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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOHN COUSINS FOR JUDICIAL REVIEW

AND IN MATTER OF A DECISION BY NEWRY MOURNE AND DOWN DISTRICT COUNCIL

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Steven McQuitty KC with David McKeown (instructed by GR Ingram & Co, Solicitors) for the Applicant
Gordon Anthony (instructed by Belfast City Council, Legal Services, Solicitors) for the Respondent

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McLAUGHLIN J

Introduction

[1] This is an application for judicial review of a decision of Newry Mourne & Down District Council ("the Council") dated 12 March 2025 whereby it both refused the applicant's application for membership of Kilkeel Leisure Centre and imposed a further exclusion for five years from all indoor leisure sites within the Council area.

[2] Proceedings were commenced on 23 September 2025. Progress was delayed on account of a combination of factors including the applicant's efforts to secure legal aid funding, a change in representation and the applicant's request to file a further affidavit. On the Respondent's side, it requested permission to file a late pre-action response and to hold a meeting with the applicant, which ultimately took place on 4 December 2025. Leave to apply for judicial review was granted on 21 May 2026, following a contested hearing. A full hearing took place on 22 October 2026.

Background

[3] Pursuant to Article 10 of the Recreation and Youth Service (Northern Ireland) Order 1986 ("the 1986 Order"), district councils have a duty to secure the provision for their area of adequate facilities for recreational, social, physical and cultural activities. They may do so by a number of specified methods including to "*establish, maintain and manage any such facilities*" (per Article 10(1)(a), 1986 Order). Kilkeel Leisure Centre is a recreational leisure facility which is both maintained and managed by the Council. Access to the leisure centre is available on a "pay-as-you-go" basis or through a range of membership options.

[4] The applicant applied for and was granted membership on several previous occasions over the last 20 years. He has also been the subject of a series of exclusions as a result of his conduct and complaints against him by other users.

2006 – 2 Year Exclusion

[5] In 2006, the applicant was excluded from the leisure centre for two years following five separate reports of inappropriate behaviour towards female users under 18 years of age.

2012 – 5 Year Exclusion

[6] The applicant's membership was subsequently renewed and in 2012 he was again excluded from the leisure centre, this time for a period of five years. The exclusion was imposed following a further four reports of inappropriate behaviour towards female users both over and under 18 years of age. In one incident, he was reported to have harassed a woman and her daughter while leaving the leisure centre, by repeatedly calling the young girl's name and attempting to engage her. When told by the mother that her daughter had gone on, the applicant was reported to have said "*she won't be when I take her*." In another incident, a girl's father reported to the leisure centre that his daughter and her friend had been made to feel uncomfortable while using the swimming pool after the applicant had approached them and asked for them for their names and addresses. In a further incident, the applicant positioned himself in the shallow end of the swimming pool, continually staring at female users and making one woman feel so uncomfortable that she left the pool, after she had attempted to stare him down. In all of these incidents, the applicant was unknown to the complainant and was identified using the centre's CCTV footage. When interviewed by staff and asked to account for his conduct, on each occasion the applicant is recorded as having denied being in attendance on the relevant dates, despite CCTV evidence and/or entry records confirming otherwise.

2020 – 5 Year Exclusion

[7] The applicant renewed his membership in 2017 but made infrequent use of the leisure centre until 2019. Between November 2019 and January 2020, the applicant made a series of complaints to the Council about the conduct of other users of the leisure centre. These were similar in nature to the complaints which had previously been made against him. He was also the subject of four fresh complaints of inappropriate conduct. These included a complaint that the applicant had approached a female user and made unsolicited offers of lifts. The female reported that he "creeps her out." In another incident the applicant was alleged to have positioned himself in the swimming pool close to a female user. When asked by the lifeguard to move, he was observed whispering in the female's ear, as a result of which she and her husband left the pool immediately. In another incident, the applicant was reported to have spoken to one leisure centre user and made inappropriate comments about a different female user. The person to whom the comments were made did not wish to engage further as he "didn't want to fall out with Mr C as Mr C knew where he lived." In another incident, a user complained that the applicant had made inappropriate remarks about his wife. These complaints were all received between 28 November 2019 and 7 December 2019. Council officials met with the applicant on 22 September, 9 December, 10 December and 24 January 2019, to discuss the complaints made by the applicant about other users and also the complaints made against him.

[7] In January 2020, an investigation was initiated by Council officials involving the complaints by and against the applicant. The applicant attended a meeting with Council staff on 24 January 2020. He initially did not engage, citing the legal advice of his solicitor and he left the meeting. He later returned and agreed to discuss the complaints against him. He denied ever offering anyone a lift. He stated that he could not recall the incident involving staring at a female in the swimming pool and he admitted making disrespectful comments about a female in front of other people but said that it took place in Newcastle rather than in the leisure centre. A report on the investigation was prepared by a group of Council staff, comprised of a member of the leisure centre staff, the Council's Safeguarding Officer (Gary Scott) and the Council's Assistant Director of Corporate Services. The report contained an analysis of the different types of risks posed by the applicant to both staff and other users and concluded with a recommendation to senior management that the applicant should be excluded with immediate effect from all leisure facilities within the Council area for a period of at least five years. The recommendation was in the following terms:

> "To remove the impact of these inappropriate and unreasonable behaviours by Mr C, it would be a practical, reasonable and proportionate response to suspend Mr C's membership with immediate effect, on the basis of ensuring the continued safety and enjoyment of all customers using our facilities, the conflict with other customers and associated risk to Mr C himself, the

> previous historical nature of Mr C's behaviour, the ongoing nature of his current behaviours including the potential risks to others and its impact on staff.
>
> If the decision was taken to suspend his membership, then this should be progressed as a priority and any suspension should be of a reasonable duration, given his previous were for two years and five years …
>
> In relation to other users that there have been allegations made, we have addressed these with the individuals in the same manner in which Mr C was, spoken with and issued a copy of the Council's Safeguarding Policy and Code of Conduct.
>
> It is important that there is a consistent application of our process for Conduct and Safeguarding for all customers and Gary Scott, Safeguarding Officer, has been involved in this process throughout."

[8] On 2 March 2020, the Council's Assistant Director of Leisure wrote to the applicant in the following terms:

> "As you are aware, the Council received reports of unacceptable behaviour from you within Kilkeel Leisure Centre, including inappropriate behaviour in a swimming pool/health suite area. …
>
> Following these reports an investigation has been conducted by Council Officers through meetings with you, other centre users and centre staff.
>
> I confirm you were issued with a copy of Council's Membership Terms and Conditions and Code of Conduct both prior to and during Council investigation.
>
> On conclusion of the investigation, it was determined that, on the balance of probabilities, the complaints received should be upheld.
>
> Given the serious nature of the matters investigated, it has been agreed to, with immediate effect, impose a ban on you from using all indoor leisure sites within Newry Mourne and Down District Council area for a period of five years. In reaching this determination, the Council

has considered previous suspensions of your indoor leisure membership.

At the end of your exclusion period, you will be entitled to reapply for membership of Council's Indoor Leisure facilities. If you choose to reapply, a meeting will be arranged with Centre Managers to discuss the terms of any re-admission. Please note that management reserve the right to impose additional conditions on membership should any future application be approved."

[9] The applicant did not avail of the Council's Internal Appeal Procedure. On 11 March 2020, Mr Jim Wells MLA, wrote to the Council on behalf of the applicant, stating that he did not know "*all of the facts which led to the decision*" but suggested that the length of the ban was excessive. On 20 May 2020, the Council received a letter from a solicitor on behalf of the applicant asserting that he had been barred from the leisure centre for "*unacceptable behaviour*" but that "*no other reasons [were] forthcoming, nor an explanation of same, per human rights law … therefore we would ask you to detail specifically the allegations against him so he has a legal right to challenge same*." The Council responded on 27 May 2020 refuting in strong terms the contention that the applicant had not been provided with details of the allegations made against him. The letter set out the dates of each of the four meetings which took place with the applicant between November 2019 and January 2020 and asserted that on each of these occasions the applicant had been informed of the specific allegations against him. The letter also referred to the previous periods of exclusion and the applicant's decision not to exercise his right of appeal. The letter also repeated that the applicant would be entitled to reapply for membership at the end of his exclusion period and that if he did choose to reapply "*a meeting will be arranged with centre managers to discuss the terms of any re-admission. Management reserve the right to impose additional conditions on membership should any future application be approved.*" No further correspondence was received from the applicant or his solicitor.

[10] The letter of 27 May 2020 was signed on behalf of the Council by its Director of Active and Healthy Communities. This was a different Director to the one who signed the original exclusion letter of 2 March 2020.

2025 - Request for Reinstatement of Membership

[11] On 22 February 2025, the applicant telephoned the manager of Newry Leisure Centre. He referred to the March 2020 correspondence and requested that a meeting be arranged, in accordance with its terms.

[12] During February and March 2025, the applicant's case was reviewed internally by senior Council officers and its Safeguarding Officer, Mr Gary Scott. Mr Scott prepared a report and recommendation, summarising the previous periods

of exclusion and the reasons for those decisions. Under a section headed "Risk Assessment", an analysis of the risks associated with the applicant was set out. This appears to be identical to the risk assessment contained in the 2020 report. Mr Scott expressed his recommendation in the following terms:

> "The Council must ensure the safety and enjoyment of all customers using our facilities and to protect them from harm. We must also ensure the safety of staff, employed at our facilities. Failure to do so either exposes Council to reputational damage, the potential of loss of income and the possibility of legal action.
>
> To exclude Mr C would mitigate or remove the risk of harm to other customers subject to the inappropriate or unreasonable behaviour by him, the risk/potential risk to Mr C himself from other customers at KLC, and support and protect Council staff. Reflecting all the information available and on the basis of my aforementioned considerations, I would recommend that, it would be reasonable and proportionate for Council to impose a further five year ban on Mr C's membership with immediate effect, for all leisure facilities within the Council area]."

[13] The Council accepts that no meeting or other contact took place with the applicant between his telephone call on 22 February 2025 and the preparation of this report and recommendation. On 12 March 2025, Mr Conor Haughey, Assistant Director of Healthy Living, wrote to the applicant to inform him that a decision had been taken to exclude him for a further five years. The letter was in the following terms:

> "Following these exclusions, a review of previous investigations has been conducted by Council officers within senior management.
>
> On conclusion of the review, it was determined that the exclusion should be upheld.
>
> Given the serious nature of the previous complaints it has been agreed to, with immediate effect, in line with Council Safeguarding Policy and Procedures, impose a further ban on you from using all indoor leisure sites within Newry, Mourne and Down District Council area for a period of five years.

> This is on the basis that you have continually demonstrated inappropriate and disruptive behaviours since 2006 and despite warnings and support (including previous renewal of membership after exclusion) you have continued to use/demonstrate these behaviours impacting on both other customers and staff.
>
> At the end of your exclusion period, ie the five-year period, you will be entitled to reapply for membership/access of the Council indoor leisure facilities. If you choose to reapply, a meeting will be arranged with centre managers to discuss the terms of any readmission. Management reserve the right to impose additional conditions on membership should any future application for re-admission be approved."

[14] The applicant was advised of his right of appeal.

[15] On 19 March 2025, Mr Kenneth Cousins emailed the Council on behalf of the applicant requesting, inter alia, an appeal of the decision.

[16] The Council undertook a "paper only" appeal which did not involve any meeting or further communication with the applicant. A further report was prepared by the Council's Safeguarding Officer, Gary Scott. The report repeated a lot of the information and analysis contained in previous reports. It included the following conclusion and recommendation:

> "It is important to note that following previous exclusions, on being readmitted Mr C's behaviour has continued to involve inappropriate and unreasonable behaviours. There is no evidence or information provided that would support an argument that Mr C would on this occasion not display similar behaviours. In addition, these are not one off incidents but a demonstration of a course of conduct involving a range of inappropriate, disruptive and unreasonable behaviours.
>
> There is no evidence that Mr C's behaviours are as a result of any disability or condition, nor has Mr C provided any such evidence. To the contrary, Mr C's behaviours were, on the basis of the evidence available, simple demonstrations of inappropriate and unreasonable behaviour. Mr C did state in response to "staring" at other customers that it was as a result of a medical condition, however, he did not provide evidence to support this …

> There continues to be no new information or evidence that would support Mr C's re-admission as a member or as a user of our facilities. The decision by Council to impose a further five-year ban on Mr C's membership with immediate effect, for all leisure facilities within [the Council area] was both reasonable and proportionate …"

[17] On 23 May 2025, the Assistant Director of Healthy Living, Mr Conor Haughey, wrote to the applicant dismissing his appeal. The letter stated:

> "Council have not been provided with specific details to confirm that any medical conditions would serve as an explanation or offer some insight into the reasons for the behaviours.
>
> I have conducted a review of previous investigations. On conclusion of the review, it was determined that the exclusion should be upheld.
>
> The decision to uphold the exclusion is based solely on safeguarding considerations. Council core values include that everyone has the right to be safe from harm, feel valued and listened to, to fulfil their full potential and to have their human rights protected.
>
> This now concludes the Council's process in this matter. However, if you wish to challenge this decision, you must do so via the Council's Complaints Procedure ..."

[18] On 29 May 2025, a solicitor on behalf of the applicant wrote to the Council stating:

> "Our client is a pensioner with chronic health conditions, who has been advised to exercise by his doctor, yet <u>for reasons not known to him</u> he is being further restricted by NMDDC to access the leisure centre. Whilst my client advises that he does not know why he was banned in the first instance, he accepted same and served his exclusion period. On what ground are NMDDC refusing his access to facilities that he is entitled to use …" [emphasis added]

[19] Following a brief response by the Council affirming its earlier decision, the applicant's solicitor sent a pre-action letter alleging procedural unfairness, including an absence of reasons for the exclusion, the failure to hold a meeting, irrationality

and a breach of legitimate expectations. No pre-action response was sent prior to commencement of proceedings.

[20] In a pre-action response dated 6 November 2025 (sent after commencement of proceedings), the Council confirmed that it was willing to meet the applicant on a without prejudice basis to discuss the possibility of reinstatement. The letter also stated:

> "The suspension imposed on him on 12 March 2025 and upheld by way of post appeal letter dated 27 May 2025, will remain in place until the date of a new decision which will be taken after a meeting between your client and NMDDC. That decision may be to allow reinstatement or it may be to impose a further five-year suspension."

[21] The effect of the Council's correspondence of 6 November 2025 was therefore to revoke the impugned five-year exclusion and to replace it with an interim exclusion from Council facilities, pending the proposed meeting and decision. The Council also took issue with the lack of detail contained within the applicant's grounding evidence about his knowledge of the reasons for the 2020 exclusion decision. The letter stated that the Council was "*… anxious in advance of the proposed meeting, to ensure that your client is fully aware of the issues we would wish to discuss with him.*". The letter also contained the following statement: "*… while NMDDC does not accept that the absence of a meeting is indicative of an illegality on its part, it would wish to ensure that your client has an opportunity to make representations about admission to the leisure centre. … NMDDC would wish to discuss with him his patterns of behaviour going back to 2006 …"* These comments were followed by an itemised summary of all three previous periods of suspension together with details of the complaints which had led to those suspensions. The Applicant was therefore reminded, in advance of the meeting, of its precise purpose and the issues of concern to the Council.

[22] A meeting took place on 4 December 2025. In attendance on behalf of the Council were Mr Gary Scott (Safeguarding Officer) and another Council officer. The applicant attended in person along with his advocate, Mr Jim Wells. The meeting was recorded and a summary transcript was later provided to the applicant, who did not dispute its accuracy in these proceedings. Some of the important exchanges which took place were recorded in the following terms:

> "GS: Asked JC why his exclusion (being barred) be lifted?
>
> JC: Stated he did nothing wrong.

GS: … Do you accept that you behaved in an inappropriate manner resulting in this length of being banned?

JC: No.

JC: Again, stated that [a Council official] who lives above JC hated him [JC] and was part of the conspiracy against him and he also had problems with her family and, in particular, her brother-in-law who had made complaints against him. …

JC: He had a quadruple heart bypass in July 2023. The consultant recommended exercise for rehabilitation. He has been attending ABC and Lisburn leisure centres/facilities and there are no complaints about my behaviour in those facilities and that he never visited KLC during the banned times. It is all jealously and fabrication. …

GS: … can you demonstrate what's different this time for you and why your ban should be lifted?

JC: No. And then JC reiterated that everything was a fabrication and people were just trying to get him in trouble.

GS: Again asked JC why his ban should be lifted.

JC: Repeated he had done nothing wrong.

GS: Council have duty of care for all customers and responsibility to protect customers and employees. There are allegations from a number of females and young girls of inappropriate behaviour, lewd comments, inappropriate touching, washing young girl's hair. How can I protect these people from these types of behaviours?

JC: No. This didn't happen. Right hand to God. It didn't happen.

GS: Asked JC with this behaviour by you in the past how can we as a Council on balance not exclude you?

JC: Continued denial of any incidents. …

JW: I recognise your concern … but could there be conditions for temporary reinstatement?

GS: Senior management will take the decision. JC doesn't accept the allegations have happened and I am aware you JC are taking legal action.

JC: All fabrication. …

GS: … GS advised that in relation to today's meeting any outcome from this was not going to be resolved today and report will be forwarded to senior management for review.

JW: Asked if GS or LM would be part of the senior management team.

JC: Management don't like me.

GS/LM: Both responded, no we would not be on the senior management team deciding on any actions arising out of this meeting."

[23] On 7 January 2026, Mr Haughey wrote to the applicant on behalf of the Council confirming that, following the meeting on 4 December 2025, the decision had been reviewed and that it had been decided to uphold the exclusion. He stated:

> "The decision to uphold the exclusion is based solely on safeguarding considerations. Council core values include that everyone has the right to be safe from harm, feel valued and listened to, to fulfil their full potential and to have their human rights protected. This now concludes the Council's process in this matter."

Grounds of challenge

[24] The applicant challenges the decision to exclude him from Council leisure facilities on three separate grounds, which overlap:

(i) Procedural fairness.

(ii) Legitimate expectation.

(iii) Irrationality.

[25] The applicant's core submission is that his exclusion was for a finite, rather than indefinite period. He was entitled to reapply for membership of this public facility and he was expressly promised the opportunity of a meeting prior to a decision on a future application, during which he would have the opportunity to put forward his case for re-admission. He contended that these promises generated a procedural legitimate expectation to a meeting, which was unjustifiably frustrated by the March 2025 decision. He also contended that the decision was procedurally unfair by reason of the absence of a meeting. During oral submissions, the applicant advanced two further aspects of unfairness which were not expressly raised at the leave hearing or in the Order 53 statement. These were a failure to provide disclosure of both the allegations of wrongdoing and the Council's risk assessment prior to the meeting of 4 December 2025. He also claimed that Mr Scott's involvement deprived the entire process of sufficient fairness on account of his involvement in 2020, his March 2025 recommendation and subsequent recommendation in January 2026. The applicant also contended that the exclusion decision was irrational.

[26] The respondent raised two preliminary objections. First, it argued that the applicant had breached his duty of candour by failing to disclose a sufficiently comprehensive and accurate account of his knowledge of prior exclusions and the reasons for those exclusions, including disclosure of correspondence and meetings with Council staff. It contended that the applicant's repeated assertions that he lacked knowledge of the reasons for prior exclusions were incomplete at best and dishonest at worst. Second, the respondent contended that membership of the leisure centre was a matter of private law, not public law and was regulated by contract. In relation to the substantive grounds of challenge, it contended that any unfairness or breach of expectation arising out of the failure to hold a meeting prior to the March 2025 decision was subsequently cured by a combination of the pre-action response and the 4 December 2025 meeting. It also contended that the exclusion decision was rational and within the scope of its management powers.

Duty of candour

[27] It is well-established that all parties to a judicial review application owe a duty of candour to the court, from the inception of proceedings until their ultimate conclusion (*Re Taylor* [2022] NICA 8, at [22](vii)). Compliance with the duty "*requires full and frank disclosure of all relevant matters, including those adverse to the applicant's case.*" (*Re Santos (No.2)* [2024] NIKB 38, at [20], per Humphreys J). The manner of disclosure may vary from case to case but invariably will include, one or other or a combination of a narrative explanation of relevant facts within an affidavit and/or a disclosure of documents containing relevant materials (*Tweed v Parades Commission* [2006] UKHL 53; [2007] 2 WLR 1 at [39]). If an applicant does not have possession of materials which are essential to the discharge of the duty, these should be requested

in pre-action correspondence (Judicial Review Practice Direction 03/2018, Appendix I, Para 11).

[28] The rationale behind the duty of candour is straightforward. The supervisory jurisdiction of the High Court under Part II of the Judicature (Northern Ireland) Act 1978 enables it to determine questions of law in the public interest. The procedures prescribed by Order 53 of the Rules of the Supreme Court of Judicature (NI) 1980 ("the Rules"), provide for evidence to be given on affidavit (Order 53, rules 3(2) & 5(2)), save in rare and exceptional cases where oral evidence or cross examination may be necessary (Order 53, rule 8). Since the procedures prescribed by the Rules are not apt for complex or detailed inquiries into, and the determination of contentious facts, the duty of candour has developed at common law to supplement those procedures. It requires the parties to put in evidence and/or disclose all relevant facts and materials which are necessary to enable the court to decide the relevant questions of law and to assess whether the public interest requires the grant of relief. The duty also reflects the public nature of the proceedings. While judicial review proceedings will have an adversarial character, the fundamental purpose of public law proceedings is to determine issues of law and the existence of legal rights and obligations, in the public interest. A failure to provide full disclosure of relevant facts and materials may inhibit the court's ability to perform its functions and, at worst result in issues of law being determined on an erroneous or incomplete basis, thus undermining the administration of justice. Where a lack of candour has been identified, the court reserves a broad jurisdiction on how it may proceed. This may include requiring further disclosure or evidence (whether on affidavit or in person by issuing a subpoena) or by drawing adverse inferences of fact against the defaulting party. In the case of a lack of candour by an applicant, the court may exercise its inherent interest to stay the proceedings or decline to determine the application (*Re TS's Application* [2022] NIQB 1, at [69], per Colton J.). In *Re Savage* [1991] NI 103, Carswell J. confirmed that non-disclosure of material facts may justify setting aside leave which had been granted *ex parte*, (at p106e). In the case of a lack of candour by a respondent, the Court may devise other proportionate sanctions such as adverse inferences or requiring attendance of witnesses. In the extreme circumstances found by Girvan J in *Re Downes* [2006] NIQB 77, he referred his findings to the Attorney General for investigation (see also *Re Downes (No.2)* [2007] NIQB 40). In all cases involving a lack of candour, the court will be guided by its assessment of the public interest and the circumstances of the case.

[28] In this case, it is clear that the applicant's evidence was grossly lacking in detail. In his grounding affidavit, his explanation of the background consisted of nothing more than a statement that he "*was a longstanding member of Kilkeel Leisure Centre up until 2 March 2020 when I received correspondence informing me that I would be banned with immediate effect for a period of five years …*"

[29] The applicant's first affidavit exhibited only the decision letters of 2 March 2020, 12 March 2025 and the appeal letter dated 27 May 2025. His second affidavit dated 18 May 2026 exhibited the post proceedings exchange of correspondence and

the fact of the meeting on 4 December 2025. His account of that meeting consisted of nothing more than the following averment:

> "5. On 4 December 2025, I met with the respondent's safeguarding officer. Soon into the meeting I realised that this meeting was being treated as an appeal of the decision to refuse me re-admittance as a review of the propriety of the ban imposed on me in 2025."

[30] I consider that the applicant's affidavit evidence was grossly lacking in material detail and failed to adequately explain the relevant background to the case. Indeed, it laid no foundation whatsoever for the two supplementary procedural fairness challenges which emerged at the oral hearing. I consider that the applicant's evidence not only omitted material details, but it also substantially downplayed the relevance and extent of the history of his exclusion from the leisure centre and did so in a self-serving manner. His conduct in the course of the proceedings was compounded by the incomplete instructions he clearly gave to his solicitors in 2020 and in 2025 at the time they wrote initial letters of claim. His evidence provided a significantly inadequate basis upon which the court approached the leave hearing.

[31] I accept that many of the documents ultimately included within the respondent's evidence may not have been within the applicant's possession at the time proceedings were in contemplation or commenced. However, he ought to have made far greater efforts to secure those materials as part of his pre-action correspondence and his grounding affidavit. These evidential gaps also ought to have been disclosed fully to the Legal Services Agency during his application for legal aid. Even after the respondent filed evidence, which included additional relevant materials, the applicant made no effort to correct, supplement or even explain his prior omissions. He filed no further evidence at all. He maintained this stance through to the hearing, notwithstanding the receipt of generous public funding for these proceedings. In the event, I do not consider the court was inhibited in its ability to determine the application or to ascertain the relevant facts, in light of the comprehensive and unchallenged evidence of the respondent. If I had been aware of the full extent of the applicant's lack of candour at the leave stage, I may well have stayed or even refused the leave application on that ground. The primary mitigating factor in favour of the applicant is that he did disclose the March 2020 exclusion letter and the March 2025 decision letter. By doing so, he disclosed just information to support an arguable claim for a breach of procedural legitimate expectation to hold a meeting. In cases of that nature, once sufficient evidence is adduced to support the existence of a promise or commitment, the evidential burden shifts to the respondent. Accordingly, notwithstanding his overall lack of candour, he disclosed the bare minimum of information to sustain a case for leave.

[32] In light of the view which I have reached on the merits of this application, I do not consider it necessary to decide whether the lack of candour was sufficiently serious to result in a summary dismissal of the application or other sanction.

Public/private law

[33] Pursuant to Order 53, rule 3(6) leave shall not be granted if the court is satisfied that the case is one in which relief could not be granted by way of mandamus, prohibition or certiorari "*having regard to the nature of the persons and bodies against whom relief may be granted ...*" It is now well recognised that the question of whether a judicial review application turns on an issue of private, as opposed to public law, requires consideration of a broader range of factors than the identity and legal status of the proposed respondent. This objection was raised at the leave hearing, however I considered the matter to be sufficiently arguable, that I deferred determination until a full hearing. I considered this approach to be consistent with the authorities in this jurisdiction.

[34] In *Re McBride* [1999] NI 299, Kerr J stated:

> "It is now recognised that the question whether a decision is subject to judicial review is best answered by identifying the issue involved and determining whether it is one of public law – see *Re Phillip's Application* [1995] NI 322 at 344. But what are the characteristics that distinguish an issue as one of public law? And must an issue be one of public law exclusively before it is susceptible to judicial review or may it partake of private law aspects provided there is also a public law dimension? …
>
> It appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group. That is not to say that an issue becomes one of public law simply because it generates interest or concern in the minds of the public. It must affect the public rather than merely engage its interest to qualify as a public law issue. It seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity …"

[35] In *Re Wylie* [2005] NI 359, Weatherup J held that a decision to refuse an application for an eel fishing licence on Lough Neagh raised a question of public law, notwithstanding that fishing rights were owned privately by a private limited company. The court in *Re Wylie* noted that the approach in *Re McBride* had been

approved by the Court of Appeal (*Re McBride's Application* (No.2) [2003] NI 319). It noted that the boundaries of public law for the purposes of judicial review were not coterminous with the question of whether the respondent was a "public authority" for the purposes of the Human Rights Act 1998 (albeit that question was relevant). In *Re Wylie*, the court was influenced by the extent of statutory regulation of the fishing industry, the broad functions and powers of the department to make regulations, irrespective of the ownership of fishing rights, the public interest in conservation of important natural resources and the impact upon the individual applicant. The court also approved the statement by the authors of DeSmith, Woolf and Jowell *Judicial Review of Administrative Action*, that the "*activities of an organisation may be governed by the standards of public law when, by virtue of the functions it is performing, it is under an implied duty to act in the public interest*" (*Re Wylie* at [7]-[21]).

[36] In the present case, the Council is a public authority and a statutory body. Its functions include a statutory duty under Article 10(1) of the 1986 Order to provide recreational facilities for the public at large within its district. This duty is owed to the public at large as opposed to specific individuals and may be described as a "general duty" or "target duty." I accept the respondent's submission that Article 10(1) of the 1986 Order does not confer individual admission rights to every or any particular Council facility. However, it does provide an important context for the functions being exercised, which are clearly in the broader public interest. I also accept the respondent's argument that none of these features preclude the formation of legal relationships between the Council and leisure centre users which are governed by private law, whether contract or tort. Indeed, it is readily clear that such relationships are likely to be governed by private law in the vast majority of cases (eg terms of admission and use; duty of care; vicarious liability etc.)

[37] Notwithstanding the above conclusions, I consider that the legal relationship between the council and an *applicant for membership* is materially different to the relationship between the council and an *existing* member or a person lawfully admitted to use the council facilities. In the latter cases, a short term or longer term contractual relationship will be in place. Once the person enters onto premises, the relationship will also be governed by the law of tort and duties under the Occupiers' Liability (NI) Order 1987. By contrast, where a person *applies* for membership and the application remains undetermined, no contract will have been formed. The application will either be a contractual offer or an invitation to treat. I acknowledge that in some cases, it is possible that an implied contract might exist which required the council to consider the application on its merits and in accordance with any rules governing membership. However, the possibility of such an implied contract is by no means clear. Accordingly, while I consider that many aspects of the relationship between the council and a facility user may be governed by private law, in this case, I consider that the statutory duty owed to the public by the 1986 Order and the absence of any clear private law relationship means that there is a sufficient element of public law in this case that judicial review should be available.

Procedural fairness/legitimate expectation

[38] The centrepiece of the applicant's claim was that the 2 March 2025 exclusion was imposed without a prior meeting or an opportunity to make his case for reinstatement. He contended that the decision was clearly adverse to his interests and that he ought to have had a fair opportunity to be heard before the decision was taken. He contended that the 4 December 2025 meeting did not "cure" the unfairness since the exclusion had already been imposed. For this purpose, he relied upon the decision of the Court of Appeal in *R(Balajigari) v Home Secretary* [2019] 1 WLR 4647 in which the court reviewed the authorities on procedural fairness and stated:

> "[60] This leads to the proposition that, unless the circumstances of a particular case make this impracticable, the ability to make representations only *after* a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made. Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. In the related context of the right to be consulted, in *Sinfield v London Transport Executive* [1970] Ch. 550, at p. 558, Sachs LJ made reference to the need to avoid the decision-maker's mind becoming 'unduly fixed" before representations are made.'"

[38] Like all cases involving an allegation of unfairness, the precise requirements of procedural fairness will depend upon the circumstances of the case. In this case, a key feature of the Council's decision was that it was exercising a safeguarding function, rather than a disciplinary one. The purpose of any potential future exclusion was public protection, rather than punishment (or further punishment) for the applicant's prior inappropriate behaviour or prior breaches of the Council's Code of Conduct and/or membership conditions. The Council had previously decided that those allegations were sufficiently well founded to justify an exclusion for safeguarding reasons. The 2020 decision was not appealed or challenged. Indeed, in the course of submissions, counsel for the applicant candidly accepted that the previous five-year exclusion could not be criticised in light of the available

evidence. The legal significance of this recognition lies in the nature and purpose of the opportunity for representations at a meeting. The process promised by the Council was not an opportunity for a fact finding or disciplinary procedure. It was an opportunity for the applicant to "make his case" for reinstatement and to assuage the Council's concerns about public protection by offering assurances about his future conduct.

[39] I consider it to be clear that no such opportunity was afforded to the applicant in March 2025 and, to that extent, the Council did not observe the requisite standards of procedural fairness at that stage, nor did it honour the procedural commitment which it plainly made. This conclusion was not strongly disputed by the Council. The real issue was whether the decision-making process as a whole, including the December 2025 meeting, was fair.

[40] Since the decision of the Privy Council in *Calvin v Carr* [1980] AC 574, it has been recognised that in some cases, a decision-making process may be fair, when viewed as a whole, notwithstanding unfairness at an initial stage. Classic examples of this possibility arise where an appeal or review process is available. However, some forms of unfairness are of such a magnitude that they will infect irretrievably the fairness of the entire process. In *Calvin v Carr*, Lord Wilberforce observed that there are some cases in which "*the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result*." ([1980] AC 574, at 593). Where a criminal penalty is imposed as a result of an unfair hearing, a subsequent appeal will generally not be sufficient to "cure" the defect (see eg *R(Rowlands v Hereford Magistrates' Court* [1997] 2 WLR 854, per Lord Bingham CJ). As in all cases of procedural fairness, the context will steer the court in its assessment of whether the process as a whole was fair.

[41] In this case, two features of the process after March 2025 are important. First, in its pre-action response letter, the Council rescinded its earlier decision to impose a further five-year exclusion. The decision was substituted with a decision to exclude the applicant pending the meeting and a final decision. To this extent, the applicant was restored to the position he enjoyed prior to March 2025. He accepts that he was never promised a right of readmission nor was he promised interim permission to use Council leisure facilities unless and until a decision to allow re-admission was taken. He accepts that he was only ever promised an opportunity to re-apply for membership and that he would remain excluded unless and until a decision was taken for his re-admission. Accordingly, at the point of the meeting in December 2025, he enjoyed the same position to which he was entitled. He was not subjected to an additional penalty of such significance that it impaired the Council's ability to restore the status quo or to reconsider the matter afresh. In light of this change to the Council's original decision, I do not accept that the principles set out in *Balajigari* apply. The applicant was not afforded a meeting only *after* an adverse decision was taken. He was afforded a meeting *before* a decision on re-admission was taken in precisely the circumstances as had been promised.

[42] Second, a detailed study of the transcript of the meeting of 4 December 2025 reveals that the applicant was afforded clear and fair opportunities to explain to Mr Scott any aspect of the prior allegations which he considered relevant and to make his case as to why re-admission should be considered. As set out above and, by way of example, he was asked "… *can you demonstrate what is different this time for you and why your ban should be lifted …*"; "… *how can I protect these people from these types of behaviour?*"; "… *why should the exclusion (being barred) be lifted? …*" These were fair and open-ended questions which were directed to the precise issues of concern to the Council and the risks posed by the applicant. He was accompanied to the meeting by a representative and he had a full and fair opportunity to respond. Rather than assuage the concerns of the Council, the applicant's consistent response was simply to deny the original allegations and to dismiss them as a mixture of fabrication, conspiracy and personal vendetta by others. He made no effort to recognise the impropriety of his prior behaviour, to give assurances about future conduct or to offer any explanation as to how the allegations came to be made. Reading the transcript of the meeting as a whole, I consider it to be clear that the meeting afforded the applicant a full and fair opportunity to make his case for re-instatement. In my view, this is precisely the sort of opportunity which he was promised and which procedural fairness required. In my view, the absence of an earlier meeting did not undermine the fairness of this process as a whole, nor did it prevent the ultimate decision to extend the exclusion from achieving the standards of procedural fairness.

[43] At the oral hearing, two further allegations of procedural unfairness were advanced on behalf of the applicant. First, it was contended the applicant ought to have received prior disclosure of the risk assessment carried out by the Council and also the details of the prior allegations. In my view, the applicant was provided with adequate information about the prior allegations. Insofar as this was not already known to him from previous periods of exclusion, the Council's pre-action response set out a clear and adequate summary of all previous allegations by reference to the relevant period of exclusions. The letter also informed the applicant that these would be the subject of discussion at the meeting in December 2025. This new proposed challenge is therefore without merit. Similarly, I do not accept that prior disclosure of the risk assessment was necessary. For the reasons set out above, the purpose of the meeting was to address the Council's safeguarding concerns, rather than inquiry into past wrongdoing. I do not consider it was necessary for the Council to provide advanced disclosure of the risk assessment to allow him to make his case for reinstatement. The risks posed by the applicant were perfectly obvious and would have been clear to the applicant. While it might have been better to make disclosure, I do not consider that the failure to do so was sufficient to render the process unfair. I therefore consider that it was sufficient to raise the Council's concerns during the meeting itself. As the transcript reveals, the applicant was afforded more than sufficient opportunity to make his case and to assuage the Council's safeguarding concerns.

[44] Second, the applicant advanced a new challenge to the independence of Mr Scott. As set out in detail above, Mr Scott was not a decision maker in March 2020, in March 2025 or in January 2026. On each occasion, he provided assistance to the Council's senior management by providing advice and recommendations, in his role as Safeguarding Officer. He prepared a written summary of the allegations, the procedures followed and he made recommendations. However, in each case, the ultimate decision was made by senior management, not by Mr Scott. This was made expressly clear to the applicant at the end of the meeting, when he asked this very question. Since Mr Scott was not the decision maker, I do not accept that his involvement in March 2025 or in December 2025 undermined the independence and impartiality of the process. As the Council's dedicated and expert safeguarding officer, I consider that he was an appropriate, if not the most appropriate, person to be involved at all stages. This proposed additional ground of challenge also has no merit.

[45] In light of the conclusion I have reached on the merits of these issues, it is not necessary for me to decide on whether to grant leave to make an amendment to the existing pleadings.

[46] For all of the above reasons, the procedural fairness ground of challenge is dismissed.

Legitimate expectation

[47] This ground of challenge overlaps very considerably with the procedural fairness challenge. In *Re Finucane* [2019] UKSC 7; [2019] NI 292, Lord Kerr summarised the public law principle of legitimate expectation in the following terms:

> "[62] From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment."

[48] In this case, I consider that the Council's correspondence of 2 March 2020 which informed the applicant of his five-year exclusion, contained a procedural commitment which was sufficiently clear and unambiguous to generate a procedural legitimate expectation that he would be offered a meeting with the Council prior to

determining any future application for membership or admission to council leisure facilities. I consider that this expectation was not fulfilled in March 2025 when the Council imposed a further ban without such a meeting. The question for the court is whether the departure from that expectation was justified and fair, in all of the circumstances of the case.

[49] In assessing overall fairness, it is necessary to consider both the fact that a meeting was ultimately provided and the fact that the Council also decided to substitute the 2025 further five year exclusion with one which continued only until the December meeting and determination of the membership application. For the reasons set out above, I consider that the combination of these measures essentially put the applicant into the position which he ought to have had at the outset. I also consider that the meeting afforded a fair and effective opportunity for the applicant to present his case for re-admission and that he did so. This process therefore ultimately accorded with the expectation generated by the Council in March 2020, even if it was somewhat belated. Accordingly, I consider that any initial departure from the March 2020 commitment was ultimately remedied by the Council's subsequent actions. It was fair in all of the circumstances and was therefore ultimately justified.

[48] Accordingly, this ground of challenge is also dismissed.

Rationality

[49] The applicant did not press this ground of challenge strongly. In light of the applicant's acceptance that the original exclusions were justified on the basis of the available evidence of inappropriate behaviour, I consider that this ground of challenge is unsustainable. The recent exclusion decision was based upon precisely the same evidence and was reached following a fair procedure. It was plainly a decision which lay within the scope of the Council's decision-making discretion and was an appropriate exercise of its management powers in furtherance of public protection objectives. This ground of challenge must also be dismissed.

Conclusion

[50] For all of the above reasons, the application for judicial review is dismissed.