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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2019 No. 37473

IN THE MATTER OF AN APPLICATION BY MA2 (A MINOR) BY HIS MOTHER AND NEXT FRIEND, SA

-v-

EDUCATION AUTHORITY

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HUDDLESTON J

The Challenge

[1] This case involves a challenge to the Education Authority's ("EA") statutory consultation process relating to a development proposal (the "Development Proposal") for Craigavon Senior High School. The Proposal was published by the EA for pre-publication consultation pursuant to Articles 14(5A) and (5B) of the Education and Libraries (NI) Order 1986 ("the 1986 Order") which was then submitted to the Department of Education (the "Department") for determination in accordance with the statutory scheme set out in Article 14 of the 1986 Order. As a result of the proceedings the EA has withdrawn the Development Proposal and the court's understanding is that a fresh decision on how to proceed will be made in light of this decision.

The Background and History

[2] Craigavon Senior High School ("Craigavon SHS" or "the SHS") was established in 1995 as a co-educational school providing for 14 to 16 year olds (otherwise Key Stage 4) operating under the Dickson Plan. It operates across two campuses - one in Lurgan (encompassing approximately 30% of the enrolled pupils) and one in Portadown (providing for the balance). From the evidence it would seem that Craigavon SHS currently has a stable enrolment (approximately 620 pupils) but one that is, on the evidence, declining. The school, however, has a significant financial deficit of approximately £600,000 per annum (to March 2018 the deficit was

£1,252,544) and the evidence is to the effect that the physical environment and condition of the school is unsatisfactory with a detrimental impact upon staff and pupils. Educational attainment levels from the evidence also appear to be declining.

An earlier ETI inspection undertaken in September 2010 identified that "*the school being split over two sites and catering for KS4 pupils only poses a structural constraint to curriculum provision and limits collaboration. Furthermore there is duplication in the provision over both campuses which needs to be rationalised in order to provide the pupils with a wider range of options.*" That finding was endorsed in a subsequent ETI inspection in 2018.

[3] The Department's Sustainable Schools Policy requires "*that all schools are sustainable in terms of the quality of the educational experience of children, enrolment trends, financial position, school leadership management, accessibility and the strength of their links to the community*". That Policy document details six quantitative and qualitative criteria under which the long term viability of a school is to be considered:

(a) Quality of the educational experience;

(b) The enrolment trends;

(c) The school's financial position;

(d) The school's leadership;

(e) The accessibility of the school; and

(f) Its links with the community.

[4] In the EA's Case for Change document (referred to in detail below) the rationale for the proposed changes to Craigavon SHS (and the Lurgan campus in particular) focuses on the following:

- The curriculum provision on the site and the condition of the site are considered to be sub-optimal because of site sharing with the SE Regional College and the split campus with a corresponding impact on staff and pupils;

- The health and safety of staff and pupils;

- The security of the site;

- The financial impact of operating across two sites in the way in which the school has done to date;

  [see Paragraph 1.3 of the Case for Change document]

All of these resonate with the criteria set out in the Sustainable Schools Policy.

[5] It is all of those drivers which led to the development of proposals for Craigavon SHS. The resultant pre-publication consultation process which forms the very core of the challenge in this case was made on the basis that "*Craigavon Senior High School will operate on a single site, 26 to 34 Lurgan Road, Portadown, with effect from 1 September 2020 or as soon as possible thereafter.*"

[6] The wider context behind this is that Craigavon Senior High School operates under what is known as the Dickson Plan - a policy initiative which was instigated in the Lurgan - Craigavon - Portadown area in the 1960s and continues to this day. The "Plan" has no statutory basis and is rather a 'model' of education that the then Chair of the Southern Education and Library Board adopted in or about 1967. Its main, and in terms of Northern Ireland unique, feature is that post-primary education is provided in all ability junior high schools (for pupils aged 11 to 14) after which they transfer on the basis of academic selection to either a grammar school (for pupils 14 to 18) or a senior high school (for pupils 14 to 16).

[7] There are seven Dickson Plan schools. Four junior high schools which are located in Portadown (two schools), Lurgan and Tandragee. There is a grammar school in each of Portadown and Lurgan (Portadown College and Lurgan College). Craigavon Senior High School is the only non-selective high school and, as I have said above, is split geographically across two campuses.

The Applicant

[8] The Applicant is a vulnerable young person who attends Lurgan Junior High School. He would in the normal course leave there at age 14 and it is currently anticipated that in the normal course he would attend the Lurgan Campus of Craigavon SHS. He is represented in this case by his mother, SA, who acts as his next friend. Her affidavit evidence identifies that the Applicant suffers from both health and learning difficulties. Her evidence is that the effects of these can be ameliorated given the close proximity between home and school and that he would not be capable of being bussed to the Portadown campus if the facilities were to be relocated to that site.

Background to the Development Proposals in respect of Craigavon Senior High School

[9] Affidavit evidence was provided by Michael McConkey, Assistant Director, of the EA in relation to the background to the impugned consultation process. It would appear that in 2009 an economic appraisal was carried out in respect of major capital works which were proposed in respect of Lurgan College. The Department refused authorisation for those works in the absence of a more comprehensive proposal for both grammar and non-selective controlled schools within the

Craigavon area. In response, the then Southern Education and Library Board (SELB) began to prepare a strategic area development plan for the area. After consultation there was a failure to reach agreement on the education provision for Lurgan and an economic appraisal was therefore commissioned.

[10] In September 2010 the economic appraisal identified two preferred options to be taken forward for public consultation. One option recommended the amalgamation of the Lurgan campus of Craigavon Senior High School and Lurgan College to provide a new 14 to 19 all ability school. The other option recommended amalgamation of the existing junior and senior high schools to provide a new 11 to 19 all ability school for the area. This view was endorsed by an ETI inspection in 2018 which confirmed the unsatisfactory condition of the school.

[11] To take this forward the SELB decided that it would consult on the strategic issues which the options raised - impacting as they did, obviously, on the principles underlying the Dickson Plan. It would seem that there was extensive support for the retention of the current two tier system which is core to the Dickson Plan. Contemporaneously to this the then Minister of Education, John O'Dowd MLA, announced the implementation of the Sustainable Schools Policy (referred to above at Para [3]) to ensure that Education Boards across the Province undertake viability audits and strategic area plans for all schools within individual areas. Individual decisions in relation to implementation of proposals were then to be made using the statutory development proposal procedure set out in the 1986 Order adhering to the criteria set out within the Policy. As part of that strategic process the SELB published a draft plan for Portadown/Lurgan/Craigavon focusing on reorganisation of the five junior and senior high schools within Portadown and Tandragee into a Portadown and Tandragee collegiate with a single Board of Governors with a single Principal. A similar arrangement was proposed in respect of the three schools within Lurgan. Separately a new build Craigavon SHS for enrolment of pupils between the ages of 11 to 19 was suggested. There followed consultation the result of which was that the SELB accepted that any proposals to restructure outwith the Dickson Plan had not secured sufficient consensus and it accordingly proposed that it move forward with a more wide-ranging consultation process.

[12] There followed, on 6 June 2016, a statement made by the then Education Minister, Peter Weir MLA, in the following terms:

> "*The Dickson Plan has proved very successful in this local area with strong support from the local community … This is something that works, and so I will ensure that the Dickson Plan is not removed either directly or undermined through stealth and that any threat is now lifted.*"

[13] As will be apparent below there is dispute as between the parties as to the effect of those words but the EA's position is that they represent the most recent

statement of policy supporting the continuation of the Dickson Plan within the Craigavon area and that this has informed its subsequent approach.

The Specific Development Proposal for Craigavon SHS

[14] The statutory process for the implementation of recommendations within an area plan requires the publication of development proposals under Article 14 of the Education and Libraries (Northern Ireland) Order 1986 (the "1986 Order").

Article 14 of the 1986 Order provides that there are three stages involved in the progression of a Development Proposal:

(i) Stage 1: Pre-publication consultation with parents, staff, Board of Governors of the school [Article 14(5A)] and other schools likely to be affected [Article 14(5B)];

(ii) Stage 2: Publication of and consultation on the Development Proposal itself – a process which is carried out by the EA [Article 14(1)], followed by a two month public consultation [Article 14(6)(b)]; and

(iii) Stage 3: A decision by the Department [Article 14(9)].

The parties agree that there is a tripartite process but disagree on the nature and extent of the consultation in this case. The EA's position is that the Article 14 procedure requires the EA to formulate a specific proposal for the purpose of pre-publication consultation as opposed to consulting on a range of options. The Applicant says that in doing so it closed its mind to other viable options and that there is nothing within the legislation to prohibit the consultation on a wider range of options and that for a consultation to be "*robust and verifiable*" (to use the language of the Departmental Circular 2017/09) it ought to do so.

[15] It would seem that to progress matters in this case and in accordance with the EA's Strategic Area Plan 2017-2020 and its Annual Action Plan the Education Authority prepared a draft Case for Change document to be tabled in front of the Education Committee. It was presented on 8 November 2018. It did indeed identify three options none of which included the option of an 11 to 16 school in Lurgan which the EA felt would have fallen outside the Dickson Plan. The Education Committee decided by a majority that the EA should commence pre-publication consultation in accordance with Article 14 based on the draft Case for Change document presented to the Committee. The exact proposal to be consulted upon was (as highlighted above) in the following forms:

> "*Craigavon Senior High School will operate on a single site, 26 to 34 Lurgan Road, Portadown, with effect from 1 September 2020 or as soon as possible thereafter.*"

[16] Given the nature of the political and community feedback the EA decided to include an option for an 11 to 16 controlled school within Lurgan within a revised Case for Change. The evidence is that this had previously been given consideration by the EA but, as I have said, had been excluded from the initial draft Case for Change as the EA felt that it sat outside the current Dickson Plan model and, therefore, considered to be contrary to the Minister's policy statement. For that reason it was not selected as the preferred option in its revised document but it was included as an option within the updated version of the Case for Change document upon which public consultation was ultimately to be pursued. The options which were ultimately included in the Case for Change document were, therefore:

(a) **Option 1** – a New Build 250 post-primary school co-located with the Lurgan JHS sharing the one campus (in Lurgan).

This was discounted on the basis that (inter alia) there would still be split provision; the cost would be £11m and it would have a timescale of 5-6 years.

The consideration reached was that:

> "*Given the timescales … and the fact that [it] does not address the rationale … in that it retains Craigavon SHS over two sites, this option has not been considered further.*"

(b) **Option 2** – CHSS operating from a single campus at Portadown (i.e. the EA's preferred option).

The initial scoping of the advantages vs the disadvantages of this option were set out in the initial Case for Change Document but then augmented in the final draft. They are detailed in full in paragraph 5.4 of that draft and proffered as the preferred option of the EA notwithstanding that there would be a loss of non-selective Key Stage 4 education in Lurgan with the corresponding disadvantage of travel (4.5 miles) and the cost(s) that would result.

(c) **Option 3** – the extension of Craigavon SHS on its current site following relocation of the Southern Regional College.

This was discounted on the basis that the 1.40 hectare site could not physically accommodate the requirements which the consultation document put at 2.91 hectares.

The Applicant says this was never a valid option and therefore asserts that the EA had included it as "window dressing".

(d) **Option 4** – Amalgamation of Lurgan JHS with CHSS on the Lurgan JHS Site to create an 11 to 16 school <u>with</u> the option of academic selection at age 14.

This was the option added to the proposal before pre-consultation.

It obviously retains provision within Lurgan but in the Case for Change Document the EA suggest that "*in taking forward this option … this could be seen as … undermining the Dickson Plan … [through stealth*]" and so contrary to Peter Weir's statement (as above) and the EA's interpretation of the Department's Policy. It "*therefore … has not been considered further …*"

Based on those perceived "*restrictions on the Authority to make changes to the Dickson Plan*" the EA, therefore recommended Option 2 as its preferred option and the one best capable of delivering the medium term outcomes for Craigavon SHS with the longer term strategic objective being for a major capital investment in the school.

[17] The court was given affidavit evidence from both Michael McConkey and Sinead McCartan as to the nature of the consultation that happened based on that document. This was done by a PowerPoint presentation to an invited audience at a large number of public meetings set up to explain the nature of the Development Proposal. The draft Case for Change document was made available at that meeting and distributed to parents as they left. The consultation meeting most germane to these proceedings was held on 14 January 2019 in Lurgan Junior High School. It would appear from the affidavit evidence of some of those who objected to the proposal that they were told that pro-forma responses would not be considered - a point which is disputed by the EA. Whilst there is some debate between the parties upon the type, format, style or content of responses the court is satisfied that consultees did have the opportunity to reply and, indeed, availed of it. In total 177 respondents agreed with the EA's proposals as opposed to 1,154 who disagreed with them.

[18] It is the EA's position that the pre-publication consultation was a "stage one process" and not the public consultation (or Stage 2 consultation) that is required as a preliminary to the Department's consideration of a proposal but that nonetheless in the interests of openness, fairness and accessibility the draft Case for Change consultation document including all of the information that was to be submitted to the Department (including the 4 Options) and the PowerPoint presentation slides were published on the Authority's website from 15 January 2019. The pre-publication consultation period closed on 13 March 2019. As I said the majority of responses received opposed the EA's proposal and the majority of parents of children at Lurgan Junior High School favoured retention of senior high school provision within Lurgan and, in particular, the formation of a new 11 to 16 school with the opportunity for transfer to grammar school at aged 14 for some pupils based on academic selection (i.e. Option 4).

[19] On 15 March 2019 the Applicant sent a pre-action letter criticising the consultation process and the draft Case for Change. It would seem that whilst the

EA did not consider that the consultation was flawed it nonetheless took account of the criticisms made and prepared a further revision of the draft Case for Change document which was then considered by the Education Committee on 30 April 2019.

[20] Notwithstanding the level of opposition and the pending challenge the Committee considered that it should proceed to publish a development proposal taking forward its preferred option (i.e. Option 2) based on the then updated and approved Case for Change.

[21] The final version of the Development Proposal (Development Proposal No. 574) was ultimately published on 9 May 2019 and submitted to the Department. The public consultation period was to run from 30 May 2019 to 30 September 2019.

[22] In light of this judicial review challenge the EA withdrew that publication of the Development Proposal No: 574 pending the outcome of these proceedings.

Statutory Framework and Legal Principles

[23] It will be apparent (as set out above at paragraph [14]) that the statutory procedure under Article 14 of the 1986 Order is tripartite in nature and involves two separate phases of consultation. There is no difference between the parties on that point.

[24] In basic terms the EA is responsible for formulating a proposal but decision making is ultimately exclusively the prerogative of the Department after a second stage of (public) consultation. It is very clear that the EA's role, however, includes both phases of consultation. The initial phase involves a more limited audience (i.e. the stakeholders in the School affected and other affected schools). The second phase takes place after the Development Proposal has been submitted to the Department and involves the public at large. The argument put is that at this second stage the options originally under consideration must have crystallised into a single proposal.

[25] The Department has separate powers both to direct the EA to submit a Development Plan or modify one which it has submitted [Articles 14(3) and (7) 1986 Order] but in all events given that the EA operates under the auspices of the Department it must ensure that it accords with Departmental policy [Article 101].

[26] In this jurisdiction the case law in respect of challenges arising out of development proposal decisions is led by the decision in *Re: McDonnell* [2007] NIQB 125. That case involved a challenge to the Department's decision to approve a proposal to close a school. That decision was challenged on the basis of the pre-publication (Stage 1) consultation process. Gillen J (as he then was) recognised two important general principles:

(i) That in relation to a challenge to a development proposal, grounded upon breach of consultation obligations, time begins to run upon publication of the proposal itself [at para 20];

(ii) That defects in the first phase of consultation can be cured at the second stage [paragraphs 17 and 19] but that this is something to be judged on a case by case basis whilst acknowledging that the Courts may intervene where "*there had been a flagrant or determined attempt … to deliberately ignore or dilute [the] first stage of the process …*" [paragraph 18].

That decision has been followed in *Re: KE* [2016] NIQB 9 and *Re: XY* [2015] NIQB 75.

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

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

- Concluded that the manner in which consultations should be conducted will be "*informed by*" the principle of procedural fairness;

- Determined that the degree of specificity within a proposal may depend upon the audience and might be influenced by the consideration as to whether or not the proposal would deprive a person of an existing benefit or advantage;

- Indicated that where there is a statutory duty to consult upon a single preferred option nonetheless fairness **may** require consultation on alternative but discarded proposals (paragraphs 27-28 and 39);

- That the requirements of a lawful consultation process should be guided by the relevant statutory context and the purposes of the particular duty to consult; and

- That, where, on the facts, a fair consultation process requires the provision of information about discarded options this means that there must be a detailed discussion about those options on the basis that "*enough must be said about realistic alternatives and the reason for the*

[particular] preferred choice, to enable consultees to make an intelligent response …" [Lord Reed at Para 41.]

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

The Challenge

[28] The Applicant's challenge as set out in its final Order 53 Statement is that the decision of the EA in relation to the consultation which ran from 14 January 2019 to 31 March 2019 (the "impugned consultation") is unlawful is based on the following grounds of challenge:

(a) Procedural unfairness on the basis that:

(i) The consultation was unlawful in that the proposal could not truly be described as at a "*formative stage*" when, as the Applicant alleges, that it was clear that the EA had already determined that there was only one viable option for consideration (Option 2) as detailed in the Case for Change document;

(ii) That the EA failed to give "*sufficient reasons*" for its proposal so as to permit of intelligent consideration and response – including details of the financial business case for change;

(iii) That the consultation document was contrary to DE Circular 2017/09 at Para 8.14, inter alia, namely the requirement that the "*consultation [is] open, transparent, timely and meaningful …*" and that the Case for Change (per Para 6.1) "*should provide sufficient evidence … to enable those affected by the proposal to understand the educational and other merits of the change proposed …*" and failed to explain its adherence to the Sustainable Schools Policy (and Para 6 in particular dealing with the sustainability criteria referred to within it);

(b) That it was unlawful because of a breach of statutory duty which the Applicant particularises on the basis that the consultation was ultra vires Article 14 of the 1986 Order because the EA failed to discharge its statutory duty of consultation in that it failed to ensure an adequate level of public participation in the decision making process regarding the Development Proposal;

(c) That the EA erred by mistake or misdirection of fact in respect of its assessment understanding and presentation of the Dickson Plan and its comments to the public in that specific regard during and as part of the impugned consultation. This is particularised as follows:

(i) That the impugned consultation represented to consultees that Option 4 would be contrary or otherwise undermine the Dickson Plan Educational Model;

(ii) That such a claim or representation was a misdirection or mistake of fact because Option 4 would not, in point of fact, undermine the Dickson Plan and that there was no evidence to substantiate the EA's position in this regard. Allied to this is the Applicant's position that the Minister's comments (as above at paragraph [12]) and as set out within the Case for Change document constitute a misrepresentation;

(iii) That the Dickson model is capable of evolution and indeed has evolved over time and that the central feature of the model relating to academic selection at 14 rather than 11 is possible within the operation of Option 4 as evidenced by the fact that the Dickson Plan historically has accommodated two 11 to 16 schools within the Catholic Maintained Sector each of which retain academic selection at age 14.

[29] Based on its challenge the Applicant seeks the following primary relief:

(i) An Order of Certiorari quashing the impugned consultation;

(ii) An Order of Prohibition prohibiting the EA from relying on any data, evidence, information or response provided arising from the impugned consultation;

(iii) A declaration that the impugned consultation was ultra vires and of no force or effect;

(iv) Such further other relief as may be appropriate; and

(v) Costs.

Agreed Issues for Determination

[30] Given that the EA has voluntarily desisted from pursuing the Development Proposal some of those proposed grounds of relief are historic. The parties, however, have agreed a list of issues for determination. These are as follows:

Issue 1

(i) Was the consultation process carried out by the EA between February and April 2019 in relation to a possible Development Proposal to close the Lurgan campus of Craigavon Senior High School unlawful? The parties have agreed that that larger question distils down to the following specific queries:

(a) Did the consultation process contravene any of the requirements of Article 14(5A) of the 1986 Order?

(b) Did the consultation process contravene paragraph 8.14 of the DE Circular 2017/09?

(c) Did the consultation process contravene the common law requirements for fairness and in particular:

- Did the consultation take place at a time when the proposal was still at a formative stage?

- Did the EA give sufficient explanation of its preferred option and the discarded options to permit of intelligent consideration and response?

- Was the consultation paper misleading or incomplete in its presentation of the Dickson Plan and the inclusion of the speech of the former Minister of Education on 6 June 2016?

Issue 2

[31] Was the consultation process vitiated by error or fact on the part of the EA in relation to:

(a) The content and nature of the Dickson plan?

(b) Which body has responsibility for determining the scope of the Dickson plan?

(c) The historical operation of the Dickson plan within the Catholic maintained sector (i.e. operation of St Mary's and St Paul's schools in Lurgan as 11 to 16 schools).

Issue 3

[32] If any of the alleged flaws in the consultation process are established whether, in light of the composite nature of the Article 14 process those flaws are sufficient to vitiate the entire process, on the ground that the flaws:

(a) Amount to "*a flagrant or determined attempt … to deliberately ignore or dilute that first stage of the process …*" (per Gillen J in *Re McDonald* at paragraph 18);

(b) Are such that the fairness of the entire process has been irredeemably undermined (per *Moseley*).

Issue 1 - Was the consultation process "unlawful"?

[33] The parties on this issue are largely agreed upon the legal principles at play – both the statutory and common law ones - but not their application to the particular facts of this case. To test the lawfulness of this particular consultation the starting point that must be borne in mind is the actual subject of the consultation that is impugned. It was not the future of the Dickson Plan itself. That has been the subject of numerous previous consultations and the EA, both in the Case for Change document and its evidence to the court, indicated that it felt bound by the policy statement of the Department (and particularly the Minister) in that regard. As to the implications of that approach I will return to those below but that certainly seems to be the basis from which the EA started its consultation. As a result, the Case for Change document had as its focus the proposition specifically as regards the future of the Craigavon SHS which is set out at paragraph [15] above. In testing the overall lawfulness of its approach to the consultation that was carried out, based on that foundation, one must look initially at the provisions of Article 14.

[34] The parties are agreed that:

- The statutory process involves the three stages which have been identified above;
- It is the first of those – the pre-publication stage that is impugned.

[35] The EA, in producing the Case for Change document at that initial pre-publication stage argues that it went further than it was required to do so at that stage. On the evidence to the court it appears to have done so because it was setting the case up for the public consultation (viz Stage 2) and, no doubt, because the Departmental Circular 2017/09 to some extent steers the EA in that direction.

[36] From the Court's perspective the evidence would appear to suggest that the consultation process was effective - it did, after all, produce a clear majority of negative replies and resulted in the EA altering the Case for Change document before the proposal was finally submitted to the Department in anticipation of the public consultation stage (i.e. Stage 2).

[37] In terms of the procedure adopted the Court finds that the procedural and substantive requirements which are set out in Article 14 were met. I say this first and foremost because when one considers the procedural steps outlined in Article 14 I find that they were followed. I also conclude that in terms of the pre-publication stage (i.e. Stage 1) the information that was provided to consultees was sufficient at that stage. I will return to the quality of that information below.

[38] The next question which the Court must address is if the consultation was lawful, firstly, in light of the policy considerations to which the EA was subject (such as those which were set out in DE Circular 2017/09) and, secondly, the common law requirements set down in cases such as *McDonnell and Moseley* – thus by reference to

the "*Sedley Criteria*". To assess that on the facts and taking the *Sedley Criteria* (set out at para [27] above) in reverse order I find that EA did give consideration to the responses it received (criterion (iv) of Sedley) and collated that information in its April 2019 Report. The parties did not dispute the fact that the time allowed for responses to be given (January to March 2019) (criterion (iii)) was sufficient.

[39] The main points which are in contention therefore are:

(i) Criterion (i) – If the proposals themselves were still at a "formative stage";

(ii) Criterion (ii) - If sufficient information had been provided by the EA to allow consultees to undertake a substantive consideration of what was being suggested.

(i) Were the proposals at a formative stage?

The Applicant says not on the grounds that the EA had made it clear that throughout the consultation that its preferred option was a relocation of the Craigavon SHS to the single site at Portadown. The EA does not demure from the fact that that was its preferred option. The question is whether the forming of that opinion in the context of a statutory consultation under Article 14 renders it unlawful.

It is my view that when one considers Article 14 it is clear that on the facts of this case that the impugned consultation can only have been formative. I say that for the following reasons:

(a) This was a pre-consultation stage and Article 14 requires (at Stage 2) a full public consultation. At the preliminary stage all options are still "open" and could be commented upon and, indeed, clearly were commented on – largely in the negative; and

(b) Within the statutory scheme under the 1986 Order one must remember that the EA is not actually the decision-making body – that function under the statutory scheme is reserved to the Department. As the case law makes clear when one is considering the fairness of a consultation process one has to bear in mind the full statutory context (per Lord Reed in *Moseley*). In the present scenario all that the EA was proffering (and capable of proffering) was its opinion – the Department remained in control in terms of both the second stage of the consultation process and its final decision. To that extent the EA was an informed facilitator.

In the context of the statutory scheme provided by Article 14, the EA within that Scheme is a facilitator in the two consultative stages of the process with decision making reserved to the Department. It would seem that the pre-publication stage

can only have been formative unless there was, to adopt the words of Gillen J in *Re McDonnell*:

> *"a flagrant or determined attempt to … to dilute [this] first stage of the process."*

I find no such attempt on the part of the EA on the facts of this case. Indeed even advancing a Case for Change Document at the preliminary stage suggests to me the opposite and rather I see it as an attempt to inform the debate at this initial stage notwithstanding the Applicant's objections to its content.

[40] As it stands the EA takes the view that it is pointless to advance something which is outwith the express policy of the Department in relation to the Dickson Plan. As yet, the Department has not yet expressed a view on either its continued adherence to the Dickson Plan model (as last reiterated by Minister Weir) or, indeed, the specifics of the impugned Development Proposal. As a result the EA initially limited its consultation to 3 options as it felt that those fell within the Dickson Plan. The fourth option was added following consultation and before the pre-publication stage. That the EA felt constrained is clear but on one interpretation one could argue that the inclusion of Option 4 was giving the Department the opportunity to give direction on the wider issues that are triggered by a consideration of change within the Dickson Plan area and indeed the Policy which it has charge of. To that extent the court finds that the proposals were at a formative stage and that the Case for Change document – read in the context of all of the earlier consultations (and most particularly the Area Plan and the Annual Action Plan) is better seen as an evolution in a broad and long history of related consultations and discussions but one that, in this instance, was focussed only on the future of Craigavon SHS. Nonetheless, in including Option 4 the EA left it open to the Department to widen the debate.

[41] In terms of the content of the relevant Case for Change document itself it does identify the four options and gives an explanation and discourse in respect of each – admittedly in varying levels of detail in terms of the advantages and disadvantages which each option offer. It provides the rationale as to why the EA discounted or advanced each Option.

(ii) Was sufficient information provided?

[42] The Applicant is critical of the level of the discourse contained within the document itself and the reasoning given by the EA for its preferred option. Certainly more information could have been added but the court considers that given the various presentations together with the Document itself that was provided at that initial stage there was sufficient information provided to say that "*enough had been said about realistic alternatives, and the reasons for the EA's preferred choice, to enable consultees to make an intelligent response*" (to adopt the words of Lord Reed at paragraph 41 of *Moseley*). On the facts, intelligent, and indeed contrary responses, resulted from the consultation which was undertaken and there is no evidence to

suggest other than that the consultees seemed completely unrestrained from expressing a contrary view to the preferred option of the EA and, indeed, advocating for an option which the EA felt fell outside of its policy remit.

[43] It is accepted that the EA, out of the four options expressed its view (i.e. that it preferred Option 2) but as we know from *Moseley* (per Lord Reed) it is clear that there is nothing inherently unfair or inappropriate in a public authority expressing its preferred option (particularly in the context of this statutory scheme). I conclude that that is all which occurred in this case. The inclusion of Option 4 – even though it was discounted by the EA as falling outside current Departmental Policy – on the facts certainly did not prevent those who were consulted from expressing a contrary view to the EA and advocating for an 11 to 16 school with the option of transferring at age 14 (based on academic selection). The inclusion of this Option together with the evidence of the support it had garnered before submission to the Department establishes in my view on the facts of this case the formative and evolving nature of the consultation leading ultimately to informing the Department – which is exactly the aim behind Article 14. As I have said above, the EA within the statutory context is merely recommending its favoured option to the Department:

(a) In advance of full public consultation; and

(b) In circumstances where the Department is the final decision maker; and

(c) In the context that the EA made available through its April 2019 report the lack of support that existed locally for its preferred option.

So, in order to answer the issues posed under Issue 1, the Court finds:-

(a) The consultation did accord with the requirements of Article 14 of the 1986 Order including specifically Article 14(5A);

(b) It met the policy requirements required of it in DE Circular 2017/09 in that it provided sufficient information to allow a robust and verifiable consultation process and one that was "open, transparent, timely and meaningful" as evidenced by the contrary arguments it generated;

(c) It satisfied the common law requirements of fairness laid down in case law - in particular *Moseley* and *McDonnell* and, in particular:

(i) The proposal was formative – both in the context of the statutory scheme (where a second stage consultation was to follow) and, more factually, on the basis that all options remained open for the public (at Stage 2) and the Department (both at Stage 2 and thereafter) to review, comment on and (in the case of the Department) determine;

(ii) That sufficient information was given in the Case for Change document to prompt "intelligent response" (per Lord Reed) and that intelligent (and contrary) responses were what was received.

Issue 2 - The Dickson Plan

[44] The Applicant's contention is that the consultation process was vitiated by the EA's inclusion of comments on and/or a misrepresentation of the Dickson Plan itself and, on the back of that approach, the outright rejection of Option 4 resulted in the consultation itself being irredeemably flawed (per Gillen LJ in *McDonnell*).

[45] The starting point in this analysis is to reiterate that it is clearly provided in Article 3(1) of the Education Reform (NI) Order 1989 that the Department has exclusive statutory responsibility for settling educational policy for NI. By Article 101 of the 1986 Order the EA must also operate within those policy guidelines in the exercise of its functions. As I have said before the Dickson Plan is a creation of policy rather than enjoying any statutory basis. It is an educational model and to that extent clearly falls within the policy remit of the Department.

[46] In terms of the principle tenets of the Dickson Plan, from the evidence before the court, the Plan appears difficult to define but what one can say with certainty is that its core – perhaps its only – principle is that academic selection is deferred from age 11 to age 14. That seems to have been its provenance and on that essential point the parties do seem at least to be in accord.

[47] From the evidence which was given to the court it also seems that the Dickson Plan is capable of evolution – and as an example of that evolution I refer to St Mary's and St Paul's Schools, Lurgan. Although now closed (St Ronan's a non-selective voluntary grammar school opened in 2015) both of those are evidence of an evolution of the original Dickson Plan in that both originally provided for educational provision to pupils between 11 and 16 whilst allowing academic selection at age 14.

[48] In this case whilst Option 4 was included in the Case for Change Document it was made very clear from the text that it was the EA's view that such an option was likely to run contrary to the Dickson Plan and to undermine it "by stealth" contrary to the view expressed by the Minister in 2016. It appears to the Court that the EA's view was formed:

(a) After discussion with the Department; and

(b) On the basis that the creation of a school for 11 to 16 year olds would be different from other Dickson Plan schools and could therefore lead to an imbalance within the educational offer available to pupils in the Craigavon area amongst those schools subscribing to the Dickson Plan.

[49] Whether one accepts that position or not, in framing the Case for Change Document one has to remember the EA was not directing or purporting to direct policy. As I said above it was consulting on the future of Craigavon SHS not the Dickson Plan itself. At all times it remained open to the Department to ask the EA to consider the Case for Change Document, to reconsider and/or amend any of the individual Options and/or to bring forward alternative proposals. The tripartite approach set out in Article 14 enshrines that possibility in statute. The wording, therefore, which is used in the Case for Change Document viz that "*[Option 4] was not considered further*" and/or that it was preferring Option 2 "*given the restrictions on the EA to make changes to the Dickson Plan …*" in the Court's view do no more than show the EA's opinion. As I have indicated above if one applies *Moseley* there is nothing intrinsically wrong with that approach – particularly when one bears in mind that at all times that approach was subject to Departmental correction.

[50] In all events the expression of such a view on the facts of this case, in no way precluded the vast majority of consultees:

- Objecting to the EA's proposal;
- Agreeing that the current Craigavon SHS provision was not meeting the needs of pupils;
- Supporting the continuing basis of deferring academic selection post age 11;
- Arguing that Option 4 be advanced.

All of that information was put before the Department.

[51] The responses from the consultees were collated into a report (the April 2019 Report) and was available to the Educational Committee and to the Department as part of the shaping of the second stage of the consultation. To that extent one might say that the consultation was indeed successful in highlighting the particular concerns which pupils, parents and others had. Indeed, on one view, rather than constraining debate around the Dickson Plan the consultation process has rather reactivated and highlighted it as an issue. On the facts it is not arguable that consultees were misled by the EA's view – in fact they spoke out vehemently against it. It was also entirely possible for the Department at any stage to correct any misstatement that it felt needed to be addressed in relation to what was its own policy as part of the Stage 2 consultation (i.e. *McDonnell* applied).

Issue 3 - If any of the alleged flaws in the consultation process are established do they vitiate the entire process?

[52] It follows from what I have said that I do not consider that the consultation process, on the facts of this case, was unlawful and/or to have been vitiated by what has occurred. Even if I were wrong on that then when one takes into account:

(a) The prolonged history of consultation on the provision of education within the Craigavon area;

(b) The two stage statutory scheme which operates under Article 14 – by which the second stage is facilitated by the EA but capable of direction by the Department the only question arises if, as part of the Stage 1 process, there was either:

  (i) A flagrant or determined attempt to dilute the first stage (i.e. applying Gillen J in *Re McDonnell*); or

  (ii) Per *Moseley* the process has irredeemably been undermined.

[53] As I have indicated above I see no basis for either assertion on the facts of this case.

[54] The reality is that the Case for Change Document has been a document which has evolved before and during the pre-publication consultation phase. The court was taken to three separate iterations of it. It is common cause that it highlighted all of the relevant options – although the parties are in dispute as to the degree to which they were advanced and/or reasoned (a point I have already dealt with) but more importantly it was only the preliminary stage in a two stage process, under the statutory scheme.

[55] As I have already said the Development Proposal has been withdrawn with a view presumably to the process starting again. In moving forward I venture to suggest that the starting point may well be for the Department to clarify its policy position on the Dickson Plan more fully and with the re-introduction of the Executive that perhaps is now a more realistic possibility. That would then inform the foundation of future consultation and might better inform the EA and those living in the Craigavon area and provide a sounder basis upon which such a consultation might be conducted.

[56] In concluding may I express my thanks to Mr Steven McQuitty BL (for the Applicant) and Mr Paul McLaughlin BL (for the Respondent Authority) for their very helpful and detailed oral and written submissions.

[57] If required I will hear the parties on the matter of costs.