

Neutral Citation no. [2007] NIQB 107

Ref: **WEAC5959**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **06/12/2007**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**AN APPLICATION BY JR17 (EDUCATION)
FOR JUDICIAL REVIEW**

WEATHERUP J

The Application

[1] This is an application for judicial review of the decisions of the Principal of a school and the North Eastern Education and Library Board suspending the applicant from the school. The applicant's challenge is directed at two main areas, namely the decisions of the Principal and the Board in relation to the suspension of the applicant from the school and the arrangements for the tuition of the applicant over the period of his absence from school. Ms Quinlivan appeared for the applicant and Mr McLaughlin appeared for the respondents.

Background

[2] The applicant was informed by the Principal on 7 February 2007 that he was being suspended for a period of 5 days. This suspension continued for further 5 day periods until 13 March 2007 and home tuition was provided by the school. From 13 March 2007 the applicant was marked in the school register as "educated off site" and home tuition was provided by the Board. By letter of 20 April 2007 the applicant was advised that he was permitted to attend school in order to study and sit exams.

[3] The background to the applicant's suspension was as follows. On 31 January 2007 the Principal was informed by a female pupil in the school that she was terrified by the applicant. The complainant did not wish to make any

formal complaint against the applicant and did not wish the Principal to tell the applicant what she had reported as she was in fear. She reported conduct on the part of the applicant both inside and outside the school which was causing her deep distress. Later that same day a friend of the female pupil approached the Principal and informed him that the female pupil was in deep distress, had low self-esteem and there were concerns that she was possibly suicidal. This friend also gave the Principal further details of the nature of the applicant's behaviour within the school which had been causing the female pupil so much distress. At this time the applicant was not attending school as he was on a work placement but the female pupil was distressed and fearful at the prospect of his return to school the following week.

[4] The Principal contacted the female pupil's mother who confirmed that she also was deeply concerned about her daughter's state of mind and also confirmed that the applicant's behaviour was the cause of her daughter's distress.

[5] The Principal made contact with the Board's Child Protection Officer and discussed the report which had been made to him and the possible threat of self-harm.

[6] On 1 February 2007 the vice-principal of the school attended a multidisciplinary case conference in relation to the applicant which had been organised by Social Services entirely independently of the complaint made to the Principal by the female pupil. The applicant's mother and grandmother were in attendance at that meeting, as were other professionals, including the Police Service of Northern Ireland. At this meeting the vice-principal was informed of three separate allegations of indecent assault, threatening behaviour and aggravated assault on females by the applicant which were the subject of criminal proceedings. All of these allegations concerned incidents which had taken place outside the school. In addition there was information regarding an allegation that the applicant had indecent photographs of a female pupil on his mobile telephone.

[7] The vice-principal informed the Principal of these allegations on 2 February 2007. The Principal contacted the Child Protection Officer and was advised that a risk assessment meeting should take place within the school. The risk assessment meeting took place on 6 February 2007, attended by the Principal, the Board's child protection officer, representatives from social services and PSNI. The purpose of the meeting was to share concerns about risks to children in the school in view of the complaint by the female pupil and the police investigations into the other events. It was decided that Social Services should carry out an assessment of the allegations concerning the female pupil and of its impact on her emotions. It was further decided that the applicant should be suspended from school for 5 days, with the possibility of extension, while the assessment took place. The minutes of the meeting state

that “The suspension to be viewed as a precautionary measure, not a presumption of guilt”. It was also decided that following the Social Services assessment, the Board would convene a formal multi-agency/multidisciplinary meeting to assess risk within the school and in transport to and from school and plan the management of any perceived risk.

[8] In his affidavit at paragraph 12 the Principal stated:

“I confirm that in reaching my decision to suspend the applicant, I was motivated by the need to protect the female pupil from the applicant. I was mindful of the nature of the allegations which she had made and of the sincerity of her condition. I also made an assessment as to the likelihood of the veracity of her complaints. In this regard, the new information which I received about allegations of assault on females in the community provided an important context to my overall assessment but was not the motivating factor behind the decision. ... I was also conscious of advice from the Department of Education that in circumstances where there was conflict between the interests of children, the needs of the victim should be paramount.”

[9] On 7 February 2007 the applicant attended the Principal’s office and was informed that certain allegations had been made against him in relation to his behaviour within the school but that the detail could not be disclosed. The Principal advised him that it had been decided it was in the best interests of everybody that he should be suspended. Initially the applicant was calm and co-operative during this meeting but 10 minutes after leaving the room he returned demanding to know why he was being suspended. The applicant referred to certain allegations having been made against him outside the school which he stated were false and that he was not guilty. The applicant also raised the issue of allegations being made against him by a female pupil whom he identified. He denied any allegations that he had photographs of a female pupil on his mobile phone and stated that the police had investigated this, seized his mobile phone, found no such photographs and returned the mobile phone to him.

[10] Following the meeting between the Principal and the applicant, there was a telephone conversation between the Principal and the applicant’s mother. The Principal informed the applicant’s mother of the risk assessment meeting which had been held on 6 February and of the decision that the applicant should be suspended from school until a meeting would be arranged by the Board’s Child Protection Officer, which she would be invited

to attend. The applicant's mother asked for the reasons for the suspension and was advised that those would appear from the minutes of the risk assessment meeting. She did not receive those minutes until 18 April 2007. A letter dated the 7th February 2007 was sent to the applicant's parents advising of the suspension. The suspension of the applicant was extended for 5 day periods to 13 March 2007.

[11] Following suspension the school made a request to the Board for home tuition to be provided to the applicant. The school was informed that home tuition would be offered by the Board. On 12 March 2007 the Principal wrote to the applicant's parents informing them that home tuition had been arranged by the Board's Tuition Service effective from 14 March 2007 and that the applicant would be marked on the school register as "educated off site". The Principal understood that this represented the end of the applicant's suspension.

[12] On 14 March 2007 a strategy meeting took place as part of the Social Services assessment of the female pupil. The minutes of this meeting were not made available until early May 2007. It is not clear when the Principal was informed of the outcome of the Social Services assessment. On 20 April 2007 the Principal wrote to the applicant to advise of arrangements available to attend school to receive assistance with studying prior to the examinations taking place. In his affidavit the Principal stated that it was decided that the applicant could be included in these arrangements as due to the termination of the normal school timetable additional staff resources were available to monitor him within the school.

[13] On 4 May 2007 a meeting was arranged at the school which was attended by the applicant's mother, grandparents, the Child Protection Officer, Principal and an elected representative on behalf of the applicant.

The Regulations

[14] Article 49 of the Education and Libraries (NI) Order 1986 provides that the Education and Library Boards prepare a Scheme for the suspension and expulsion of pupils. The relevant Regulations are the Schools (Suspension and Expulsion of Pupils) Regulations (NI) 1995 (as amended by 1998 Regulations/255). Regulation 3 provides that a Scheme prepared under Article 49 shall include provision that -

- (a) A pupil may be suspended from school only by the principal.
- (b) An initial period of such suspension shall not exceed 5 school days in any one school term.

(c) A pupil may be suspended from school for not more than 45 school days in any one school year.

(d) Where a pupil has been suspended from school the principal shall immediately –

(i) give written notification of the reasons for the suspension and the period of suspension to the parent of the pupil, to the Board and the chairman of the Board of Governors and in the case of a pupil suspended from a Catholic maintained school to the local diocesan office of CCMS; and

(ii) invite the parent of the pupil to visit the school to discuss the suspension.

(e) The principal should not extend the period of suspension except with the prior approval of the chairman of the Board of Governors and shall in every such case give written notification of the reasons for the extension and the period of extension to the parent of the pupil, to the Board and in the case of a pupil suspended from a Catholic maintained school to the local diocesan office of CCMS.

The Board's Scheme

[15] The North Eastern Education and Library Board published a Scheme entitled "Procedures for the Suspension and Expulsion of Pupils in Controlled Schools. The Scheme includes the following requirements -

"3.1 A pupil may be suspended only by the principal.

3.2 An initial period of suspension shall not exceed 5 school days in any one school term.

3.3 A pupil may be suspended from school for not more than 45 school days in any one school year.

3.4 The principal shall not extend the period of suspension except with the prior approval of the chairman of the Board of Governors and shall in every such case give written notification of the reasons for the extension and the period of extension to the parent of the pupil and to the Board.”

“Steps to be Followed Prior to Suspension”:

“4.1 The school’s disciplinary policy describes the standards of behaviour expected from pupils and outlines the procedures and sanctions to be adopted when these guidelines are not adhered to.

4.2 The disciplinary policy will provide for the suspension of a pupil in certain circumstances. The option of suspending a pupil for a prescribed period should only be considered;

4.2.1 after a period of indiscipline the school is required to maintain a written record of events and of the interventions of teachers, contacts with parents and any requests for external support from the Board’s educational welfare and educational psychology services; and/or

4.2.2 after a serious incident of indiscipline the school is required to have investigated and documented the incident the investigation should include an opportunity for the pupil to be interviewed and his or her version of events given before the decision to suspend.”

“Instigating Suspension”

“5.1 On taking the decision to suspend a pupil the principal must immediately notify the parents, in writing of the suspension, its duration and the reasons for the suspension (for sample letters see appendix 2). The letter notifying the parents of the suspension must be sent out on the day of the

suspension. Its letter is sent home with the pupil this must be followed by a copy sent by first class post.

5.2 The letter must also invite the parents to visit the school to discuss the suspension. Should the parents accept this invitation the principal may consider it appropriate to invite other parties such as educational welfare, educational psychology or social services. The meeting should be chaired by the principal.

5.3 Schools should keep full notes of the meeting.

5.4 A copy of the letter must be sent to the chairman of the Board of Governors.

5.5 All suspensions from all grant aided schools must be notified to the Board using form S1 (see appendix 3) and accompanied by a copy of the letter sent to the parent.

5.6 A suspended pupil can only be sent home before the end of the normal school day with the agreement of the parent and only if the pupil can be delivered directly into the care of the parent or of a person previously agreed by the parents.

5.7 Work should be made available to the pupil during the suspension.

5.8 On the day of the pupil's return from suspension the pupil should report immediately to the principal or nominated teacher."

Arrangements for education otherwise than at school.

[16] Under Article 86 of the Education (NI) Order 1998 the Board operates a Tuition Service that provides home tuition for pupils who are absent from school. The Board provided home tuition for the applicant from 13 March to 20 April 2007. Article 86 provides -

“(1) Each board shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who by reason of illness, expulsion or suspension from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.

(2) A board may make arrangements for the provision of suitable education otherwise than at school for those children over compulsory school age who-

(a) have not attained the age of 19; and

(b) *by reason of illness, expulsion or suspension from school or otherwise*, may not for any period receive suitable education unless such arrangements are made for them.

(3) In determining what arrangements to make under this Article in the case of any child a board shall have regard to any guidance given from time to time by the Department.”

The Applicant’s Grounds for Judicial Review

[17] The applicant’s grounds for judicial review are:

(1) The school failed to comply with the regulations by -

(a) not giving the applicant notification of the reasons for the suspension; and

(b) not inviting his parents to the school to discuss the suspension.

(2) The school took an irrelevant consideration into account namely unproven allegations made about the applicant in relation to conduct outside school.

(3) The school failed to take into account relevant considerations in particular the fact that the applicant had not been involved in any incidents inside school which justifies suspension.

- (4) The school and the Board have failed to provide the applicant with adequate tuition.
- (5) Lack of sufficient tuition amounts to failure of the school and the Board to provide the applicant with an education.
- (6) The Board is acting unlawfully and unreasonably in facilitating the applicant's exclusion from school.
- (7) The Board is failing to provide the applicant with an education.
- (8) Neither the school nor the Board have acted in accordance with the best interests of the child principle.
- (9) Failure to provide the applicant's parents with an adequate explanation of the applicant's current status is unlawful and unfair.
- (10) The conduct of the school and the Board contravenes the applicant's right to an education in Article 2 Protocol 1 of the ECHR.
- (11) The school is in breach of the Board's procedures for suspension and they extended the period of suspension without giving written notification of the reasons for the extension and the period of extension to the parents.
- (12) The school breached the respondent Board's procedures in that the applicant was not suspended after a period of indiscipline or after a serious incident of indiscipline.
- (13) The school breached the Board's procedures by failing to maintain a written record of events.
- (14) The school breached the Board's procedures by failing to investigate the incident and affording the applicant an opportunity to be interviewed and give his version of events prior to the decision to suspend.
- (15) The school breached the Board's procedures by not inviting the applicant's parents to visit the school to discuss the suspension.
- (16) The school breached its own regulations and disciplinary policy in that the applicant was suspended as a precautionary measure and the policy does not provide for suspension in such circumstances.

Suspensions on disciplinary grounds and on precautionary grounds.

[18] In recent years it has been recognised in Northern Ireland and in England and Wales that while the published procedures for suspension from school may be apt to deal with suspensions on disciplinary grounds (“disciplinary suspensions”) the published procedures are inapt to deal with other suspensions (which have been described as “precautionary suspensions”), such as suspensions for the investigation of allegations of indiscipline or other assessments that necessitate the absence of the pupil from school. Accordingly the requirements of the Scheme published by the Board are not appropriate in the case of precautionary suspensions. The steps preliminary to suspension set out in paragraph 4 of the Scheme are based on a period of indiscipline or a serious incident of indiscipline and the requirements of the published procedures will apply to such cases.

[19] The Court of Appeal in M’s Application [2005] NIJB 217 dealt with a suspension during investigation of allegations of drug dealing. In the event it was found that the suspension had been imposed as a punishment but the Court of Appeal considered the use of the suspension power to facilitate investigation. Kerr LCJ stated –

“[20] We are satisfied that school principals must have the power, in appropriate cases, to suspend pupils before investigating the full circumstances of an alleged infringement of school rules or other misbehaviour. In those circumstances suspension is not a form of punishment but merely a means of allowing the proper investigation of the allegations. We therefore cannot agree with the judge’s comment that because suspension is a severe sanction it is always a form of punishment. Nor do we agree that it may not be used as “a mechanism to give time for further reflection on the ultimate penalty to be imposed”. On the contrary, we consider that it is entirely proper for a principal to suspend a pupil who may face the prospect of expulsion if the allegations made against him are substantiated for the purpose of having the case against the pupil explored. One need only instance a simple example to demonstrate the inevitability of that conclusion. If a pupil was alleged to have assaulted a teacher, it would be inconceivable that the principal should not be able to suspend the pupil pending a full investigation of the

incident or a final decision as to what the ultimate punishment should be.”

[20] Kerr LCJ stated that two principles of public law supported the conclusion that the principal of a school had the power to suspend in such circumstances. The first was that while it may be desirable to allow a hearing or an opportunity to make representations or simply to give prior notice before a decision is taken which interferes with a person’s rights or interests, summary action may be justifiable when an urgent need for protecting the interests of other persons arises. Secondly, where a person carries out a preliminary investigation with a view to deciding what further action requires to be undertaken he will not normally be subject to the rules of procedural fairness. However if the inquiry is “an integral and necessary part of a process which may terminate in action adverse to the interests” of the person under investigation, he may be placed under such an obligation (referring to paragraph 9-011 to 9-026 of *de Smith, Woolf and Jowell, Principles of Judicial Review*). On either basis the Court of Appeal was satisfied that the suspension had been for the purpose of investigating the circumstances of the incident and the principal was not bound to involve M’s parents in the decision to suspend.

[21] The House of Lords considered the issue in Ali v Head Teacher and Governors of Lord Grey School [2006] UKHL 14. The legislation in England and Wales provides for decisions to “exclude” a pupil and “exclude” means exclude on disciplinary grounds. A pupil in a school was suspected of being involved in an offence of arson at the school. A criminal investigation took place and he was later charged with arson. The school authorities judged that the pupil should not attend school while a criminal investigation and ensuing prosecution were in train and he was excluded from the school for successive periods. The pupil complained that he had been unlawfully excluded from the school in breach of the procedures required by domestic law and in breach of his right to education under Article 2 of the First Protocol of the European Convention.

[22] Lord Bingham considered that the legislation and the guidance seemed to be “.... singularly inapt to regulate the problem which confronted the school in this case and which must confront other schools in comparable cases.” Respect for the pupil and for the integrity of the criminal justice process required that the pupil should not attend the school pending the completion of the investigation; that he should not be interrogated by the school about matters which were the subject of police investigation followed by prosecution; that he should not be punished for something he was not shown to have done; re-admission to the school, with a criminal prosecution in train, would have been inappropriate, as would permanent exclusion, since the school had no wish to expel the pupil. “If, as has been found and agreed, the school acted inconsistently with the requirements of domestic law, the inadequacy of the law contributed to that result” (paragraphs 21 to 24).

[23] Lord Hoffman observed that the statutory code was well adapted to the use of exclusion as a punishment for a serious disciplinary offence, imposed in the interests of education and welfare of the pupil and others in the school. However it was “... far less suitable for dealing with a case like this, in which the pupil was excluded on precautionary rather than penal grounds.” In considering how a precautionary suspension would fit into the statutory code it was stated that such a case “cannot be shoehorned” into the legislation. The school needed to exclude the pupil “... for the necessarily indeterminate period which must elapse until the investigation or prosecution is completed” (paragraphs 36 to 40).

[24] The House of Lords considered the legal justification for precautionary suspensions. One possibility suggested by Lord Hoffman was that the school has “... as part of its general powers of management, the right to exclude a pupil on precautionary grounds limited only by the need that it should be reasonably exercised.” Lord Scott also adopted this approach and stated that the enforced absence from the school was not on disciplinary grounds but was “a management decision.” The management powers of a head teacher enabled him or her to keep a pupil temporarily away from the school for reasons that have nothing to do with discipline. Baroness Hale agreed that the legislation and the guidance were “inapt to cater for this situation and require urgent reconsideration by the Department of Education and Skills.”

[25] The applicant’s grounds for judicial review in the present case are wide ranging and proceed on the basis that the suspension of the applicant was a disciplinary suspension to which the requirements of the Regulations and the Board’s Scheme applied. Although the Regulations do not confine themselves to a disciplinary suspension it is apparent that the time limit of 45 days for the overall period may not be appropriate to a precautionary suspension during an investigation or assessment. Further it is apparent that the terms of the Board’s Scheme are limited to a disciplinary suspension. Both the decision of the Court of Appeal in M’s Application and the decision of the House of Lords in Ali, in the different statutory setting of England and Wales, point to additional management powers of the school principal to impose precautionary suspensions.

[26] The above developments raise an issue about the nature of any procedural requirements in the event of a precautionary suspension. In M’s Application the Court of Appeal relied on the principle that a preliminary investigation will not normally be subject to the rules of procedural fairness unless the investigation was a necessary part of a process that may lead to action adverse to the interests of the pupil. In the present case the assessment would not have led to disciplinary proceedings as the complainant did not wish to be identified. However the outcome of the assessment, had the applicant returned to the school other than for examinations, may have led to restrictions on, or monitoring of, the applicant in the school and in travelling

to and from the school, which would also have been adverse to the applicant's interests. I conclude that, as precautionary suspensions for investigation or assessment will almost invariably carry the risk of action adverse to the pupil at the conclusion of the exercise, whether by disciplinary action or otherwise, the rules of procedural fairness would apply. The requirements of procedural fairness may vary, depending on the nature of the case. In any event the Regulations include procedural requirements that involve written notice to the parents of the reasons for the suspension and an invitation to the parents to discuss the suspension. To the extent that existing procedures are insufficient the Court may import additional requirements to achieve procedural fairness.

[27] In light of the decisions in M's Application and in Ali the following propositions may be stated in relation to the present case -

(i) A school principal has a power to order a precautionary suspension from school, for example during a police investigation or during a Social Services assessment or by reason of suspected infectious disease.

(ii) The Regulations apply to all suspensions. The time limit of 45 days will not be appropriate in some cases of precautionary suspensions as the school authorities cannot control investigations undertaken by police or Social Services or medical authorities or other outside agencies. However the requirements in the Regulations for the giving of reasons for suspension and extensions of suspension and invitations for parental discussions of suspensions would be appropriate requirements in all suspensions.

(iii) The Board's Scheme applies to disciplinary suspensions. Consideration might be given to the expansion of the text of the Scheme to provide appropriate requirements in the case of precautionary suspensions. In the absence of specific terms dealing with precautionary suspensions the common law rules of procedural fairness would apply to any such suspension where the outcome involved a risk of action adverse to the pupils interests. The Court may import such requirements as are required to attain procedural fairness.

(iv) The Board is entitled to provide suitable education for a pupil outside school, if so required by reason of "illness, expulsion or suspension from school or otherwise." The school considered that the applicant's status changed on 14 March 2007 when the applicant's parents agreed to arrangements for home tuition from the Board's Tuition Service under Article 86 of the 1998 Order. This was treated by the school as an alternative to precautionary suspension.

[28] In light of the above propositions the following questions arise.

First, was the suspension of the applicant a precautionary suspension or a disciplinary suspension?

Second, for the purposes of both the requirements of the Regulations and the common law requirements for procedural fairness in relation to precautionary suspensions, were the applicant's parents given the reason for the suspension and the extensions of suspension?

Third, were adequate steps taken in relation to parental discussion of the suspension?

Fourth, was there adequate disclosure to the applicant and his parents of the particulars relating to the suspension?

Fifth, was the applicant suspended from 14 March 2007 to 20 April 2007?

- *precautionary suspension or disciplinary suspension*

[29] Was suspension in the present case a precautionary suspension or a disciplinary suspension? The minute of the meeting of 6 February 2007 records that the applicant was to be suspended from school pending a Social Services assessment of the alleged incident with the female pupil and its impact on her emotions. The alleged incidents outside the school were factors taken into account by the Principal in evaluating the situation but I accept that the decision to suspend was based on the complaint of the female pupil. The meeting was careful to minute that the suspension was to be viewed as a precautionary measure and not a presumption of guilt. The Principal emphasised his concern for the protection of the female pupil. I am satisfied that the suspension was not punitive and was a precautionary suspension pending the Social Services assessment.

- *the reason for the suspension and the extensions of suspension*

[30] Were the applicant's parents given the reason for the suspension and the extensions of suspension? For shorthand, I refer to the applicant's mother and grandmother as the parents. The initial letter dated 7 February 2007 stated:

"Following the case conference on Thursday 1 February 2007 at which you were present a risk assessment meeting with representatives from the school, social services, NEELB, child protection

officer and the PSNI took place in school on Tuesday 6 February 2007 based on the information presented at this meeting it was agreed that in the circumstances X should not remain in school.

It must be emphasised that this not an assumption of X's guilt in these matters but instead a precautionary strategy which has been taken I believe in everyone's best interests including X's.

A further meeting will be arranged by the NEELB as soon as possible in order to consider the matter further.

In the meantime X is suspended from school for 5 days ie Thursday 8 February to Wednesday 14 February with a possible extension to follow.

Work will be made available for collection from school office by an adult after 10.00am on Thursday 8 February 2007 for X to complete during this period of suspension.

Please contact me should you wish to discuss the matter or require any further information."

[31] The subsequent letters extending the period of suspension stated that in order to allow for further investigation the suspension would be extended for a further 5 days, that this was not an assumption of guilt but a precautionary strategy, that a meeting would be arranged by the Board, that work would be available for collection. The letters ended by inviting the parents to contact the principal should they wish to discuss the matter or require any further information.

[32] The initial letter of 7 February 2007 referred to the meetings of 1 February and 6 February and did not refer to an incident in the school involving a female pupil. The reference to the meeting of 1 February, at which the applicant's mother and grandmother were present, would have directed them to the incidents that were the subject of the police investigations. The reference to the meeting of 6 February, which the applicant and his family did not attend, led to a request for the minutes of the meeting and the minutes were not made available until 20 April. The minutes refer to an incident involving the female pupil as well as four PSNI investigations into assaults in the community. It may require a close reading of the minutes to establish that the reason for suspension was connected to the incident involving the female pupil. It was not until a meeting of 4 May

2007 that it would have become clearer to the applicant's family that the incident involving the female pupil in the school was the basis of suspension.

[33] There is a separate issue about the extent of the details of the complaint by the female pupil that should have been disclosed to the applicant and that issue will be considered below. However it is apparent that the letters to the applicant giving notice of the suspension and extensions of suspension did not identify the reason for suspension as being the complaint by a female pupil of the applicant's conduct in the school. The concerns about confidentiality need not have prevented the disclosure of that basic information to the applicant and his family. It is apparent from the reference to the complaint in the minutes disclosed to the applicant and from the Principal's account of the meeting of 4 May 2007 (in paragraph 4 of his affidavit) that the suspension had been based upon an allegation arising within the school. The basic information about the complaint from the female pupil being the occasion for the Social Services assessment and the suspension of the applicant, as appeared in the minutes of the meeting of 6 February and discussed at the meeting of 4 May, could have been imparted to the applicant's parents in the letter of 7 February 2007.

- *invitation for parental discussion of the suspension*

[34] Was there an adequate invitation for parental discussion of the suspension? The initial letter of 7 February 2007 and the letters giving notice of extensions of suspension invited the parents to contact the Principal to discuss the suspension or obtain any further information. The meeting eventually took place on 4 May 2007. There were opportunities for earlier arrangements for a meeting and the parents did not avail of those opportunities. It is the position that the nature of parental discussions may differ between on the one hand a disciplinary suspension and on the other hand a precautionary suspension that awaits a particular investigation or assessment to be completed.

- *disclosure of the particulars of the suspension*

[35] Was there adequate disclosure to the applicant and his parents of the particulars of the suspension? The applicant contends that there was a clear breach of his entitlement to a fair hearing in that he was not provided with any information about the allegations against him, had no opportunity or forum in which to challenge the allegations, the school conducted no investigation of any kind into the allegations but accepted the complainant's allegation, the applicant was not advised of the identity of the complainant and was therefore significantly disadvantaged in seeking to refute any allegations.

[36] The respondents contend that the requirements of procedural fairness depend on the circumstances. They point to the circumstance in this case where the complainant had requested that the information be dealt with in confidence and the Principal had made a confidentiality promise to the complainant when she was in a state of deep distress. The Principal did engage in further investigation, speaking with other pupils and the mother of the complainant and conducted a detailed risk assessment with multi disciplinary input and advice from the Child Protection Officer of the Board. The Principal reached an informed view that if he were to reveal the nature or detail of the complaint it would be likely to reveal the identity of the complainant. The risk to the female pupil included a potential risk of serious self harm and departmental child protection guidelines indicated that the needs of the victim should be paramount.

[37] When a decision may be taken that is adverse to a person's interests and the rules of procedural fairness apply they include "the right to know and to respond", that is the right to know the information that is adverse to the person's interests and the right of the person to make representations that the decision-maker will take into account. Depending on the circumstances the right to know the adverse case may involve disclosure of all relevant information or merely the "gist" of the information or may involve the disclosure of no information. Thus the extent of disclosure may be restricted where it is necessary to withhold details or sources for the protection of other interests.

[38] The general approach was stated by Lord Mustell in Doody v Secretary of State for the Home Department [1994] 1 AC 531 as follows -

"(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.

(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[39] Thus the "gist" of the case to answer will "very often" be required and there may be cases where in the circumstances it is not required that the gist

be provided. The requirements of fairness depend upon the context of the decision and that includes the character of the legislative framework within which the decision is taken and the interests of the other parties affected. When the right to know and to respond is necessarily limited it is equally necessary to examine whether there are in place such countervailing safeguards as may reasonably be introduced to maintain overall procedural fairness.

[40] I refer to three instances where the interests of the applicant may have to yield to the interests of others, although there remains a need for overall fairness in the circumstances. First, Henry's Application [2004] NIQB where a prisoner was removed from association under Rule 32, which permits such removal where necessary for the maintenance of good order and discipline or in the prisoner's own interests. The removal took into account information that had been received about the prisoner that the prison authorities decided must remain confidential. The prisoner complained that he was denied his right to know and to respond to the basis for the adverse decision. As in the present case the action in question was not taken under disciplinary procedures. Where there are public interest grounds for withholding information the overall requirement of fairness must be satisfied in the circumstances. It was held that fairness required that extensions of restricted association included a system of anxious scrutiny of the information by those charged with making the decision to extend the restricted association; that those given in effect a supervisory role by the statutory regulations, namely the members of the Board of Visitors and the Secretary of State, must have access to the information and be able to subject it to such scrutiny as they considered necessary; that fairness in that context involved in the first place, that there must be information, which was judged to be reliable, upon which it could be determined that the prisoner represented a risk to good order and discipline; secondly, that the information must be available to be assessed by those making the decision in relation to removal from association; thirdly, that the gist of the concern should be disclosed to the prisoner; fourthly, that the details of the information and the sources should be protected to the extent that that was considered necessary in the interests of the informants; fifthly, that the independent scrutiny by the members of the Board of Visitors and the Secretary of State should include ongoing assessment of the information available and of the risks to informants.

[41] Second, in Donnelly's Application [2007] NIQB Gillen J considered refusals of firearms certificates where the applicants had been informed in general terms that the basis of the refusal had been association with members of a proscribed dissident Republican organisation. The police and the Secretary of State sought to protect the confidentiality of the information and claimed that disclosure may harm the public interest and stultify the purpose of the firearms legislation. Gillen J emphasised the statutory context of the decision making process, being the regulation of the possession of firearms. He was

satisfied that there would be occasions in which the public interest must prevail over the private interest to some degree. The gist of the case had been provided to the applicants, albeit in a diluted form. It was held to be appropriate that no further information be disclosed, as such disclosure would serve to undermine the purpose of the legislation and perhaps seriously impede firearms control.

[42] Third, in Tweeds Application [2007] NIQB information had been provided to the Parades Commission on a confidential basis and this information was taken into account by the Commission in making a determination as to a public procession. The organiser of the parade that had been restricted by the determination contended that he had a right to know and to the respond to the information that had been relied on in interfering with his right of assembly. The Commission considered that the guarantee of confidentiality had encouraged a broad spectrum of human sources to supply the Commission with material information, views and representations. Those who provided relevant views frequently expressed their concern about publication of their communications. The confidence was stated to be that of the supplier of the information and the Commission was not at liberty to breach such confidence at will. The Commission considered that if a confidentiality rule were not in existence it would significantly impair the frank and uninhibited disclosure of information to the Commission and this in turn would frustrate and compromise the performance of the Commission's statutory functions. In the context of the legislative framework relating to the regulation of public processions the Court was satisfied that there were public interests grounds for the evidence provided to the Commission, both oral and written, being treated as confidential.

[43] The starting point in the present case must be to repeat that the applicant's suspension did not involve disciplinary procedures but rather was a precautionary suspension that concerned the assessment of the female pupil's complaint and the impact on her emotions. The school was not investigating a disciplinary offence but was awaiting the assessment from Social Services. The female pupil did not wish to be identified to the applicant because she was in fear of the applicant. The Principal had to satisfy himself that there were good grounds for believing that the complaints were genuine, that the concerns that led to the demand for confidentiality were believed to be genuine and that the complainant believed that she was at risk of significant harm from the conduct about which she was complaining. From the steps undertaken by the Principal I am satisfied that he made the necessary enquiries and satisfied himself in relation to the complaints and the threat and the harm. Further I am satisfied that the Principal had good grounds for concluding that, in response to the complaint, action by the Principal in relation to the applicant required to be considered and reasonable action was taken. The Principal also had to account to the Board for the suspension and extensions of suspension. Further I am satisfied that the lack

of information about the complaint (although not the delay in furnishing the reason for the suspension as discussed above) was justified in the interests of the complainant and future complainants. In all the circumstances and taking account of the interests of all those involved the overall fairness of the process was not compromised.

- *absence from school from 14 March 2007 to 20 April 2007*

[44] Was the applicant suspended from 14 March 2007 to 20 April 2007? The school regarded the suspension as having ended on 13 March 2007 and the relevant part of the Board to which the school was reporting presumably agreed as there was no further reporting of a suspension by the school to the Board. On the other hand the Board's Tuition Service appears to have considered that it was providing tuition while the applicant was suspended. The applicant's parents consented to the arrangements for Board tuition but that was in the belief that the applicant's suspension was continuing.

[45] The applicant's status from 14 March 2007 was either as a pupil subject to precautionary suspension or as a pupil absent from school with the agreement of the Board and the parents. The arrangements from 14 March 2007 certainly involved a change from school tuition to Board tuition. The provision of tuition by the Board may be by reason of illness or expulsion or suspension "or otherwise". A pupil may be receiving Board tuition while suspended or there may be reasons why he should be educated outside school by agreement of the Board and the parents, where no disciplinary or precautionary suspension arises. The school's reason for requesting the Board's tuition service was stated to be "emotional/behaviour". The home tuition criteria recognise behavioural problems and risk analysis as one of the grounds for home tuition. So there was a basis in the present case for Board tuition outside school by agreement of the parents and the Board, which would have been "otherwise" than by reason of suspension. If it were necessary to reach a conclusion on this issue I would conclude on the balance of probabilities that the applicant was not suspended during this period but was subject to a period of absence from school with the agreement of the Board and the parents. That those involved were in some uncertainty about the status of the applicant is a further instance of the confusion arising from the existing arrangements for suspensions.

[46] Many of the applicant's grounds proceed on the premise that the applicant was involved in a disciplinary process which I have held was not the case. The applicant refers to the best interests of the child principle and in the circumstances of the applicant's precautionary suspension there were the best interests of several children to be considered by the school and the Board, which I am satisfied governed their considerations. This case illustrates the need for the Boards to review the procedures that schools apply in relation to

disciplinary and precautionary suspensions and in relation to tuition out of school for disciplinary or other reasons, so that schools and pupils may be aware of the precise nature of the process that is applied from case to case.

[47] In summary, the answers to the five questions posed above are that the applicant was subject to a precautionary suspension from 7 February 2007 to 13 March 2007, the notices to the applicant's parents did not give the reason for the suspension or the extensions of suspension, the applicant's parents were offered an adequate opportunity to visit the school to discuss the suspension, in all the circumstances there was adequate disclosure to the applicant and his parents of the particulars relating to the suspension and finally the applicant was absent from school from 14 March 2007 to 20 April 2007 by agreement of the Board and the applicants' parents.

The adequacy of the arrangements for tuition out of school

[48] The applicant contends that the arrangements for the tuition of the applicant during his absence from school were a breach of the right to education under Article 2 of the First Protocol of the European Convention. Article 2 provides that –

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

[49] This issue was also considered by the House of Lords in Ali in relation to the tuition provided for the pupil during the period of suspension from school. Lord Bingham at paragraph 25 stated the question as being whether, between the relevant dates when the pupil was absent, the school denied the pupil “effective access to such education facilities as this country provides.”

[50] The applicant contends that he was suspended for a period without any provision being made for his education and that when the Board tuition was provided it was of a limited nature, did not cover the full range of subjects the applicant was studying and was therefore inadequate and amounted to a breach of his right to education. The respondents contend that during the period of suspension from 7 February to 13 March 2007 the school arranged a programme of work that was made available to the applicant for collection and return by him each week. He did not avail of this, only collecting the work on one occasion and failing to return any work. Further the respondents contend that from 14 March to 20 April 2007 the Board's

Tuition Service provided home tuition as part of the Board's normal programme of tuition and that the education provided during that period was not inappropriate or a breach of the applicant's right to education.

[51] I accept the respondents' approach to this issue. I am satisfied that the applicant was not denied effective access to the education facilities provided in this jurisdiction and there was no breach of the applicant's right to education.