Kiley BL and HD (as another Notice Party) by Mr Donal Sayers of counsel. The Department, as a further Notice Party, were represented but did not take an active role in the hearing.

[17] I am indebted to each of counsel for their very helpful written and oral submissions.

Background Facts

[18] The Applicant in this case is 15 years of age and is taking these proceedings through her mother and next friend. She is currently a pupil at the School. On 20 December 2018 she alleged that a male pupil had sexually assaulted her during a class. That evening her mother contacted the Principal of the School and a meeting

was arranged for the following morning between the Principal, the pupil against whom the allegations were made and his mother. The male pupil was asked about the allegation and admitted the assault. The details of the sexual assault were, in summary, that the male pupil, HD, was sitting beside the Applicant during a geography lesson. He felt her bottom with one hand and put his other hand on her leg. He rubbed his hand on her upper leg touching her vagina. Initially the Applicant elbowed him in an attempt to get him to stop but as the assault progressed she froze. That, and another incident involving HD and the Applicant (which was only subsequently reported to PSNI) are now the subject of a police investigation. After HD was confronted and admitted the incident he was immediately suspended. The Principal discussed the matter with the Chair of the Board of Governors and they subsequently considered that expulsion was possible and sought the advice of the Education Authority. They were advised to arrange a Consultative Meeting between the parties which was arranged for 8 February 2019 in accordance with the Scheme. That meeting was attended by an officer from the Education Authority. HD and his mother were permitted to attend and to make representations on HD's behalf. The court has seen a copy of the minutes relating to the Consultative Meeting but nothing turns on those.

[19] There was a subsequent meeting of the Board of Governors, held on 11 February 2019, to which HD and his mother were also invited and permitted to make representations. The Board of Governors, having considered the evidence, including information about the Applicant and the impact the incident had on her wellbeing, decided to recommend expulsion. The matter was, therefore, in accordance with the statutory Scheme referred to the Education Authority and an Expulsion Committee convened to meet on 6 March 2019. As with the previous meetings, HD and his mother were invited to attend that Committee hearing and permitted to provide evidence and make representations. The School in adherence to the "checklist" referred to above (see paragraph [11]) had supplied the information which it held in relation to the incident and HD more generally. This included a background report on HD prepared by the School. The salient details of that report are as follows:

- In terms of his educational history he had been transferred from another school in Year 9 because of "*inappropriate behaviour and [the need] for a new start*".

- The reason for recommending expulsion was given as –

    - *"his general poor behaviour;*
    - *his sexual behaviour including … sexual assault of a girl in class making his position in [the School] untenable".*

- Under a heading of "General Behaviour" multiple incidents were quoted with a conclusion that "*From a school point of view, he is a high risk to have in the school*

as he has no boundaries, no limits and is not learning from his mistakes or the support given to him …".

[20] Within the report there is reference to a history of sexualised behaviour which occurred in the 18 month period leading up to the incident which triggered the recommendation to expel.

[21] Based on these incidents the Report concluded that, from the School's perspective, "*[HD] is viewed as a sexual predator*" and concluded that the Board of Governors "*[was] concerned about [the Applicant's] safety and well-being following this incident*". In passing I note from the Report, that both CPSS and PSNI were involved. In the case of CPSS that was for a year before the subject incident and in the case of PSNI that was from the subject incident itself.

[22] The Report also includes sections detailing the "*ongoing support*" specifically provided to support HD generally.

[23] It was the series of incidents referred to above that formed the basis of the Consultative Meeting held on 8 February 2019 leading, subsequently, to the meeting of the Board of Governors on 11 February 2019 which then made the recommendation to the Education Authority that HD be expelled.

[24] As I have said, the Expulsions Committee met on 6 March 2019. It wrote to the Principal of the School on 8 March 2019 indicating that it was the unanimous decision of the Committee not to expel. The letter is couched in terms that "*the Committee came to its decision following careful and lengthy discussion of the* ***verbal and written evidence*** *presented by the Principal, the Chair of the Board of Governors, HD and his mother."* The reference to "*verbal and written evidence"* obviously resonates with the text of paragraph 7.8(i) of the Scheme (set out at para 12 above).

[25] The reasons which are then given for the decision focussed on the fact that the Committee felt that the School had "*not followed proper procedure with regards the management of a pupil who displays harmful sexualised behaviour*" as set out in the Circular. The letter continues in the following terms:

> *"The Committee was particularly concerned that the School had documented seven incidents of sexualised behaviour involving this pupil but it was only after the seventh incident that a Risk Assessment Management Plan (RAMP) was drawn up in partnership with the Education Authority Child Protection Safeguarding Service (CPSS) noting that formulation of the RAMP was completed on 14 February 2019 – some 3 days after the Board of Governors meeting which recommended expulsion had taken place. As a result the members felt that no time had been given for the RAMP to be implemented and for the impact of its actions to be monitored and assessed".*

[26] The Committee expressed its view that the School had failed to provide evidence that it had (pursuant to the recommendation in paragraph 5.8 of the Scheme) "*instigated and tried a range of alternative strategies*" to resolve HD's behaviour. Those are the reasons given for the refusal to expel.

The Applicant

[27] Affidavit evidence was provided by ELM's mother ("LM") who reported details of ELM's report of the index offence and subsequent police investigation. The evidence provided in that affidavit focuses on two points:

(a) the considerable effect that the incident has had on ELM both emotionally and in terms of her academic performance leading to counselling and indeed hospitalisation in April 2019 due to suicidal ideation; and

(b) the fact that neither ELM nor her parents have had any opportunity to input into the question of, firstly, the recommendation of the Board of Governors as to the potential expulsion of HD nor, secondly, the decision of the Committee to reject that recommendation.

[28] Specifically in her affidavit evidence LM takes issue with any suggestion that the Committee was not fully aware of the sexual assault or its gravity. In a subsequent affidavit she also asserts that HD is not complying with the RAMP and is actively intimidating the Applicant. I emphasise that the comments in the subsequent affidavits are included for the sake of completeness but obviously cannot trench on the original, and disputed, decision of March 2019 save to confirm, to the extent relevant in the matters before the court, the effect that the Impugned Decision has had on ELM.

[29] That impact is confirmed by the affidavit evidence of the Principal of the School:

> "*26 .. The school however noticed a deterioration in the Applicant since HD's return. The mitigation measures in the RAMP mean that she rarely encounters HD. She has seen him in the school since his return which I understand caused her significant strain. She reports not being able to relax, not wanting to be in school. She no longer takes part in school activities such as sports day, careers fair or the termly school fun days as they cause her too much anxiety. Her mental health has been impacted significantly and she has reported that she has had suicidal thoughts. She is receiving counselling outside of school …*

Her academic achievement has declined significantly … She said that the only way she can move on is if HD is not in school."

[30] From the evidence available to the court it is thus clear that the impact on the Applicant of HD's continued presence in the School is significant.

Grounds of challenge

[31] The Applicant's Order 53 statement contained the following grounds of challenge:

(1) Right to education - Originally it was asserted that ELM had a right to education pursuant to Article 2 of the First Protocol in Part II of Schedule 1 of the Human Rights Act 1998. That argument was not advanced at the hearing;

(2) Breach of Article 8 of the ECHR - The Applicant's contention is that education is part of her private life. The decision to permit HD to be educated in the same School is, in that context, she asserts an unlawful interference with her Article 8 rights;

(3) Breach of Article 3 of the ECHR - It is suggested that the decision is in breach of Article 3 by reason of its impact on ELM which in turn is categorised as inhuman treatment. The contention is that the minimum threshold required in respect of an Article 3 claim is met given the seriousness of the sexual assault in question and the Applicant's reaction to HD's return to the school;

(4) Breach of Articles 3, 28 and 29 of the United Nations Convention on the Rights of the Child - The Applicant asserts that the Impugned Decision is in breach of ELM's best interests (per Article 3) and her right to education (per Articles 28 and 29) of the Convention (the latter not being advanced in this case);

(5) Wednesbury unreasonableness - The Applicant asserts that no reasonable decision-maker, properly directed and in possession of all of the information would have arrived at the decision which the Committee reached and therefore, in that sense, the Impugned Decision was "unreasonable" according to established "Wednesbury principles";

(6) Irrationality - That the Impugned Decision is irrational because the following material considerations were given no or inadequate consideration:

(a) it failed to have any or adequate regard to the views of ELM on allowing HD to return to school;

(b) it failed to have any or adequate regard to the likely effect HD's return would have on ELM;

(c) it failed to have any or adequate regard for the existence of previous sexual allegations about HD of which it was fully aware;

(d) it failed to have any or adequate regard to the objections of the School to HD returning and the likely impact of that return upon the entire School population.

(7) Procedural Unfairness - It is asserted that the inability of ELM and her parents to have any input into the decision to permit HD back into the School and allow him to mix with the general school population is, on the Applicant's case, unfair in the context of her being a victim of serious sexual assault.

(8) Failure to give reasons - That no reasons - or rather no accurate reasons - were given for the Impugned Decision and that there has been a wholesale and unequivocal refusal to provide any explanation to the Applicant for the Impugned Decision which is (as above) having a serious effect on her well-being.

The Applicant's Contentions

(1) Irrationality

[32] The Applicant's case is that the cumulative effect of a number of factors renders the Impugned Decision irrational in the public law sense.

Those factors are as follows:

(a) Lack of Consideration of the best interests of the Applicant

[33] Having placed reliance upon Article 3, 28 and 29 of the UN Convention on the Rights of the Child - provisions which emphasise the significance to be given to what is in the best interests of the child – it is argued that those considerations should have been to the fore of the collective mind of the Committee. The Applicant, through her counsel, contended that the "best interests" objective had been ignored in the decision-making process in this case given that the Applicant was the victim of a serious and admitted sexual assault but that little or scant regard was given to her position or the impact upon her.

[34] In support, the court was referred to the Circular which (in that specific context) emphasises (at paragraph 14) that "*The needs of the victim must be given priority; and [that] nothing should be done which causes the victim harm*". It is the Applicant's case that there are only two brief references to the Applicant in the contemporaneous notes of two of the three Committee members who took the Impugned Decision and so there is little evidence of note that regard - or due regard - had been given to the Applicant's position. In support the Applicant cites from the Principal's affidavit (at paragraph 20):

> "*20. I have a number of concerns about the way in which the meeting was conducted. My main concern was the impact of this incident on the Applicant, and how it might affect her education and well-being if HD remained in the School, was a key issue for the School in making its recommendation, but it appeared to be given little consideration by the Committee, which instead focused on the actions of the School.*"

[35] In similar vein the court was taken to a letter written by the Chair of the Board of Governors to the EA the day following the Committee hearing in which the Chair stated:

> "*In my view, throughout the process, there was a lack of concern for the 'victims' of the incident.*"

[36] To particularise it further the Applicant's counsel also highlighted the following alleged failures namely:

(a) Failure on the part of the Committee to explore the incident which had led to the recommendation for expulsion in any detail whatsoever;

(b) The failure to consider the effect on other pupils in contravention to paragraph 5.8 of the Scheme, which provides:

> "*that allowing the pupil to remain in School would be seriously detrimental to the education or welfare of other pupils and staff*"

and so it is contended it is a consideration to which the Committee should have had regard;

(c) Failure to take into account that this was one of a total of seven incidents involving five different girls at the School - incidents which were known to the Committee at the time of hearing;

(d) Failure to acknowledge or take into account the fact that the incidents – particularly the index incident - were likely to result in criminal proceedings, given HD's admission.

[37] The Applicant's contention, is that not only were those particular omissions in the decision-making process itself but that, on the other side of the coin, the Committee also placed too much emphasis on the School's perceived failures to manage the situation and on its consideration of the planning and implementation of the RAMP and the requirement (per paragraph 5.8 of the Scheme) that expulsion would only be considered "*after a range of alternative strategies … had been tried and proven to have failed …*".

[38] Taking all these factors into account, on the Applicant's case, the EA's obvious failure to follow the Department's Circular resulted in a cumulative failure which rendered the decision irrational in public law terms.

(b) No articulation of the test applied

[39] The Applicant's second contention on the irrationality of the decision in public law terms is that, within the Committee proceedings, there was no reference to the 1986 Order, the 1995 Regulations nor, more importantly, the Scheme. There is, on the Applicant's case, an admission that there is a reference within the Impugned Decision letter to the Department of Education's Circular, but that the Circular, in turn, does not actually deal with the question of expulsion and was referred to only in terms of the Committee's criticism of the School in failing to adhere to the guidance which it provides. Referring to paragraph 7.8 (set out in full in paragraph [12] above) Counsel for the Applicant made the case that there was clearly guidance in place as to how an expulsion hearing should be conducted and that in the present case that the Committee had failed to articulate or make any reference to this or any other test. Such an omission it is argued renders the Impugned Decision irrational in public law terms.

(2) Breach of Policy - The Circular

[40] As a separate ground of challenge Counsel argued that, firstly, on its face the Circular did apply to the EA and that the Committee's failure to adhere to those parts of the Circular which require:

(a) that the interests of the victim should be prioritised; and

(b) that nothing should be done to cause the victim further harm

was further evidence of, not only a lack of a reasoned approach, but also a breach of their own Department's policy guidance on the specific facts of this case.

[41] The Applicant says that inadequate consideration was given to the position of a vulnerable 15 year old victim of an admitted serious sexual assault rendering the decision to permit HD back into the School alongside other females "unreasonable" when judged in accordance with the Wednesbury principles and, indeed, perverse on the facts.

(3) Breach of Articles 3 and 8 ECHR

[42] The Applicant, as the Order 53 Statement makes clear, argues a freestanding case that her Article 3 and 8 rights under the ECHR, have been breached contrary to Section 6 of the Human Rights Act 1998. Acknowledging the decision in *R (SA) v SSHD* [2015] (IJR) UKUT 536 (IAC) it is suggested that the court must first ask itself whether there has been a breach of a Convention right. In the present case the Applicant contends that Article 8 is engaged because of the significant role education plays in the Applicant's life and because of the effect HD returning to the School had (and is continuing to have) on the Applicant's health and general well-being which the Applicant says is a breach of that right. The interference, it is suggested, caused by allowing HD to return is disproportionate in the circumstances and facts of this case.

[43] In respect of the alleged Article 3 breach the Applicant says the test set out in *Soering v UK* [1989] 11 EHRR is satisfied on the basis that the Applicant has demonstrated that there are substantial grounds for believing that there is a real risk to the Applicant arising from the decision to permit HD to return to the School in that the Applicant, as a result, would be subjected to inhumane and/or degrading treatment. It was forcibly put that she is a blameless victim but yet remains the individual who has suffered (and continues to suffer) most from the Impugned Decision.

(4) Failure to give adequate reasons

[44] The final main contention by the Applicant was that the Committee failed to give the Applicant adequate or indeed any reasons at all for the Impugned Decision - even allowing for the issues of confidentiality that arise in cases such as this. The Applicant asserts a right, as a person affected by the decision, to be given a reasoned decision rather than requiring her (as she has done) to secure public funding and then issue proceedings as the only method of obtaining the explanation as to why HD was returned to the School.

The arguments on behalf of the School

[45] The School, through its counsel Ms Kiley, supported the contentions of the Applicant which are summarised above but also invited the court to focus on:

(a) the Committee's function in the case;

(b) the relevant considerations which the Committee failed to take into account; and
(c) the considerations which were given manifestly excessive weight by the Committee.

[46] Ms Kiley having referred the court to paragraphs 5.8 and 7.8 of the Scheme distilled the following propositions:

(i) that the EA is the sole decision-maker in respect of expulsions;

(ii) that it exercises that power through the Committee who acts on its behalf;

(iii) that the Committee is not an appeal body nor is it a reviewer of the Board of Governors' recommendation to expel a pupil but that it has a primary decision-making role under the Order which, once engaged, means that the Committee must determine for itself whether expulsion is reasonable in the circumstances;

(iv) That, in that context, paragraph 5.8 of the Scheme specifically includes instances of sexual assault as something which are to be borne in mind - including the possibility of immediate expulsion for serious offences (even where they are "one-offs").

[47] The School's specific criticism is that (and here I quote from Ms Kiley's skeleton argument):

> "*Rather than focusing on whether expulsion was reasonable in all the circumstances, the Committee instead focused on whether the School was reasonable. It asked itself the wrong question. That error in approach diverted its attention from its real task and caused it to ignore relevant considerations and to attach manifestly excessive weight to others.*"

[48] As regards the function of decision-making Ms Kiley indicated that this was a classic case of Wednesbury unreasonableness referring to Lord Greene in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1947] 4 All ER 680 who put it thus:

> "*A person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may clearly be said, and often is said, to be acting 'unreasonably'.*"

[49] On the facts of this case the School contends that the issue of HD's expulsion undoubtedly required the Committee to consider all of the circumstances including the impact which his reinstatement would have on his victims and other pupils. In support of that proposition the court was referred to the case of *R v Camden LBC Ex parte H* [The Times, 15 August 1996] where the English Court of Appeal determined that the effect which reinstatement of a pupil (who in that case had shot another pupil in the head with a pellet gun) would have on both the victim and other pupils was a relevant consideration in an expulsion decision. That case is also reflected in this jurisdiction in the case of *Re Shay Lappin* [delivered on 15 March 2006] where Girvan J (as he then was) - in a case involving inappropriate touching by a pupil of a teacher - said that the Committee in that case should have considered whether the touching occurred and whether the pupil had an improper motive:

> *"Requirements of a fair procedure set against the context of the gravity of the alleged offence and gravity of potential consequences points to the conclusion that fairness required that the Tribunal should have turned their mind and directed their mind to the question of whether fairness required that both the teacher and the pupil should be in a position to explain their version of events so that they could be properly analysed."*

[50] Ms Kiley, in furtherance of that proposition, advanced the argument that the Committee in this case made no substantive enquiry as to the effect HD's remaining at the School had on the Applicant or indeed the School population generally and that this approach was in marked contrast to the fact that these factors were the matters which went to the core of the School's recommendation to expel HD.

[51] In support of Mr Henry, Ms Kiley on behalf of the School, contended that the decision letter demonstrated that the Committee had focused - and therefore given excessive weight - to the question of the RAMP and the question of "alternative strategies" employed in relation to HD - in effect to the exclusion of all other matters to which they should have had regard. On that basis she argued that the decision should be struck down.

The Respondent's Case

[52] Having made the not insignificant point based on the Circular that "*harmful sexualised behaviour … is damaging to* ***both*** *victim and the child …"* (her emphasis) counsel for the Respondent Authority, Mrs McCartan, made the following contentions:

(1) As to the Question of Irrationality

[53] Quoting from *Auburn, Moffett and Sharland* ("Judicial Review Principles and Procedure") she emphasised that the test for the court in terms of the question of

irrationality is not reached in the present case. Quoting from Auburn (at paragraph 17.01) she suggested that the test was "*[if] the decision [was one] which no public body acting reasonably could have reached"* or, in its more modern formulation, that "*the decision will be unlawful if it is beyond the range of reasonable decisions open to the public body*."

[54] This she suggested is a high threshold and was not met on the facts. She further contended that it provides public bodies with (as she put it) a "*significant degree of latitude in their decision-making."*

[55] She also asserted that the court should be slow to interfere with the expertise of the Committee in its consideration and assessment of the evidence. In support of that proposition she referred the court to the case of *In the matter of an Application by TCM (a minor) for Judicial Review [2013] NICA* where Morgan LCJ, referring to Lord Hope in the case of *EBA v Advocate General for Scotland [2011]* stated as follows:

> *"The courts have often made it clear that a tribunal decision ought not to be subject to an unduly critical analysis. A more recent statement of the general principle in the context of employment tribunals can be found at paragraph 26 of the opinion of Lord Hope in Hewage v Grampian Health Education Authority [2012] UKSC 37 –*
>
> > *'It is well established and has been said many times that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subject to an unduly critical analysis.'"*

[56] Applying that to the facts of the present case Counsel's contention was that regard should be had to the fact that the main purpose of the decision letter was to provide the school with a reason as to why HD had not been expelled (contrary to its recommendation) and that the emphasis, therefore, naturally would be on factors militating against any such expulsion rather than a rehearsal of all the factors in the case.

[57] In the context of the correct interpretation to be given to the application of paragraph 7.8 of the Scheme she reminded the court that no guidance was given by the Department.

[58] As to the balancing exercise which the Committee had to achieve she reminded the court that the Committee had to have regard to the interests of **both** of the children involved and that the true function of the approach taken by the Committee was to supervise whether or not the School had followed the correct application of the Guidance and the Circular in coming to its recommendation. As a

result she cautioned the court against a determination or rehearing on the merits of the case as opposed to focusing on its supervisory jurisdiction.

[59] In emphasis of that point, the Circular, it was contended, provided guidance for the School and not for the Expulsions Committee so that accordingly, to use Counsel's words (as taken from her skeleton argument), that *"the weight to be attached to any factor or particular piece of evidence is a matter for the discretion and expertise of the Committee …"*

[60] In that assessment when considering paragraph 14 (particularly the question of the "*priority*" which should be given to a victim) it was suggested that the prioritisation of the Applicant's rights over those of HD would not have precluded the School from actively considering and/or implementing a Risk Assessment Management Plan or RAMP in respect of HD and that indeed the Committee was entitled to form the view that proper implementation of a RAMP **would** have prioritised her needs, together with those of any other pupils who might be potentially affected by HD's harmful sexualised behavior. Citing in support of that proposition, *R v Camden London Borough Council, ex parte H, The Times, 15th August 1996 [1996] ELR 380* which, she argued (whilst acknowledging that one must look at the effect of exclusion on the offender) does not detract from the fact that the primary consideration for the decision-maker is the need to maintain discipline in the school so as to safeguard the welfare and interests of the victim and other pupils.

[61] As regards the decision-making process itself Counsel for the Authority:

- Emphasised the informal nature of the Committee (as per *Hewage*) and that accordingly "*one ought not to take too technical a view*"; and

- That the primary purpose of the decision letter was to reply to the Board of Governors' recommendation and that the School, as an "*informed audience*", ought not to have expected a full rehearsal of the "pros" and "cons" of the decision.

[62] Notwithstanding that position Mrs McCartan argued that, in looking at the Committee notes and the affidavit of Mr Doran (which had been provided subsequent to the issue of proceedings but which seeks to explain and elaborate upon the decision-making process) that it **was** clear that "*the impact of the incident on the Applicant was taken into account*". On that specific point she indicated to the court that the Committee, based on HD's admission, had accepted that this was a serious incident and therefore it did not behove the Committee to undertake further investigation. That, in itself, she said distinguished the decision-making process from that in *Re Shay Lappin [15th March 2006]* upon which the school relied (see paragraph [49] above). In that case it was held that the tribunal in question ought to have engaged in a fact-finding exercise about whether the alleged assault did or did not happen. In the present case the point was made that whilst the Committee was aware of the admitted sexual assault, the School did not advise the Committee that

HD had touched the Applicant's vagina nor was the Committee advised of any criminal investigation and accordingly the same level of or requirement for investigation did not arise.

[63] Citing "*The Report of the Working Party on the Management of Schools in Northern Ireland [1979] ("the Astin Report") (at paragraph 27)* Counsel for the Respondent made the point that "*suspension and expulsion, should be steps of last resort*" a point, she said had been emphasised in the Supreme Court judgment in *In the Matter of an Application by JR17 for Judicial Review (Northern Ireland) [2010] UKSC 27.*

[64] This, Counsel said, supported the approach taken by the Committee which was to conclude that there was an absence of sufficient evidence of the adoption of meaningful alternative strategies – such as an earlier introduction of the RAMP - to address HD's behaviour. Given that, it was, she said, difficult to discern from the written and oral evidence presented to the Committee what "*range of alternative strategies*" had in fact been adopted and the gravity of an expulsion it was therefore, reasonable and rational for the Committee to refuse to expel HD.

[65] In response to the Applicant's criticism that no test was articulated in the decision letter the Authority makes the point (as above) that the School, as an informed audience, was well aware of the statutory framework and indeed the specific recommendation (for expulsion) and, in the context of the earlier submissions that the Committee must be given latitude in terms of how it expressed itself and how any test was applied.

As to the Breach of Policy – The Circular

[66] The Respondent argues that the Circular is intended as guidance for schools and other educational settings and that the Expulsion Committee cannot be said to be in breach of a policy document of which it was not the intended audience.

As to Wednesbury Unreasonableness

[67] Essentially, for each of the reasons given above, the Respondent does not accept that the decision to expel HD was either perverse or unreasonable in the Wednesbury sense.

As to Article 3 and 8 ECHR

[68] The Respondent denies any breach of the Applicant's Article 3 or Article 8 rights in relation to the Impugned Decision and goes further to deny the Applicant's case in respect of such breaches is made out.

As to the Adequacy of Reasons

[69] The question of the adequacy of reasons, having been raised by the Applicant through her counsel, was dealt with by the Respondent in the following way. The court was referred to the decision of the House of Lords in *South Bucks DC v Porter (No 2) [2004] UKHL 33* for the following proposition:

> *"The reasons need refer only to the main issues in dispute, not to every material consideration."*

[70] The court was again referred to *Auburn, Moffett and Sharland* (para 10.37) which suggests that in assessing the need for reasons a number of factors need to be taken into account based on the individual facts of each particular case namely:

(1) the legislative and administrative context within which the decision is taken;

(2) the nature of the decision-maker;

(3) the subject matter of the decision – it being the proposition that the closer a decision is to an exercise of pure judgment, the less is required by way of detail;

(4) the complexity of the issues under consideration;

(5) the nature of the audience to which the reasons are addressed, or to which the reasons are likely to be relevant.

[71] In the present case it is contended by the EA that it is sufficient that the Decision Letter is both intelligible and adequate in the sense that it be sufficient that the School could understand why the decision was made not to expel HD.

[72] The further contention is that there is no duty on the Committee to provide the Applicant with reasons and that it is clear from the statutory Scheme that the provision of reasons would be a breach of HD's own confidentiality and right to private and family life.

[73] The applicant raised an issue that the provision of an explanation in the form of Mr Doran's affidavit, which was given after the commencement of proceedings but directed to the question of the adequacy of the decision-making process, was inadequate and an ex post facto rationalisation. In answer the court was referred to the decision of McCloskey J (as he then was) in *In the Matter of an Application by JR45 for Judicial Review [2011] NIQB 17* (paragraph 20) …

> *"A replying affidavit will not be unexpected, if there are issues or areas of contention between the parties. A replying affidavit might also be appropriate if the challenge were based on an assertion that the tribunal took into account some extraneous*

factor or disregarded material evidence or considerations and the text of its written decision does not readily lend itself to resolution of the issue raised …"

[74] To address the point counsel submitted that, even discounting the affidavit evidence of Mr Doran, the written decision, along with the Committee members' and clerk's notes together with the written materials upon which the decision was based speak for themselves and that there is no ex post facto rationalisation of the decision. In that context, she asserted that Mr Doran's affidavit is within the realms envisaged by JR45.

The Case of HD

[75] Mr Donal Sayers BL appeared on behalf of HD, who had been granted notice party status in respect of the proceedings. In support of the Authority Mr Sayers said that it could not tenably be said that the decision not to expel HD was "irrational" in the sense of being Wednesbury unreasonable. Citing Colton J in *Re EM's Application [2016] NIQB* the proposition was put that reasonable people may hold different opinions and that there is a cadre of administrative discretion to these matters. Re *EM's Application* concerned the response of the School to an incident involving pupils where the applicant complained of the failure of the School to address matters by way of disciplinary action. Colton J concluded that the approach taken by the School was, however, one that was *"within the bounds of the responses rationally open to it".*

[76] Mr Sayers advanced that Mr Doran in his affidavit provided evidence of the Committee's consideration of each of the matters said by the School to be relevant but not taken into account in coming to its determination namely:

- the particular incidents of sexual assault that prompted the recommendation of expulsion he said were addressed in paragraphs 6, 7 and 8 of Mr Doran's affidavit;

- the earlier incidents of sexual misconduct on the part of HD - paragraph 6;

- the impact on ELM of a decision not to expel HD - paragraphs 6 and 7;

- the welfare of other pupils and the maintenance of good discipline in the School - paragraph 10;

- the consideration of the recommendation for expulsion and the reasons for the Committee's rejection of that recommendation – paragraphs 8-11.

[77] As to the question of the Committee's alleged failure to discharge a duty of inquiry the court was referred to the case of *Plantagenet Alliance Ltd v Secretary of State for Justice and Others [2014] EWHC 1662* at [100]:

"The following principles can be gleaned from the authorities:

1. *The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable;*

2. *Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of the inquiry to be undertaken;*

3. *The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neil LJ in R(Bayani) v Kensington and Chelsea Royal LBC [1990] 22 HLR 406).*

4. *…"*

[78] Mr Sayers said that the decision should only be struck down if no reasonable body, possessed of the material which was before that authority, could come to the decision in question. On the facts of the present case he asserts that the Committee was entitled to expect that the School recommending expulsion had placed before it all relevant evidence and that its approach to the inquiry should be assessed accordingly.

As to the question of relevant considerations

[79] On Mr Sayers' case the Circular, and indeed the policy and statutory background which lies behind it, provide clear emphasis on the importance of efforts to address problematic behaviour in a manner that may avoid the option of expulsion. Mr Sayers' contention is that any suggestion that ELM's position was not taken into account is not supported by the evidence.

As to the provision of reasons

[80] Mr Sayers' interpretation of the decision letter is that the Committee was concerned:

- That proper procedures were not followed by the School with regards to the management of a pupil who displayed harmful sexualised behaviour;

- That there was failure to put in place a RAMP until the seventh recorded sexualised behaviour incident (and after the taking of a decision to recommend expulsion);

- About the lack of time between the decision to recommend expulsion, implementation of the RAMP and the monitoring of its potential impact;

- About the absence of appropriate documentary evidence by reference to which the Committee could assess the strategies implemented by the School and their impact on HD's behaviour – citing in particular the very generalised approach the School had adopted to the Duke of Edinburgh Award trip – in spite of HD's perceived risks.

[81] The decision letter, therefore, he asserts left no room for genuine doubt about what was decided (i.e. not to expel HD) and why (namely that the Committee was not satisfied that a range of alternative strategies to resolve HD's disciplinary problems had been tried and proven to have failed) and so was not, therefore, deficient.

Discussion

[82] The statutory Scheme within which decisions to expel are made (in relation to the controlled sector):

- makes it clear that, under the 1986 Order, the decision itself rests with the EA - per Article 49.

- The statutory Scheme made under that provision:

  - having re-emphasised the decision-making role of the EA (per paragraph 5.2);

  - makes it clear (per paragraph 5.8) that expulsion is only appropriate

    - in response to serious breaches of the school's Disciplinary Policy and after "*alternative strategies*" have been tried and failed; or

    - where there is a serious "*one-off offence*"

  and then provides that (per paragraph 7.8) -

> "*… The EA's Expulsion Committee* ***will*** *-*
> *(i) consider all verbal and written evidence;*
> *(ii) determine whether or not proper procedures have been followed;*
> *(iii) determine whether expulsion is or is not reasonable taking account of the circumstances of each individual case …"*

[83] That approach (as it is expressed) is to give guidance to the Committee and to address issues of proportionality and, in particular, the question of reasonableness in the context of those pupils who might potentially be expelled from an individual school. There are two aspects to be observed. Firstly, the language used in Paragraph 7.8 is mandatory and, secondly, sub-paragraphs (i)-(iii) encompass three different steps. Firstly, there is a consideration of the evidence. Secondly, there is a review process in terms of what has happened (to address the behaviour) and finally, there is a decision which the Committee must take – one that is "*reasonable in all the circumstances …*" – i.e. taking all relevant factors into account and not being blind to matters upon which they are on notice and which fall to be considered.

[84] Within the context of sexualised behaviour the Department has seen fit to issue the specific Circular (as referred to above) to provide guidance. That guidance is addressed to a "*Target Audience*" (as described within the text of the Circular) which specifically **includes** the Education Authority as one of a class of specific addresses - although (per paragraph 5) it is clearly "*aimed particularly at schools*".

[85] In passing I should say that, to the extent that it is argued, I do not accept the Respondent's contention that the Circular is not something to which it should have regard. The Circular as issued by the Department is clearly addressed to the EA (amongst others) and is something to which, in the proper course of its functions, the EA should indeed have regard. That, in the context of sexualised behaviour, necessarily in my view, imports the considerations contained in paragraphs 13 and 14 of that document, namely that:

- Harmful sexualised behaviour is damaging to **both** victims and perpetrators (paragraph 13); and

- That "*in the balance of what is in the child's best interests, the needs of the victim **must** be given **priority**; and nothing should be done which causes the victim further harm*". (emphasis added)

[86] Lest there be any doubt on the point, the issue of what is in the best interests of the children involved also resonates with the policy considerations which are enshrined in Article 3(1) of the UN Convention on the Rights of the Child viz:

> *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a policy consideration."*

[87] Given that context, I would have thought it difficult for the EA to resist the application of the guidance provided by the Circular given both its provenance and the EA's status and function.

[88] In cases such as the present case all of those considerations obviously lead to the need to conduct a balancing act between the competing interests of the two children concerned - in this case HD and ELM. In that context, the Court considers that paragraph 14 of the Guidance is then intended to give specific guidance as to how that balancing exercise is to be conducted in the case of sexualised behaviour which impacts negatively on potential "*victims*". That must, therefore, be a consideration when a decision under paragraph 7.8 of the Scheme is being taken. That, in turn, brings us to the decision-making process itself in the present case.

The decision-making process

[89] It is clear that (as per the Astin Report) suspension and expulsion should be "*step(s) of last resort*". That position has received judicial recognition in the case of *JR17* (cited above). As a principle, the gravity of such a sanction is also reflected in paragraph 5.8 of the Scheme and, as an act of censure, the fact that it is reserved to the EA under the Order (as opposed to resting with a school) is something which further underscores the significance of that decision-making process. That, in itself, is clearly not controversial.

[90] The question to be focused on in relation to any particular expulsion is what is reasonable in all the circumstances of the individual case elucidated through the 3 step process set out in paragraph 7.8. To the extent that Mrs McCartan for the EA sought to suggest that the Committee had more of a supervisory role in relation to the activities of the School this court does not agree. At most such a supervisory role is only part of the job of the Committee - a point which paragraph 7.8(ii) makes clear. It is only one of the three steps which is under consideration. The question is rather, as Ms Kiley put it, whether expulsion is reasonable in <u>all</u> the facts - **not** just if the School has been "*reasonable*". The three aspects of paragraph 7.8 need to be borne in mind at all times. As to what is "reasonable" as a concept in this context I refer back to Lord Greene in *Wednesbury* (supra) to which Ms Kiley told the court:

> *"A person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may clearly be said, and often is said, to be acting unreasonably."*

[91] That, as a proposition, then requires the Court to look specifically at the component parts of the decision-making process itself in any given case. In the context of this application I do that under the following headings:

(a) Was there a failure to take into account relevant considerations?

[92] Paragraph 7.8 sets out (in particular at sub-paragraph (i)) a requirement that the EA's Expulsion Committee "*considers all relevant, verbal and written evidence …*". The Decision Letter asserts that the Committee did that, but, in terms of this application, it falls to this court in its supervisory jurisdiction to test that proposition.

[93] On the facts, the Education Committee:

- Knew that the recommendation to expel HD was on the basis of his sexualised behaviour;

- The main Report which supported the School's recommendation to expel HD:

    - Described the particular incident which led to the recommendation as a "*sexual assault*";

    - Said that "*his position [at the School] was 'untenable'*" and described HD *'as a sexual predator'*;

    - cited (in summary) each of the seven incidents in which he was involved*;*

    - Documented the involvement of CPSS for the year leading up to the trigger incident and PSNI from then onwards;

    - Raised the Board of Governors' concerns about:

        - their safeguarding responsibilities for all pupils; and

        - their specific concerns about the '*safety and well-being*' of the Applicant.

    - Provided to the Committee in tabular form (largely as a summary of the text) details of what "*support*" had been provided to HD - for which one can read disciplinary or other corrective action(s) which had been adopted.

- Included the RAMP which made it clear that HD had touched the Applicant's "private parts" and that there was now PSNI involvement in the case.

[94] The summary of the support provided by the School in that tabular form provides in sequential date order and over a total of nine pages particularised all that was done to address HD's actions and to this Court seems detailed as to:

(i) the specific behaviour of HD complained of;

(ii) the strategies adopted by the School to address them; and

(iii) the outcomes.

[95] In that context it seems strange, therefore, to the court that the Decision Letter states that:

> "*In the absence of appropriate documented evidence it was difficult … to assess the strategies that had been implemented … and their impact …*"

[96] In that context it must be remembered that the lack of process and failure to implement a RAMP earlier was primarily the reason given for the refusal to expel. The court cannot help but note that the CPSS - an agent of the EA – had been assisting the School for upwards of a year and, on the evidence before the Court, (even though they are a specialised agency of the EA), do not appear to have advocated an earlier adoption of a RAMP. As Mr Doran concedes in his affidavit this ultimately led to a form of an apology in respect of the advices given to the School by CPSS/the EA acting in that capacity.

[97] In all the circumstances it is difficult to see what more "documented evidence" the Committee might have sought or what more the School – acting under advice – might have done. The court cannot help but feel that the Committee failed to give full consideration to what had been done by the School - most of it, as I say, under the guidance of the CPSS. One cannot help but get the impression that the Committee focused on the recent adoption of the RAMP and the fact that the impact had yet to be tested and seized on that as the reason to refuse expulsion.

[98] In focusing on that aspect the court finds that they excluded from their consideration all other issues – including the effects on ELM.

[99] That position is resisted by the EA. They refer to the summary handwritten notes of the Committee which says (in the case of Mr Doran) that "*[the main incident] impacted the girl greatly*" and (in the case of another member of the panel, Ms Rosemary Rainey) that it had a "*huge impact - traumatised, counselling, depression, not sleeping*" and that it had an "*impact on girls*" and, finally, in the case of Mr Neil McGivern, (Clerk to the Committee) "*that there was an impact both on the Applicant - in that she had to be separated from HD - and on other girls in the School*". The affidavit of Mr Doran, provided on behalf of the EA (after the event), acknowledges that "*this was a serious incident … that [they] were not told that HD had touched the Applicant on her vagina … [nor that] there was a criminal investigation …*" but asserted that "*the impact on the Applicant formed part of the wider circumstances which [they] took into account when determining if [the] expulsion was reasonable*".

[100] The question remains, however, if the Committee – on the facts available to it – could leave it there?

(b) Was there a duty to enquire?

[101] The position adopted by the EA inevitably raises in the court's mind the extent to which the Committee - having been on notice of the seriousness of the allegations concerning HD and the impact on ELM - ought to have enquired further before making its decision.

[102] The Report - as is clearly acknowledged by the EA - raised the admitted sexual assault as one of grave concern. The Scheme at para 5.8 indicates that a single "one-off" event may be enough to justify the expulsion of a pupil. The Circular - at paragraph 14 in particular - in a case of sexual misbehaviour then raises a question of priority as to between the respective interests of a victim and perpetrator - in this case between the Applicant and HD.

[103] In the context of that position and given what was before them in terms of the basis for the recommendation for expulsion it is therefore strange that:

(a) the Committee did not enquire more. The Committee's position appears to be that they were not specifically aware that HD had touched the Applicant on her vagina and/or that there was a criminal investigation. That is said notwithstanding the fact that it is clear to the Court from the papers before the Committee that HD had touched the Applicant's "private parts" and that PSNI were involved after the incident in question;

(b) the Committee did not at least consider hearing from the Applicant/her mother or, if not that, enquire further into the detail and substance of the allegations to establish the exact details. If it was a grave case then under the Scheme they should have been aware that a single "one-off" event may still justify expulsion – depending on the facts;

(c) in coming to a determination, that they did not actually then explain the extent to which they had considered and then disposed of those concerns as part of their decision-making process - knowing that it was precisely those concerns that had caused the School to make the recommendation in the first place.

[104] Specifically as to the obligation on the Committee to enquire, counsel for the Respondent sought to distinguish the facts of this case from those in *Re Shay Lappin* (supra). Mr Sayers for his part, took the Court to the case of *Plantagenet* (supra) in which referring to Neill LJ in *R (Bayani) v Kensington and Chelsea Royal LBC* it was suggested that:

> "*[The Court] should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed information necessary for its decision.*"

He advanced that as the basis for saying that no duty to enquire arose. Obviously, however, that emphasises the question of Wednesbury reasonableness in adopting such an approach.

[105] Here the Committee knew of the allegation, that it was serious and that it had a significant impact - not just on the Applicant but, on the evidence before the court, the other girls involved in the various incidents and potentially on the wider school population. Even if one accepts (as per the Guidance) that a disciplinary process is not perhaps the best method of dealing with harmful sexualised behaviour, nonetheless, given the text and spirit of the Circular, that does not, in the court's view, remove the need:

(a) for the Committee to ensure that it has sufficient information to ensure that it is sufficiently informed to allow it to perform the analysis required of it in all of the aspects directed by paragraph 7.8; and

(b) where it does not have that information before it, but is on notice of a fact of some gravity which is directly relevant to the subject matter of the recommendation, that it makes appropriate and sufficient enquiry. On the facts of this case there is certainly the implication that the Committee, whilst on notice of the admitted sexualised behaviour purports to justify its position by saying that it was not aware of the exact detail of the assault when it did not make any enquiry in relation to the specifics or, indeed, the involvement of PSNI;

(c) to give priority to the victim of sexualised behaviour in line with paragraphs 14/15 of the Guidance;

[106] In such circumstances it seems clear to the court that there was a duty of enquiry upon the Committee - which could (I do not say must) have been satisfied by hearing the Applicant or her mother but, if not that, certainly did require further investigation. None of that additional enquiry was undertaken and that must, therefore, bring into question the extent to which the impact on the Applicant was properly taken into account and, accordingly, the factors to which the Committee did give weight in reaching its conclusion.

(c) The Weight to be attributed to the Various Factors

[107] I do not demur from Mrs McCartan's contention that in cases of expulsion the maintenance of discipline is a primary concern (see paragraph [60] above). I equally

agree with both Mrs McCartan and Mr Sayers (for the EA and HD respectively) that the balancing exercise and decision-making itself must be left to the Committee. The Order makes that clear. All of that, however, is circumscribed by the principles of "Wednesbury reasonableness".

[108] On the facts of this case - even taking into account Mr Doran's evidence as set out in his affidavit - there is very little evidence as to:

(a) the factors which the Committee actually did take into account;

(b) the weight which they respectively attributed to each; and

(c) (of what is more of concern for this court) how the considerations of paragraph 14 of the Guidance and the impact on ELM and others were then taken into account – if at all.

[109] It is, respectfully, not enough for the EA to say - after the event - that the needs of both pupils were met by implementation of the RAMP as seems to be its position. As the Committee itself highlighted, the RAMP was only implemented after the decision of the Board of the Governors to recommend HD for expulsion was made. Without understanding the actual extent and nature of the risk which HD posed (and upon which they were on notice), it is difficult to understand how the Committee could logically ever have considered that implementation of the RAMP was <u>of itself</u> sufficient to deal with any risk that he posed. Without making enquiry and fully understanding the risks involved how did the Committee properly know that the risk had been addressed - not only in a general sense but more particularly in a way that satisfied the requirements of paragraph 14? And, in terms of the jurisdiction of this Court, how is it to be satisfied (looking at it in retrospect) that all that was to be addressed in coming to the decision not to expel had been addressed or considered by the Committee and, consequently, the weight that it ascribed to those considerations?

(d) The Duty to give Reasons

[110] This logically brings us to the question of giving reasons, Counsel on behalf of the EA and HD both assert a certain "*latitude*" and a "*wide discretion*" (as they put it) accruing to the Committee in cases such as this - particularly so where the recipient of their decision is an informed audience (in this case the School). Mr Sayers put it that the School knew "*what*" had been decided and "*why*"- with a clear implication that there was no requirement for the Committee to provide more.

[111] I respectfully do not agree. If one looks at either *Auburn* and/or *Plantagenet* (both of which the court was referred to) there is clearly a sliding scale which applies to decision-makers and which they in turn must take into account in the context of their particular decision-making function and their presentation of the results. On the facts of the present case - as will be apparent from what I have already said:

- The decision whether or not to expel HD was a significant one - both as regards the impact on HD **and** the Applicant and the maintenance of discipline within the School;

- Pursuant to the Order that is emphasised by the fact that it is only the EA who can take that decision;

- Both external commentators (Astin) and the courts (in *JR17*) have emphasised the gravity of a decision to expel in terms of that sliding scale.

That suggests to this court, given that the consequences for a person facing an expulsion are severe, that the approach to decision-making itself must be robust. Paragraph 7.8 confirms that view and, it is suggested, that its remit extends to the provision of reasons for the ultimate decision in a way that reflects each of the three steps set out in sub-paragraphs (i)-(iii) and (as I have said) the weight given to each and not, as the EA have suggested, solely its obligation to supervise the School's approach. That supervisory role really only arises under 7.8(ii) and so is only one step in the overall process.

Decision

[112] On the facts of this case I find that the EA had been given adequate information and so:

(a) could address any concerns it had with the School's approach and whether (as per paragraph 7.8(ii)) the School had followed due process in the steps followed and/or to interrogate the "*alternative strategies*" that had been adopted and their outcomes (as they had been reported by the School). Contrary to that, I find that the Committee seized upon the perceived late introduction of the RAMP and the limited period of its operation to reject the recommendation to expel. It appears to have attributed too much weight to that individual factor to the exclusion of other issues;

(b) From the language used in the Report the Committee was on notice of the impact on the Applicant and other pupils but did little to investigate the circumstances or to fully address its mind to either the risk that HD posed or the full impact of their decision to allow him to return – not just on ELM but also on the wider school. That must be considered in the knowledge – which the Committee had – that a single "one-off" event of sufficient gravity may be sufficient to warrant expulsion; and

(c) Were aware of and purported (according to Mr Doran's affidavit) to follow the Guidance which, in itself, established a certain priority in

terms of the considerations to be borne in mind and the balance to be applied in cases involving harmful sexualised behaviour. If they did adopt that approach, however, they failed to demonstrate how they had given effect to the Guidance (if at all) and/or the factors that they did take into account and the weight accorded to each.

[113] Given the nature of the decision - and its importance to both parties - I find that this falls foul of the principles of Wednesbury reasonableness as set out above, simply on the basis that it did not address all of the issues which were before the Committee - either expressly or by implication and so cannot be said to have satisfied the public law test requirements of rationality.

[114] Given these findings it is unnecessary to deal with the Article 3 and Article 8 arguments advanced.

[115] In applications such as this, it is not for the court to retake or impose a decision. The court's role is purely supervisory. In terms of the appropriate relief the court orders that the decision not to expel HD is quashed and the question whether or not to expel HD is referred back to the EA to be considered afresh by a differently constituted Expulsion Committee. I appreciate that the delay which this will obviously import into an already difficult and fraught situation, but unfortunately there is no alternative.

[116] If desired, I will hear the parties as to the question of costs.