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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**27/11/2020**

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 JR 129 (A MINOR) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Representation:
Applicant: Mr Andrew Moriarty BL (instructed by Madden & Finucane)
Proposed Respondent: Mr Barry Mulqueen BL (instructed by A & L Goodbody)

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HUMPHREYS J

Introduction

[1] This is an application for leave to apply for judicial review in relation to the decision of a school to suspend the minor Applicant for a period of one day. The matter proceeded before me by way of a 'rolled-up' hearing.

[2] In light of the age of the minor Applicant and the circumstances surrounding the suspension, I determined that the proceedings be anonymised. Nothing should be published which identifies the minor Applicant, the school concerned or any of the school pupils involved.

Background

[3] On 17 September 2019, the minor Applicant engaged in a conversation on a school bus on his way home. This conversation related to the apparent suicide of a family member of a fellow pupil at the school ('Pupil A'). Pupil A was not on the bus but it is common case that the conversation was overheard. The content of the conversation was relayed to Pupil A by another pupil. There is some dispute around the exact nature of what was said but this is not relevant to the issues before the Court.

[4] Pupil A presented to the school in a very distressed state and following an investigation, the school determined that the minor Applicant should be placed in detention for a period of one hour. The minor Applicant's parents disputed this decision and refused to consent to the detention. As a result, the minor Applicant was suspended from school for one day on 8 October 2019. It is this decision which is under challenge in these proceedings.

[5] The Court has had the benefit of detailed written and oral submissions from Counsel and I wish to express my gratitude for the careful and concise way in which the case was presented.

The Evidence

[6] The School's Positive Behaviour Policy seeks to encourage, *inter alia*, good relationships between pupils, the development of mutual respect and sensitivity and the promotion of effective teaching and learning. It stresses the important roles played by each of the teachers, pupils and parents. It recognises the rights of individuals and the responsibilities of each of the various participants in the life of the school.

[7] Included within the 'Responsibilities of the Pupil' are the obligations *'to show respect for self, others and property'* and *'to refrain from abuse – physical, emotional or verbal'*. Parents are asked to ensure that their child obeys school rules and shows respect for others. In turn, parents are entitled to have their child treated with fairness and respect.

[8] In the event of a failure to adhere to the school rules, there are a range of options open to the school. These include informal disposals as well as the more formal routes of detention, suspension and exclusion.

[9] The School has also published a 'Detention Policy' which states that *'detentions can be requested by the class teacher for persistent non-compliance with school rules'*. It also cautions that in the event of a pupil not doing the detention, he or she *'may be suspended'*.

[10] The Council for Catholic Maintained Schools has made a 'Scheme for the Suspension and Expulsion of Pupils' pursuant to its statutory obligation under article 146 of the Education Reform (Northern Ireland) Order 1989. This Scheme states:

> *"When a pupil fails to meet the minimum standards of behaviour, the school is entitled to impose such sanctions as are outlined in the school discipline policy. These may include suspension and, if necessary, expulsion."*

[11] The Scheme incorporates and is consistent with the Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995 which prescribe the notification requirements around suspensions and limit the period of time for which a pupil can be suspended.

[12] In relation to the instant case, a member of the school staff spoke to Pupil A, the minor Applicant and another pupil who overheard what was said on the school bus. He accommodated a meeting between Pupil A and the minor Applicant at which the latter apologised and said that the comments would not happen again. The teacher consulted with the Vice Principal and they determined that a one hour detention was appropriate. The letter notifying the minor Applicant's parents of the detention stated, in bold and in capitals:

> *"If he/she fails to do this detention, he/she knows that he/she will be suspended."*

[13] There followed a series of communications between the school and the minor Applicant's mother, the thrust of which was that the detention was unfair and the pupil would not be completing it. On 3 October 2019, the Principal wrote to the minor Applicant's mother stating that a decision had been made to suspend but this would be cancelled in the event that the detention was completed on 7 October. This did not occur and the suspension took effect on 8 October.

The Grounds for Judicial Review

[14] In his Order 53 Statement, the minor Applicant advances five discrete grounds of challenge to the decision to impose the suspension from school:

(i) A breach of Article 6 ECHR;
(ii) A breach of Article 10 ECHR;
(iii) Illegality;
(iv) Irrationality; and
(v) Procedural impropriety.

[15] The challenge based on an infringement of Article 6 rights was abandoned at the hearing. I propose to consider each of the remaining grounds in turn.

Article 10 ECHR

[16] Article 10 of the European Convention on Human Rights provides for the freedom of expression. By Article 10(2), the exercise of this right may be restricted, *inter alia*, "*for the protection of the reputation or rights of others*".

[17] In *Handyside v UK* (1979-1980) 1 EHRR 737, the ECtHR commented:

> *"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population…This means…that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued"*

[18] The School's Positive Behaviour Policy focusses strongly on the issue of mutual respect between pupils. The importance of maintaining good relationships and recognising sensitivities are repeatedly emphasised. These are entirely legitimate aims, particularly in the context of the school environment. It may be that the minor Applicant in this case was careless in the comments he made and in causing those comments to be overheard. However, it is clear that the imposition of the sanction of a one hour detention was an entirely proportionate step for the school leadership team to take.

[19] The suspension of the minor Applicant came about as a result of his failure to attend at the detention and cannot therefore be seen as a discrete Article 10 issue.

[20] The case advanced by the minor Applicant in relation to the interference with his freedom of expression is unarguable and leave to apply for judicial review on this ground is refused.

Illegality

[21] In his skeleton argument, Counsel for the minor Applicant suggested that the school had no jurisdiction to impose any form of sanction in respect of behaviour which occurred on a school bus. This is wrong as a matter of law and of principle. The Positive Behaviour Policy expressly references the journey to and from school. In *R –v- London Borough of Newham ex parte X* (1995) ELR 303 Brooke J rejected the argument that a head teacher could not take disciplinary action in relation to the behaviour of pupils towards one another off school premises. This was approved by the Court of Appeal in *Bradford-Smart –v- West Sussex County Council* (2002) EWCA Civ 7.

[22] The minor Applicant's case in this regard is unarguable and leave on this ground is refused.

Irrationality

[23] The proposition that the decision to impose a period of detention (followed by the suspension) in respect of the behaviour in this case was irrational, in the legal sense, is startling. It is trite law that a Judicial Review Court, exercising its supervisory jurisdiction, will not intervene on the basis of the merits of the decision under review, save in a case where the decision is unreasonable, capricious or arbitrary.

[24] None of these adjectives could remotely be said to attach to the decision under challenge. It is entirely proper that the senior leadership teams in schools, who have been tasked with the upholding of standards, ethos and discipline, should be afforded a wide margin of appreciation by the Courts in respect of their decision making. I am of the opinion that a Court should only intervene in the clearest of cases where the merits of such a decision are under scrutiny.

[25] There is no basis to impugn the decision to impose the period of detention in this case, nor is there any arguable challenge to suspend the minor Applicant once the detention had not been completed. Leave to apply for judicial review on this ground is refused.

Procedural Impropriety

[26] There are a number of aspects to this ground of challenge. Firstly, the minor Applicant contends, by reference to the Positive Behaviour Policy and the Detention Policy, that some persistent non-compliance with the school rules is required before detention could be deemed appropriate.

[27] On analysis of the Policies, and on the application of common sense, this contention cannot be correct. The document entitled 'Staged Referral Process' indicates that one instance of bad behaviour may justify sanction at a high level. This must be correct – it could not be that a pupil is immune from serious sanction simply because he or she had not committed any previous offence. Persistence may be a factor to take into account in determining the appropriate disposal in any given case but it is not a prerequisite to the taking of disciplinary action.

[28] Secondly, it is argued that suspension should be reserved only for cases where the pupil's behaviour is presenting serious difficulties for the school. It was common case that suspension is a severe sanction but, in these circumstances, it is difficult to see what other option was open to the school but to suspend the minor Applicant.

[29] Thirdly, the minor Applicant states that there was an inadequate investigation of the circumstances of the incident in that the pupil who relayed the content of the conversation to Pupil A was not interviewed. It was suggested that if that pupil's intentions were shown to be malicious, this may have some bearing on the proposed

disposal of the matter. I wholly reject this contention. The minor Applicant discussed another pupil's private family affairs within earshot of other pupils and it came as no surprise that these would be relayed back to Pupil A. The responsibility for this rests entirely with the minor Applicant and even if another pupil could be shown to have behaved poorly, this would not exonerate the minor Applicant from responsibility. I consider the investigation process and the communication of its outcome by the school was beyond reproach.

[30] Fourthly, the case is made that the school fettered its discretion by treating suspension as the automatic outcome of the failure to attend the detention. Rather, it is said, the school should have exercised its discretion and considered whether suspension was an appropriate sanction in all the circumstances. The contrast is drawn between the language of the Positive Behaviour Policy which says that a pupil *'may be suspended'* and the detention letter which says *'he/she will be suspended'* in the event of the detention not being completed.

[31] A decision maker exercising public functions must not disable itself from exercising a discretion by the adoption of a rigid policy which does not admit of exceptions. However, a public authority may adopt a policy or rule which guides the implementation of discretionary powers. The question as to whether a discretion has been unlawfully fettered may resolve to the issue of whether an exception to the rule or policy would be admitted in a deserving case.

[32] In the subject case, the consequences of failing to attend detention were made very clear to the minor Applicant and the parents. However, even after he had failed to attend, the school was prepared to afford a further opportunity to complete the detention on 7 October, in which case the suspension would be cancelled. There were no representations made that suspension would not be a fair or appropriate outcome since the parents had formed the view that detention was not an appropriate sanction. In the absence of any material upon which the school may have taken the view not to impose suspension, it cannot be said that the school would not have considered an exceptional course.

[33] There is nothing to suggest therefore, on the evidence, that the school would not consider an exception to the automatic suspension approach in a given case. The policy of imposing suspension on pupils who fail to attend detention does not therefore amount to an unlawful fetter on the discretion.

[34] I have concluded that the minor Applicant has made out an arguable case on the procedural impropriety ground, limited to the question of the fetter on discretion. However, having considered the evidence, the application for judicial review on this ground is dismissed.

Conclusion

[35] I refuse leave to apply for judicial review on all grounds, save for the fettering of discretion. Having granted leave on that ground, I dismiss the application for judicial review.

[36] I will hear the parties on the question of costs.