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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ST. PATRICK'S GRAMMAR
SCHOOL, DOWNPATRICK
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

QUINLIVAN J

Introduction

[1] The applicant, Mr Aidan Hamill, acting on behalf of the Board of Governors for St Patrick's Voluntary Grammar School, Downpatrick, is challenging the decision of the Council for Catholic Maintained Schools (hereinafter CCMS) and the Trustees of the De La Salle Congregation (hereinafter the Trustees) to present a Case for Change to the Education Authority. The Case for Change requested that the Education Authority publish Development Proposals in relation to the establishment of a proposed new, co-educational, 11-19, voluntary grammar school in Downpatrick. The establishment of this new school is predicated upon prior approval being given to the proposed discontinuance of St Patrick's Grammar School, and also De La Salle High School and St Mary's High School, two non-selective schools in Downpatrick. It is the decision to discontinue St Patrick's which is the focus of this challenge.

[2] Mr Peter Coll QC who led Mr Stephen Gilmore appeared for the applicant. Ms Denise Kiley appeared for the proposed respondent, CCMS. Mr Donal Sayers QC appeared for the proposed respondent, the Trustees. Mr Philip McAteer appeared for the Department of Education, a Notice Party to these proceedings. I am indebted to all Counsel for the quality of their oral and written submissions.

The Challenge

[3] The applicant's grounds of challenge, as outlined in the Order 53 statement (Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980), raise the following issues:

Ultra Vires

It was contended that neither CCMS nor the Trustees were empowered to make a proposal under Article 14 of the Education and Libraries (NI) Order 1986 in relation to St Patrick's Grammar School, in particular, it was contended, that they could not make such a proposal without the agreement of the Board of Governors.

Procedural Unfairness

The applicant contended that the consultation process was conducted in a manner which was procedurally unfair. In particular, the applicant contended that there had been a failure to comply with the 'Sedley requirements'.

Material/Immaterial Considerations

It was contended that the proposed respondents had taken into account a number of immaterial considerations and failed to take into account material considerations.

Breach of Statutory Duty/ requirement

The applicant pleaded a breach of the duty imposed by the Rural Needs Act (NI) 2016 to give due regard to rural needs when developing strategies and plans and further claimed that there had been a failure to assess the impact of the proposal on protected groups, in breach of section 75 of the Northern Ireland Act 1998.

Irrationality

The applicant complained that the decision arrived at was irrational, there was some overlap between the grounds relied upon as aspects of the irrationality challenge and grounds pleaded in relation to material/immaterial considerations and procedural unfairness.

Improper motive/Bad faith

Again, the grounds here overlapped in some respects with grounds pleaded in relation to vires, material/immaterial considerations and procedural fairness.

Substantive legitimate expectation

The applicant contended that the Board of Governors had a substantive legitimate expectation that St Patricks Grammar School would continue to operate as a grammar school with academic selection to meet the needs of Catholic boys of post primary age.

[4] In oral submissions the applicant's primary focus was on the Vires challenge and the Procedural Fairness Challenge, but other issues, such as the

material/immaterial considerations and breach of statutory duty were also addressed. These will be addressed further below.

Timing of the Challenge

[5] The proposed respondent, the Trustees, have raised the issue of delay in the context of the challenge brought against the Trustees. I propose therefore to outline briefly the manner in which this challenge has come before the court.

[6] The Case for Change document, which included the proposal to discontinue St Patrick's Grammar School, was presented by CCMS and the Trustees to the Education Authority on 30 August 2019. The applicant issued pre-action correspondence to CCMS on 15 October 2019 and received a response on 13 November 2019. In their response to the pre-action correspondence, Napiers Solicitors, on behalf of CCMS stated:

“the De La Salle Congregation, as the planning authority of St Patrick's Voluntary Grammar School, is the proposer for the development proposals associated with that particular school and CCMS, as the planning authority of De La Salle High School and St Mary's High School, is the proposer for the development proposals associated with those schools.”

At a later stage in the same correspondence it was stated that:

“It is accepted that CCMS does not have any jurisdiction regarding St Patrick's Voluntary Grammar School . . . the Trustees of the De La Salle Congregation put forward the proposal for St Patrick's Grammar School.”

[7] The applicant instituted proceedings against CCMS on 29 November 2019. A leave hearing was listed on 6 February 2020. On 3 February 2020 the proposed Respondent, CCMS, served a Skeleton Argument which made the case that CCMS were not the correct Respondent as CCMS had not proposed the discontinuance of St Patrick's Grammar School, rather the Trustees of the School had made that proposal. As a consequence, the applicant requested an adjournment of the leave application. Thereafter, an Amended Order 53 statement, which included the Trustees as proposed respondents, was lodged on 19 February 2020.

[8] The Trustees make the case that, as the Order 53 statement identifying the Trustees as a respondent was not served until 19 February 2020, over 6 months after the Case for Change was submitted, the application for leave to apply for judicial review is out of time.

History & Factual Background

[9] St Patrick's Grammar School was founded in Downpatrick in 1934 by the De La Salle Brothers. The school is a Voluntary Grammar School providing education for boys aged 11 - 19 years, it has a co-educational Sixth Form. As the Chair of the Board of Governors Mr Hamill states in his affidavit, St Patrick's Grammar School has built a reputation for excellence in education and that is not in dispute. It is clear from the evidence before the court, including the outworking of the impugned consultation process, that the continuance of the school has the strong support of the Board of Governors, staff, parents and pupils.

[10] De La Salle High School was established as an Intermediate School in 1950, it currently operates as a non-selective, 11-19 boys' school. St Mary's High School was established by the Sisters of Mercy in 1957. It is a non-selective, 11-19 girls' school.

[11] The future of post-primary provision in the South and East Down areas has been under consideration by the De La Salle Congregation (the Trustees) for some time. In 2002 a proposal was made to the Department of Education that St Patrick's Grammar School would become a co-educational school, whilst remaining a voluntary grammar. The Department of Education feedback indicated that they would like to see a proposal, not for a single school, but reflective of all schools in the Downpatrick area.

[12] The impugned Case for Change document identifies the policy context. In and about 2012 the proposed respondent, the Trustees (who are Trustees of De La Salle High School as well as St Patrick's Grammar School), together with CCMS and the Down and Connor Diocese (Trustees of St Mary's High School) came together as the Downpatrick Project Board in order to implement a number of policies including, inter alia the Sustainable Schools Policy 2009 and NICCE Post-Primary Review Strategic Regional Report (2012).

[13] The NICCE report recommended that the three Catholic post-primary schools in Downpatrick, St Patrick's Grammar School, St Mary's High School and De La Salle High School, work together to create a model of co-educational 11-19 provision for the area. (NICCE Report, p. 21)

[14] In reviewing the factual background I propose to refer to a number of documents which the applicant has referred to in the course of submissions. The applicant relies upon these, and other documents, to support its contention that the consultation process embarked upon by the Trustees and CCMS had essentially been pre-determined. I have not referred to each and every document relied upon by the applicant in support of this submission, but I am mindful of all the documents to which I have been referred.

[15] The court has been referred to a meeting between the De La Salle and Diocesan Trustees with the Chairs of the Boards of Governors and School Principals

of the three schools which took place on 4 September 2012. This meeting outlined the Trustees' Position to the effect that "the best provision for the Downpatrick area is an all ability, co-educational 11-19 school."

[16] Thereafter a range of options were explored by a Steering Group of the principals and chairs of the Boards of Governors from each of the three schools over the period 2012 - 2016, the 5 options identified were as follows:

1. Do nothing
2. One school formed by the amalgamation of the three Downpatrick Schools
3. One school formed by the closure of the two smaller Downpatrick schools and the expansion of St Patrick's Grammar School
4. One school formed in 2 stages:
 - (i) The amalgamation of the two smaller schools to form a co-educational 11-16 school;
 - (ii) A subsequent amalgamation or expansion/closure with St Patrick's Grammar School

(This option envisaged the possibility of St Patrick's becoming co-educational as part of the process whilst retaining academic selection.)

5. One school formed in 2 stages:
 - (iii) The amalgamation of the two smaller schools to form a co-educational 11-19 school;
 - (iv) A subsequent amalgamation or expansion/closure with St Patrick's Grammar School

(This option envisaged the possibility of St Patrick's becoming co-educational as part of the process whilst retaining academic selection.) (LB1, p. 244)

[17] At a meeting of CCMS and the Trustees (both De La Salle and Down and Connor) held on 9 March 2016 Options 1, 4 and 5 were rejected. Option 1 was regarded as untenable in terms of the long-term viability of some of the schools and was also seen as inconsistent with the Trustees' stated vision. Options 4 and 5 were rejected because the staggered approach would result in a period of uncertainty for all schools and would involve all the expense and disruption of the formation of a school which school would only have a limited lifetime. It was also felt that expanded provision at St Patrick's Grammar School would have an adverse effect on the proposed interim non-selective school. It was noted at that meeting that options

2 and 3 were essentially the same option, albeit the methods of achieving that option differed.

[18] At a further meeting in April 2016 in the discussions around 'Methodology' it was noted that:

"the easiest method to attain the Trustee Vision of a non-selective co-educational 11-19 school would be expansion/closure, thought this may incur considerable opposition from some schools, CCMS Council and Unions. Amalgamation will involve establishment of a new VG with attendant costs. If amalgamation is the preferred method a case will have to be made to DE to justify the non-financial aspects.

Expansion/closure will not allow for a redesign of management structures and enhanced competition for posts of responsibility allowing better opportunities for all staff. Pupils may regard amalgamation as a 'fresh start' rather than continuation of an existing structure. An amalgamated new school could be branded 'St Patrick's' or something similar to empathise (sic) continuity of provision in Downpatrick."

The meeting concluded that the preferred route was option 2 (Amalgamation) for reasons of equity.

[19] It was further agreed at this meeting that a consultation process would commence and it was stated, in a passage about which the applicant is critical, that "parental/staff/governor consultation would be on the preferred option as the appearance of a ballot is to be avoided. Other options can/will be discussed and reasons for their dismissal noted. Any new options raised 'from the floor' can be investigated."

[20] On 14 October 2016 the Board of Governors advanced a proposal identified as option 6 which proposed "A bilateral co-educational Catholic Voluntary Grammar School developed through expansion of Saint Patrick's Grammar School, providing for the needs of all pupils attending the Catholic Post-Primary Education in Downpatrick. The school will continue under the trusteeship of the De La Salle Order." The Trustees responded to that proposal on 23 November 2016 setting out the rationale for its preference of the amalgamation model over the expansion/closure model.

[21] In December 2016 the Strategic Development Subcommittee of the Board of Governors produced a document entitled "Draft Proposal for the Future Education

of St Patrick's Grammar School, Downpatrick, it identified the parameters of the debate as follows:

"All three schools' board of governors have accepted this vision [of a single school made up from all three existing schools, designated as an all ability voluntary grammar school under the trusteeship of the De La Salle order] but no agreement has been reached as to the timeline and structure of such a development. While the governors of St Patrick's have accepted the vision as a longer term development, they do not accept that this can be achieved by a single step or 'amalgamation.' The Trustees current preferred option is for the closure of all three schools and the establishment of a completely new school on the Saul park campus."

[22] At a meeting held on 26 July 2017 the Project Board were advised that both De La Salle High School and St Mary's High School preferred the amalgamation route, whilst St Patrick's Grammar School favoured expansion/closure. At that meeting the Project Board indicated its commitment to the amalgamation method. Thus, the essential difference between the applicant Board of Governors and the proposed respondents is as to the methodology by which a new school is to be achieved. The Trustees having indicated a preference for the amalgamation route, with all three Downpatrick schools being discontinued and a new school created, whilst the Board of Governors prefers a route whereby the two smaller schools are discontinued and St Patrick's Grammar School expanded.

[23] In saying that, I am conscious that, in the course of the consultation process, other objections to the proposal were identified by the consultees, including, by way of example, issues around the size of the proposed new school and the impact that increased size would have on the quality of pastoral care available to pupils in an enlarged school.

The Consultation Process

[24] The statutory consultation provided for under Article 14(5) ran from 15 March - 16 May 2018. It should be noted that statutory consultation actually involved four schools, St Patrick's Grammar School, St Mary's High School, De La Salle College and St Columba's College in Portaferry. The consultation process therefore involved consulting with the Board of Governors, teachers and parents of St Patrick's Grammar School but also the relevant personnel in De La Salle High School, St Mary's High School and St Columba's College, Portaferry. Ultimately, following the consultation process, CCMS and the Trustees did not include St Columba's College in their proposal to the Authority.

[25] The Case for Change document provides a summary of the statutory consultation. Whilst not a requirement of the statutory consultation, in all cases CCMS and the Trustees consulted with a cross-section of pupils from each school. The consultations were conducted through meetings and in written format. Minutes of the consultation meetings are available to the court, as are the PowerPoint presentations used by the Trustees and CCMS. It is clear that, so far as St Patrick's Grammar School is concerned, staff, governors, parents and pupils were all given the opportunity to express their views on the proposal, and that they clearly expressed their strong opposition to the proposal. This is clearly recorded in the Case for Change document, as are their reasons for opposing the proposals. It is recorded that their response to the proposal was almost universally negative, with 2% of respondents in favour of the proposal and 98% opposed.

Statutory Framework

[26] The statutory process for development proposals is set out in Article 14 of the Education and Libraries (Northern Ireland) Order 1986 (hereinafter the 1986 Order). So far as is relevant to the proposal to:

- (i) Discontinue St Patrick's Grammar School; and,
- (ii) To establish a new school, following the discontinuance of St Patrick's Grammar School and the two smaller schools.

The legislation provides that where a person other than the Education Authority proposes to establish a new voluntary school (Article 14(2)(a)), or proposes to discontinue a voluntary school, (Article 14 (2)(b)) then the proposer shall submit a proposal to the Education Authority and the Authority shall submit the proposal to the Department of Education together with its views on the proposal.

[27] Before submitting a proposal to discontinue a school, the proposer must (as per Article 14(5) of the 1986 Order) consult with:

- (a) The Board of Governors of the School;
- (b) The teachers employed at the School; and,
- (c) The parents of pupils registered at the School.

[28] Thereafter, the Authority, before submitting a proposal to the Department of Education, must engage in a further and wider statutory consultation process. (Article 14(6) of the 1986 Order)

[29] I was also referred to Article 9B(4)(a) & (b) of the 1986 Order which provides that it is the duty of the Board of Governors in a voluntary grammar school to prepare a scheme of management for the school. Thus the Board of Governors was

responsible for preparing a scheme of management in St Patrick's Grammar School, a matter they place reliance upon in advancing their contention that neither CCMS nor the Trustees can make a proposal without their agreement.

[30] Finally, I was referred to Article 13 of the Education (NI) Order 1998 which provides that it is the duty of the Board of Governors to prepare a school development plan. The Education (School Development Plans) Regulations (NI) 2010 identify the matters which fall to be addressed in school development plans.

Challenges to CCMS

[31] In its original Order 53 statement the applicant challenged the decision of CCMS proposing the discontinuance of St Patrick's Grammar School. The response from CCMS is that CCMS did not propose the discontinuance of St Patrick's Grammar School, that proposal had been made by the Trustees as the Trustees of St Patrick's Grammar School. CCMS' case is that this meets all grounds of challenge directed at CCMS.

[32] As outlined above, this led to the lodging of an amended Order 53 statement but the challenge to CCMS has not been expressly abandoned. I did ask the applicant, and indeed the second proposed respondent, whether, given that it appeared to be common case that it was the Trustees who had advanced the proposal of discontinuance of St Patrick's Grammar School, albeit in a proposal linked to one advanced by CCMS, CCMS could be released as a respondent. Neither the applicant nor the Trustees were in a position to agree to this course.

[33] I propose in the first instance to deal with the challenges brought against CCMS given that CCMS's primary contention is that they are not the decision-maker so far as the impugned decision is concerned.

[34] Addressing firstly the Illegality/Vires challenge. I can deal with this issue fairly shortly. The Case for Change document was submitted to the Education Authority by CCMS, CCMS are identified in the document as the 'proposer' and the Area Planning Programme Manager signed the document. However, it is made clear in the body of the document that the proposal was made by the Trustees of St Patrick's Grammar School (also the Trustees of De La Salle High School), CCMS and the Down and Connor Diocese (Trustees of St Mary's High School) and that these proposers are referred to as the Downpatrick Project Board.

[35] The reason for the Case for Change document being submitted jointly by CCMS and the Trustees (and indeed the Down and Connor Diocese) was, according to CCMS, because Departmental guidance provides that in the case of amalgamation "it is essential that all the proposals are published at the same time and clearly inter-linked" (9.4 Department of Education Guidance on the Publication of a Development Proposal). Nobody disagreed with this proposition.

[36] It is clear, on the evidence before the court, that CCMS does not purport to have the jurisdiction to make a proposal under Article 14 of the 1986 Order on behalf of St Patrick's Grammar School, rather it was involved because it was responsible for the linked proposals made in relation to the discontinuance of St Mary's High School and De La Salle High School.

[37] In my view, CCMS did not propose the discontinuance of St Patrick's Grammar School, that proposal came from the Trustees. In the circumstances CCMS are not a proper respondent to this challenge and I therefore refuse the applicant leave on this ground of challenge.

[38] In my view this disposes of the remaining grounds of challenge against CCMS, I will however, further below address the complaint about a failure to comply with the statutory duties under the Rural Needs Act (NI) 2016 and section 75 of the Northern Ireland Act 1998.

Challenges to Trustees - Vires Challenge

[39] The applicant further contended as regards the Trustees, that the Trustees have no power to make a proposal to the Education Authority without the express authorisation and agreement of the Board of Governors. He referred the court to the Scheme of Management prepared by the Board of Governors pursuant to Article 9B(4)(b) of the 1986 Order and relied upon the fact that the Board of Governors perform the management and control function within the school and are responsible for preparation of the School Development Plan.

[40] Essentially it was the applicant's contention that both, the role of the Board of Governors in control and management of the school, and the Board's obligation to draft a School Development Plan, meant that the Board had an effective power of veto over any proposal. In response Mr Sayers QC on behalf of the Trustees, referred the court to Article 13 of the Education (NI) Order 1998 which provides for Boards of Governors to prepare a school development plan. This legislation provides that Regulations will prescribe the matters to be dealt with by a school development plan. The Education (School Development Plans) Regulations (NI) 2010 identify the matters which fall to be addressed in school development plans. As Mr Sayers QC observed neither the Scheme of Management nor the School Development Plan gave the Board of Governors any power to make a proposal to discontinue the school, nor did they preclude Trustees from making proposals in relation to the discontinuance of a school to the Education Authority. In reality, both are silent on the matter.

[41] Mr Sayers QC also referred the court to Article 14 of the 1986 Order which prescribes the procedure by which development proposals are made. Article 14(2)(c) provides that "where a person other than the [Education] Authority proposes to discontinue a voluntary school" then "the person making the proposal shall submit

the proposal to the Authority". As is noted the legislation is silent about who can make a proposal of this nature.

[42] Article 14(5(a), however, provides that the proposer must consult with the Board of Governors. While identifying the Board of Governors as a consultee (along with staff and parents), the legislation did not give the Board of Governors any power to veto the proposal.

[43] Mr Sayers QC also referred to the Department of Education Circular 2017/9 entitled 'Guidance on the Publication of a Development Proposal'. Section 7 of the circular is headed 'The Proposer' and 7.2 lists the 'managing authorities which bring forward DPs for publication'. The list includes School Trustees of voluntary grammar schools in the Catholic sector (7.2 (vii)).

[44] Mr Sayers' arguments were supported by Mr McAteer, appearing on behalf of the Department of Education. Mr McAteer made the observation that the role of the Board of Governors as a recognised consultee within the statutory scheme undermines the contention that the Board of Governors is the appropriate proposer and further reflects the fact that the Board of Governors may well disagree with the proposer about that which is being proposed.

[45] In my view, the applicant's application for judicial review on this ground must be refused. While the Departmental Guidance may not ultimately be determinative of the issue, the applicant has not sought to challenge the Departmental Guidance. More importantly however, the express identification of the Board of Governors as a consultee within the statutory scheme appears to me to fatally undermine any suggestion that the Board of Governors could exercise an effective veto over any proposal advanced under Article 14. I agree that the identification of the Board of Governors as a consultee suggests that they are not an appropriate proposer of a proposal covered by Article 14. More fundamentally, their role having been expressly identified within the statutory scheme as a consultee, nothing in the legislation supports the view that the Board of Governors must authorise or agree any proposal, as suggested by the applicant. Rather it is clear that they must be consulted with, but in the event that the appropriate consultation has taken place, the proposer can ultimately advance a proposal with which they don't agree. For these reasons leave on this ground will be refused.

Procedural Unfairness

[46] As outlined above, there is a statutory obligation for the proposers to engage in a consultation process prior to making a proposal, either to discontinue a voluntary grammar school, or to propose the establishment of a new school. Article 14(5) of the 1986 Order provides that before a proposal in relation to an existing school is submitted to the Education Authority the person making the proposal must consult with: the Board of Governors; staff; and, parents of registered pupils.

[47] Alongside the Vires challenge the main focus of the applicant's complaint was to the effect that the manner in which the consultation process had been conducted was procedurally unfair. In particular the applicant contends that there had not been compliance with the 'Sedley requirements'. He maintained that the consultation process entered into by the proposed respondent was not at the formative stage of the proposal and further that the concerns and objections raised by the school community were not subject to proper, conscientious consideration by the proposed respondent and that the outcome of the consultation process was in fact pre-determined.

[48] In *R v Brent London BC, ex p Gunning* (1985) 84 LG 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation had been unlawful. He said:

"Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when the proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third . . . that adequate time must be given for consideration and response and, finally, that the product of the consultation must be conscientiously taken into account in finalising any statutory proposals."

[49] The Sedley requirements have been endorsed by the House of Lords in *R(Mosley) v Haringey London BC* [2015] 1 All ER 495 at (25). The decision is usefully summarised by Huddleston J in a judgment in this jurisdiction, *In re MA2's Application* [2020] NIQB 34, as follows:

"Underpinning all of this is the Supreme Court decision of *Mosely b Haringay LBC* [2015] 1 All ER 495 which reviewed the common law requirements for a fair consultation. In summary in that review the court:

- Endorsed what are known in shorthand as the "*Sedley criteria*" [per *R v Brent London BC, ex p Gunning* [1985] 84 LGR 168 (at 189)] which are seen as setting out the essential requirements of a fair consultation process viz (i) that there is a formative stage; (ii) the provision of sufficient information about the proposal; (iii) the provision of sufficient time within which to respond and (iv) a conscientious consideration of the responses (see paragraph 25);

- Concluded that the manner in which consultations should be conducted will be *"informed by"* the principle of procedural fairness;
- Determined that the degree of specificity within a proposal may depend upon the audience and might be influenced by the consideration as to whether or not the proposal would deprive a person of an existing benefit or advantage;
- Indicated that where there is a statutory duty to consult upon a single preferred option nonetheless fairness may require consultation on alternative but discarded proposals (paragraphs 27-28 and 39);
- That the requirements of a lawful consultation process should be guided by the relevant statutory context and the purposes of the particular duty to consult; and
- That, where, on the facts, a fair consultation process requires the provision of information about discarded options this means that there must be a detailed discussion about those options on the basis that *"enough must be said about realistic alternatives and the reason for the [particular] preferred choice, to enable consultees to make an intelligent response . . ."* Lord Reed at para 41.]

Whilst this sets the framework for fair consultations by their nature each consultation raises fact specific issues – as is obviously the case in the present challenge."

[50] The applicant's first complaint as to the alleged procedural fairness of the procedure was to the effect that the proposals were not at a formative stage. Rather, it was contended, the Trustees had, prior to the consultation process identified their preferred option, amalgamation of the three schools. In response the Trustees state that whilst pre-determination was not permissible, there is nothing wrong with a degree of predisposition where there is a preferred option to be consulted on. In support of this proposition the court has been referred by the proposed respondent to *Judicial Review: Principles and Procedure* (2013) Auburn, Moffett & Sharland at paragraph 7.30 which states:

" . . . there is nothing objectionable about a decision-maker having a preferred option or provisional view, or a course it is minded to take subject to the outcome of the consultation: the decision-maker is permitted some level

of predisposition, a degree of which is legitimate and may be inevitable’.

[51] The three options presented during the consultation process, as reflected in the PowerPoint presentation, were:

1. The status quo, retention of four individual schools;
2. Two co-educational schools;
3. A single school.

In relation to the first option the Trustees indicated their opposition to this proposal and the reasons for their opposition. In relation to the second option the Trustees acknowledged that this option would be sustainable but set out the reasons this was not their preferred option. In relation to option 3 the Trustees clearly indicated that this was their preferred option and set out their reasons.

[52] I am mindful that Mr Coll QC in his careful submissions to this court, has painstakingly identified occasions over the years prior to the statutory consultation, where the Trustees have clearly articulated their preference for a single school option and further, their preference for arriving at that option via the amalgamation route. I am also alive to an issue about which concerns have been expressed, namely that there is a long-term vision of a non-selective, co-educational, 11 - 19 school. I am however, also conscious that the Board of Governors has throughout the process leading up to the statutory consultation process, been fully informed about all of the options under consideration, the Trustees’ evaluation of their pros and cons, and that they have been able, throughout the pre-statutory consultation process to articulate their opposition to the methodology preferred by the Trustees.

[53] I should say something about the timing of this application, as it relates to the first stage of the consultation process. Proceedings were issued by the Board of Governors at this stage in the process because, in a number of judgments: *In re McDonnell’s Application* [2007] NIQB 125; and, *In re XY’s Application* [2015] NIQB 75, applicants for judicial review of Departmental decisions have been criticised for delay in bringing the proceedings at the stage of Departmental decision-making rather than at the conclusion of the first stage of the consultation process, in circumstances where they were criticising that process.

[54] In *McDonnell’s Application* Gillen J stated that:

“I consider that the appropriate time to have made the challenge in this case was when the proposal was first made by CCMS.” (21)

The Board of Governors, having identified concerns about the first stage of the consultation process, were aware that, if they raised these issues at a later stage of the process, they too could be met with the response that they ought have brought this challenge at an earlier stage. On this issue, I accept that the Board of Governors, having formed the view that the consultation process had not been carried out in a manner which was procedurally fair, were entitled to challenge that process at this stage (subject to the rather different delay issue raised by the Trustees).

[55] In all the circumstances, I am however unable to accept that the consultation process did not occur at a time when the proposals were at a formative stage. In the first instance, I am conscious that as a result of the consultation process a significant change did occur, albeit not in relation to St Patrick's Grammar School. The consultation process had initially envisaged the amalgamation of four schools however, the Case for Change document does not suggest the amalgamation of four schools, but instead proposes the amalgamation of three, such that the proposed discontinuance of St Columba's in Portaferry does not form part of the proposal. It was also apparent that other less substantive changes flowed from the consultation document.

[56] I am also mindful of Huddleston J's observations in *In re MA2's Application* [2020] NIQB 34, wherein he states:

"As the case law makes clear when one is considering the fairness of a consultation process one has to bear in mind the full statutory context". (39)(i)(a)

[57] So far as the statutory context is concerned, this is the first pre-publication stage of the process and it is a process in which the Board of Governors, the staff, the parents, and indeed the pupils have been given ample opportunity to express their views, and have done so. The Development Proposals must now undergo a further statutory consultation which consultation will be carried out by an entirely different body, the Education Authority, before they in turn make proposals to the Department of Education, which will make the final decision. The clear opposition of those associated with St Patrick's Grammar School, and the reasons for that opposition, will be available to the Department before it makes any decision and the applicant and those associated with the school will have further opportunities to engage with the process.

[58] In that context it is noteworthy that the Case for Change document sets out fully and comprehensively the objections verbalised by the Board of Governors, staff, parents and indeed the pupils of St Patrick's Grammar School. The document also attaches as Appendices:

- Reorganisation Options (Appendix C) which represents a detailed analysis of each of the options originally considered and their pros and cons. It will thus be open to those who participate in the next stage of the consultation process

to make representations on any of the options which have been considered and the Department has available to it the panoply of options which were considered by the Trustees and CCMS and can engage in their own evaluation of those options.

- The Consultation Summary (Appendix H) provides a detailed summary of the responses of the consultees and the issues and concerns which they have identified. It places the Department on clear notice of the depth of opposition to the proposals from those associated with St Patrick's Grammar School and their reasons for opposing the proposals.
- A letter and draft proposal from St Patrick's Grammar School Strategic Subcommittee and the Trustees response (referred to at 20-22 above) which sets out the Board of Governors' reasons for its opposition to the amalgamation option and the reasons for its preference for the closure/expansion methodology.

[59] Thus, all of the reasons for the opposition on the part of the Board of Governors, staff, parents and pupils are contained within the Case for Change document and will inform the next stage of the consultation process conducted by the Education Authority. I am therefore satisfied that the consultation process has occurred at a formative stage.

[60] Neither do I accept the contention that the concerns and objections raised by the school community were not subject to proper, conscientious consideration by the proposed respondent and that the outcome of the consultation process was in fact pre-determined.

[61] As noted above, a significant change was made to the proposal as originally envisaged. It is thus apparent that the Trustees were prepared to depart from their preferred course in light of the representations made to them in relation to St Columba's School in Portaferry.

[62] It is also evident that all consultees were given an adequate opportunity to articulate their opposition to the proposals and the reasons for that opposition and indeed the Trustees extended the consultees beyond those with whom they were required to consult with to include the views of pupils in the School. I am satisfied from a full consideration of the materials that the proposed respondent was prepared to consider representations made in opposition to their preferred option.

[63] In the circumstances I refuse leave on this ground also.

Material/Immaterial Considerations

[64] The applicant in his Order 53 statement maintained that either material considerations had not been taken into account, or immaterial considerations had been taken into account:

- The impact on traffic of one proposed large campus
- That St Patrick's Grammar School is a sustainable school
- The absence of any assurance of capital funding to develop the necessary infrastructure
- That the amalgamation will result in inequality in accessing Catholic grammar education for boys in the area currently served by St Patrick's
- The objections from parents, pupils and staff
- The alternative solutions proposed by the Board of Governors
- The impact of the proposal on other schools in the area.

[65] However, in oral submissions, the applicant focussed on the: absence of any assurance as to capital funding; impact on traffic of one proposed large campus; and, on the fact that St Patrick's is a sustainable school.

[66] The proposed Respondent referred the court to *Re SoS Limited's Application* [2003] NICA 15, at (19) wherein the Court of Appeal said:

"it is for the applicant for leave to show in some fashion that the deciding body did not have regard to such changes in material considerations before issuing its decision. It cannot be said that the burden is imposed on the decider of proving that he did do so. There must be some evidence or a sufficient inference that he failed to do so before a case has been made out for leave to apply for judicial review."

[67] I have considered the parties submissions and also the Case for Change document. In a section entitled 'Resource Implications' the document addresses: Future Capital Requirements and identifies the need to create additional teaching and support spaces on the site of the two existing adjacent schools, De La Salle High School and St Patrick's Grammar School. It states that:

"If the development proposals are approved, the De La Salle Congregation would work with the DE to secure

investment through the Department's procurement processes by way of major capital calls. It is at this point the DE would support a detailed feasibility study and design for extension. An extension would require planning permission which cannot be sought until the completion of the development proposal and capital procurement processes." [7.3, p. 48]

[68] In my view, it is clear that the proposed respondent identified the need for further capital investment in order to provide that all pupils would be able to be educated on one site. Clearly steps such as procurement cannot commence until such time as the Department approves the proposal, but it cannot be said that the proposed respondent failed to have regard to fact that capital funding would be required for infrastructure work.

[69] On the issue of transport, the proposed respondent referred to the fact that this issue was identified in the course of the consultation process (Appendix H to the Case for Change). The issue is also addressed in A Case for Change at 7.4 wherein it observes that the site currently has a generous allocation of car parking/drop off places as well as provision for bus parking places and states that of the proposals are approved "the number of car parking places and transportation routes will be formally assessed by the DE ahead of the application for planning permission for an extension on the site." [7.4]. Again, I am not satisfied that the proposed respondent did not have regard to this issue.

[70] Finally, the fact that St Patrick's is a sustainable school has been expressly recognised by the Trustees. The Trustees response is that what was being addressed by the Downpatrick Project Board was area planning. This issue was also addressed by Mr McAteer on behalf of the Department of Education, albeit in a slightly different context, when he observed that many Development Plans are about area planning their focus is not on individual schools but about broader issues. He contended that the issue is not about sustainable schools, as such, but rather it is about developing a network of sustainable schools and about looking at the future needs of the area as a whole and comparing those future needs with what exists. I am satisfied that, at all times, the Trustees were mindful of the fact that St Patrick's was a sustainable school.

Rural Needs Impact Assessment & Section 75 of the Northern Ireland Act 1998

[71] The applicant refers to the duty imposed on public authorities by section 1(1) of the Rural Needs Act (NI) 2017 to have due regard to rural needs when discharging certain functions.

[72] The Trustees response in relation to this issue is succinct. The legislation lists the public authorities upon whom this obligation rests in the Schedule to the Act, the Trustees are not listed in the Schedule and thus no breach of duty can be committed

by the Trustees. Their response in respect of the s.75 duty is the same, they are not a 'public authority' for the purposes of s.75 and they cannot as a consequence breach any such duty.

[73] These grounds of challenge were also brought against CCMS. In that respect, I had some concerns that, if there were merit in the challenge to the failure to have 'due regard' to rural needs, or to comply with s.75 of the Northern Ireland Act, the applicant might, in due course, be left with no remedy.

[74] Ms Kiley, addressing this issue on behalf of CCMS made the point that this is the first stage in a process. The Department of Education will be the ultimate decision-maker and will have the ultimate responsibility for deciding whether to implement the proposal. The Department will itself be obliged to have 'due regard' to rural needs under the Rural Needs Act and will also be obliged to comply with its duties under s.75 of the Northern Ireland Act.

[75] I am satisfied in any event that the Department of Education, if it moves forward with the proposal is a 'public authority' within the meaning of both pieces of legislation and must act in compliance with both. If there is a failure by the Department to have due regard to rural needs or to have due regard to the need to promote equality of opportunity the applicant will not be prevented from challenging that decision at the appropriate time.

[76] Thus, as I am satisfied that the Trustees are not a 'public authority' within the meaning of either the Rural Needs Act or s.75 of the Northern Ireland Act. In the circumstances I refuse leave against the Trustees and given my view that CCMS are not an appropriate respondent to these proceedings in any event, I also refuse leave against CCMS in relation to these issues.

[77] In his Order 53 statement the applicant also complained that the decision of the proposed respondents were irrational, motivated by improper motive and bad faith. These grounds in part over-lapped with other grounds of challenge addressed above and in any event were not advanced in oral argument. Leave is refused on these grounds.

[78] Finally, it was contended that the Board of Governors had a substantive legitimate expectation that St Patrick's Grammar School would continue to operate as a grammar school. The applicant has not identified any commitment or promise made by the Trustees to the applicant in this regard and it is abundantly clear from the discussions which have been taken place over the years that no such commitment was ever made. Moreover, it is clear that, the current proposal envisages the retention of academic selection, albeit not for every school place. I do not consider that the applicant has an arguable case on this issue.

Delay

[79] Order 53 Rule 4(1) provides that:

“An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.”

[80] The Case for Change document was presented by CCMS and the Trustees to the Education Authority on 30 August 2019. The applicant instituted proceedings against CCMS on 29 November 2019. There is no issue of delay as against CCMS. However, upon receipt of a Skeleton Argument from CCMS stating that the CCMS was not the correct respondent, the Applicant lodged an amended Order 53 statement dated 20 February 2020.

[81] The applicant contends: in the first instance, that the Order 53 statement has been lodged within time; and, in the alternative that there is good reason for extending time.

[82] As to whether the application for judicial review as against the Trustees is out of time I can deal with this issue fairly summarily. Mr Coll QC, on behalf of the applicant maintains that the application was made within time. He points out that the Case for Change document expressly identifies CCMS as the Proposer and further that the document is signed by the Area Planning Programme Manager of CCMS. The Case for Change document is also signed by the Area Planning Programme Manager of CCMS. He contends that the first time it is expressly stated by either CCMS or the Trustees that CCMS was not the decision-maker was in the Skeleton Argument dated 3 February 2020.

[83] However, as I have noted above, while the response to the pre-action correspondence does not specifically state that the Trustees rather than CCMS were the decision-makers in respect of the impugned decision, it does state that: “the De La Salle Congregation, as the planning authority of St Patrick’s Voluntary Grammar School, is the proposer for the development proposals associated with that particular school and CCMS, as the planning authority of De La Salle High School and St Mary’s High School, is the proposer for the development proposals associated with those schools.” Thus, the letter identified that the Trustees were the proposers associated with St Patrick’s Grammar School. It appears to me that the correspondence, at the very minimum, identified as an issue the question of whether the Trustees ought to be a respondent to these proceedings. I am therefore satisfied that the application for judicial review has not been brought within time.

[84] Mr Coll QC further contends that, in any event, time should be extended. He points to the matters identified above, as to the identified Proposer of the Case for

Change and he maintains that, in any event, no prejudice has been caused to the Trustees given that they had worked alongside CCMS in preparing the Case for Change and also given the fact that the Trustees nominate members of the Board of Governors and that at least one member of the Board of Governors is a Trustee, thus the Trustees were aware, within the three month time-limit, that the Draft Proposal was under challenge.

[85] I indicated during the oral hearing on leave that I did not propose to dismiss the application for leave on grounds of delay and that remains my position. I should state, for completeness, that, had I granted leave on any other ground, I would have remitted the issue of delay to the full hearing and would have expected an affidavit from the applicant dealing with the issue. Given my conclusions on the applicant's challenge, such a course is rendered unnecessary.