Neutral Citation No. [2015] NIQB 75 | *Ref:* **STE9738**

Judgment: approved by the Court for handing down | *Delivered:* **28/08/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

XY'S APPLICATION

STEPHENS J

Introduction

[1] The applicant, XY, seeks to judicially review a decision of Mr John O'Dowd MLA, the Minister for Education for Northern Ireland**,** made on 15 May 2015 whereby he approved proposal No. 223 made by Belfast Education and Library Board ("BELB") to close Avoniel Primary School with effect from 31 August 2015 or as soon as possible thereafter. That decision was linked to a decision made by the Minister on the same date to approve proposal No. 224 made by BELB to, amongst other matters, increase the admission number and enrolment number at Elmgrove Primary School at 1 September 2015 and to establish a 52 full-time place nursery unit at Elmgrove Primary School with effect from 1 September 2015. The decision to close Avoniel Primary School was the only reason for increasing the admission and enrolment numbers at Elmgrove Primary School. Both of those decisions were made in the context of a capital investment project of some £9 - £10 million to refurbish and extend the existing premises on the Avoniel Primary School site with the intention that after those works were completed an enlarged Elmgrove Primary School would move to the site of what had been the Avoniel Primary School.

[2] The impugned decision is that of the Minister and therefore the Department for Education for Northern Ireland is the respondent to this application. The proposal was made by the BELB. On 1 April 2015 and under the Education (NI) Act 2014 the functions of all the Education and Library Boards in Northern Ireland were transferred to the Education Authority ("EA"). The EA has assumed responsibility for the proposal made by the BELB and is now responsible for implementing that proposal. It is a notice party to the application.

[3] The challenge is to the decision to close Avoniel Primary School. It is not a challenge to the decision to increase admission and enrolment numbers at Elmgrove Primary School. At the outset of the application I raised with the applicant whether

the challenge should be to both decisions given their linked nature and given the statutory duty on the EA under Article 14(9A) of the Education and Libraries (Northern Ireland) Order 1986 to implement proposal No. 224 in relation to Elmgrove Primary School. It was indicated on behalf of the applicant that the sole challenge remained to the decision to close Avoniel Primary School and that it was anticipated that pursuant to Article 14(9B) the EA would request the Department to modify the proposal in relation to Elmgrove if in fact the decision to close Avoniel was quashed. Accordingly the challenge remains to only one of these two linked decisions. The limited nature of the challenge may impact on the practicality of any relief.

[4] The proposals were made by the BELB to the Department on 12 December 2014. The decisions were made by the Minister on 15 May 2015. The applicant commenced these proceedings on 26 June 2015 seeking leave to apply for judicial review. Treacy J listed the leave application for hearing on 4 August 2015. The parties agreed that the leave hearing and the substantive hearing should be heard together as a rolled up hearing.

[5] The grounds upon which the application is based are contained in the order 53 statement. They were presented during the course of the hearing as follows:-

(a) The BELB's consultation with the parents of the applicant, which took place between 16 September 2014 and 17 October 2014 was unfair and improper in that:-

(i) The consultation did not take place when the proposals were at a formative stage.

(ii) The consultation failed to include sufficient reasons for the proposal to allow those consulted to give intelligent consideration and response.

(iii) The consultation failed to include an outline of the alternative to proposals numbered 223 and 224 which alternative was to amalgamate Avoniel and Elmgrove Primary Schools by closing both and creating a new school.

(iv) The consultation failed to give the parents adequate time to submit their responses.

(v) The product of the consultation was not adequately taken into account by BELB.

(b) The Minister's decision was irrational in that it was based on his mistaken belief that the consultation process carried out by BELB had been fair and proper whilst in reality it was procedurally unfair.

(c) The Minister was provided with inaccurate information in relation to the consultation that had in fact been carried out in that for instance he was informed that BELB had consulted with three options namely the status quo, rationalisation and amalgamation whereas in fact whilst there had been consultation responses in relation to amalgamation there had been no consultation in relation to it.

(d) The Minister failed to adequately consider the alternative of amalgamation and failed to engage in reasonable enquiry in relation to BELB's submission that amalgamation would cause more disruption, take longer to implement than the proposed rationalisation, have a negative impact on the progression of the capital investment project for Elmgrove Primary School.

[6] Mr Coll QC and Ms Denise Kiley appeared on behalf of the applicant, the Attorney General appeared on behalf of the Department for Education for Northern Ireland and Mr Paul McLaughlin appeared on behalf of the notice party, the EA. I am grateful to counsel for the assistance that I derived from their carefully prepared and well-reasoned oral and written submissions.

[7] A number of preliminary issues arise in this case with which I will deal before turning to the factual background and to the substantive issues.

Anonymity

[8] The applicant brings these proceedings by XY's mother and next friend. An application was made for an anonymity order prohibiting publication of the name and address of the applicant and XY's family and requiring that in all court documents the applicant would be identified by the letters XY. The application was under article 170(7) of the Children (Northern Ireland) Order 1995 which provides that the court may direct that no person shall publish any material which is intended, or likely, to identify (a) any child as being involved in (these) proceedings; or (b) an address or school as being that of a child involved in any such proceedings, except in so far (if at all) as may be permitted by the direction of the court. An order was granted by Treacy J pending the hearing of the application, though the order did not prohibit the identification of the applicant's school.

[9] In *JXMX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ. 96 the Court of Appeal in England and Wales gave consideration to anonymity orders in the context of the hearing of an application for approval of a settlement involving a child or protected party. Giving the judgment of the court Moore-Bick LJ said:

> "The identities of the parties are an integral part of civil proceedings and the principle of open justice requires that they be available to anyone who may

> wish to attend the proceedings or who wishes to provide or receive a report of them. Inevitably, therefore, any order which prevents or restricts publication of a party's name or other information which may enable him to be identified involves a derogation from the principle of open justice and the right to freedom of expression. Whenever the court is asked to make an order of that kind, therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose. The approach is the same whether the question be viewed through the lens of the common law or that of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular arts 6, 8 and 10."

He went on to set out the following principles of general application which had been identified by Lord Neuberger MR in *JIH v Newsgroup Newspapers Limited* [2011] EWCA Civ. 42, as follows, namely:

> "(i) an order for anonymity should not be made simply because the parties consent to it;
>
> (ii) the court should consider carefully whether some restriction on publication is necessary at all, and, if it is, whether adequate protection can be provided by a less extensive order than that which is sought;
>
> (iii) if the application is made on the basis that publication would infringe the rights of the party himself or members of his family under art 8 of the Convention, it must consider whether there is sufficient general, public interest in publishing a report of the proceedings which identifies the party concerned to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

JXMX is also authority for the proposition that in relation to an application for an anonymity order the true question is whether it is *necessary* for the court to grant derogation from open justice and thus from the rights of the public at large. It includes, but is not simply confined to, a question of balancing the demands of privacy and freedom of expression.

[10] The Article 8 rights of the applicant are engaged. The applicant suffers from a number of conditions. XY has a statement of special educational needs. XY attends Avoniel Primary School and the impact on XY of the decision to close the school is set out in the affidavit of XY's mother and next friend. Those matters are all aspects of XY's private life. A feature of particular importance in this case is that the issues are controversial and divisive. For understandable reasons emotions are running high in the community in which the applicant lives given that what is at issue is the closure of a school which is an integral part of that community. Furthermore the issues in this case impact on relatively small tight knit urban communities. If XY was known to be the applicant in these proceedings then that knowledge may impact on XY's ability to integrate into Elmgrove Primary School, if in the event this litigation is unsuccessful and XY has to move to that school. That is a matter of considerable importance in relation to the question of anonymity.

[11] The competing public interest is in open justice a part of which is that the identities of parties should be available. The questions in issue in this litigation concern the methods by which decisions are made to provide education for children in the catchment area of Avoniel and Elmgrove Primary Schools. The court is concerned with the proper administration of that important public function and I consider that the identities of the individuals involved on both sides and their characteristics, insofar as those characteristics are relevant to the issues truly in dispute, would ordinarily be a necessary aspect of open justice and the Article 10 rights of others.

[12] The test is whether having considered the Article 10 and Article 8 rights of those involved it is necessary for the court to grant derogation from open justice. I consider that it is. I confirm the anonymity order prohibiting publication of the name or address of the applicant or the name or address of any member of XY's family and requiring that in all court documents the applicant is identified by the letters "XY." I also make a reporting restriction order that no person shall publish any material which is intended, or likely, to identify the child involved in these proceedings except in so far (if at all) as may be permitted by direction of the court. I give this judgment in open court but place a restriction on any reporting of it until the parties have had an opportunity of considering its terms so that they can inform the office in writing within a timescale which I will set at the end of this judgment as to whether there is any reason why the judgment should not be published on the court service website or as to whether it requires any further anonymisation prior to publication. If the office is not so informed within that timescale then it will be submitted to the library for publication in its present form.

Standing

[13] Section 18(4) of the Judicature (Northern Ireland) Act 1978 and Order 53, Rule 3(5) of the Rules of the Court of Judicature (Northern Ireland) 1980 require that the applicant in a judicial review application has "a sufficient interest in the matter to which the application relates". It was submitted on behalf of the Minister that the

applicant, XY, did not have a sufficient interest to bring this application but rather that the persons with a sufficient interest were the applicant's parents. In support of this proposition reference was made to Article 14(5A) of the Education and Libraries (Northern Ireland) Order 1985 which requires consultation with *the parents of registered pupils* before a proposal is submitted to the Department to discontinue a controlled school. It does not require consultation *with the registered pupils*. Accordingly it was submitted that the right to be consulted regarding such a proposal resides with the parents of the registered pupils and not with such pupils in their own right. That the alleged failures in this case relate to the consultation process. The Attorney General in making this submission also relied on the decision of the court of appeal in *Re Anderson (A Minor's) Application for Judicial Review* [2001] NI 454 which gave guidance to judges as to refusal of leave in respect of judicial review of governors or tribunals decisions in relation to school admissions. The headnote to the report includes the following:

> "Per curiam (1) The parents must as a general rule be the parties to bring an application for judicial review to challenge the admission decisions of school Governors or the findings of Appeal Tribunals. In some cases, however, the children themselves may be the proper parties to bring the applications. Unless sufficient ground has been established for such an exception to operate, judges ought to refuse leave for applications for judicial review of Governors or Tribunals decisions in relation to school admission to be brought in the names of the pupils. By the same token legal aid should be refused when sought for such applications to be brought in pupils' names, unless sufficient cause is shown why they and not their parents should be the applicants."

I consider that in school admission cases, as a consequence of the statutory scheme of parental preference and the potential for an appeal to a tribunal by a parent, that the approach endorsed by the court of appeal is that leave should be refused if the application is brought by a child as opposed to a parent, unless sufficient grounds are shown for the child to make the application.

[14] That approach in school admission cases relies on the statutory scheme. It is correct that in relation to school closure the statutory obligation to consult is an obligation to consult with the parents of the registered pupil. However another aspect of the legislative framework is the Human Rights Act 1998 which incorporates Article 8 ECHR into domestic law. The question arises as to whether XY can establish that Article 8 is engaged and would be engaged for any child at Avoniel Primary School. The meaning of "private life" for the purposes of the Convention covers the physical and psychological integrity of a person (*X v Netherlands* [1985] E.H.R.R. 235 at paragraph [22]). It also encompasses a right to

personal development and to establish and develop relationships with other human beings in the outside world (see *Botta v Italy (1998) 26 E.H.R.R. 241 /Bensaid v United Kingdom* (2001) 33 E.H.R.R. 10). The ability to establish and develop relationships with other human beings and the ability to develop the psychological integrity of the applicant are all emphasised by virtue of XY's disabilities and have greater significance than in relation to other pupils. The Attorney General in response made a number of points including that

(a) the relevant convention right in respect of education is contained in Article 2 of Protocol No. 1 and Article 8 should not be used to bolster the rights contained in that Article. The articles in the convention should be read harmoniously so that by the application of Article 8 one does not achieve what cannot be achieved under Article 2 of Protocol No. 1 namely a right to education at a particular school. In support of that proposition he relied on *Catan and others v Moldova and Russia* (2013) 57 E.H.R.R. 4; and

(b) the level of seriousness of any potential breach of article 8 was insufficient to engage that article. For instance it was submitted that there was insufficient evidence to support the proposition that the applicant's relationships with XY's school friends would be seriously disrupted by the closure of Avoniel Primary School in that many of them would in any event be transferring to Elmgrove.

In the event it is not necessary to resolve that issue given the decision in England and Wales in *R (on the application of B and another) v Leeds School Organisation Committee* [2002] EWHC 1927 and I do not do so. However I entertain reservations about the proposition that the closure of a school does not give standing to the pupils at that school under Article 8 given that children have a fundamental right to have their basic needs fulfilled, not out of benevolence on the part of their parents or the authorities but as a result of their own status as separate human persons. Children can no longer simply be seen as the object of proceedings but as active participants and actors in their own right. The right to education under Article 2 of the First Protocol does not include any entitlement to education at a particular school, see for instance *In the Matter of an Application by JS for Judicial Review* [2006] NIQB 40. However there are separate rights under Article 8 which arise in the context of a school environment and which by definition must be engaged separately from article 2 of Protocol No. 1. For instance, if a decision was made by a school authority to deprive a child of all contact with his peers then that would engage article 8.

[15] I note that it was contended that the alleged failures in this case relate to the consultation process but I do not consider that all of the alleged failures relate to that process. For instance there is an alleged failure on behalf of the Minister to make reasonable inquiries.

[16] *R (on the application of B and another) v Leeds School Organisation Committee* involved a judicial review challenge, as in this case, to a decision to close a school. It was contended before Scott Baker J that children are not appropriate claimants in school closure cases. The argument was that for children rather than their parents to bring proceedings is an abuse of process and that the claim was in reality that of the parents and not the child. It was contended that whereas children are likely to be eligible for public funding the probability is that parents will not be. Scott Baker J was referred to *R v Richmond LBC ex p JC* [2001] ELR 13 which was the authority referred to by the court of appeal in *Re Anderson (A Minor's) Application for Judicial Review*. He stated that the observations of Kennedy and Ward LJJ in *JC* were related to admissions challenges whereas the present case is a school closure or reorganisation challenge and that there was no indication that their observations were intended for any wider application than the particular type of case with which they were concerned. He stated:

> "[37] My conclusion on this point is therefore as follows. *Both parents and children have a sufficient interest to bring proceeding for judicial review in school closure or re-organisation cases.* Ordinarily, it is likely to be the parents who have the real and primary interest in bringing the case. It is, as Ms Mountfield points out, the parents and not the children who have the right to be consulted under the legislation and the parents whose objections are required to be taken into account under the DfEE guidance. It may be an abuse of process for proceeding to be bought in the name of a child rather than a parent where this is done for the purposes of obtaining public funding and protection against a possible costs order. However, clear evidence would be needed to establish this and there is no such evidence in the present case." (emphasis added).

I agree that in school closure cases both parents and children have sufficient interest to bring proceedings for judicial review. I consider that the applicant XY has sufficient standing in relation to all the grounds of challenge.

[17] In relation to standing the Attorney General also relied on the decision of Treacy J in *Doyle's (Ellen) Application* [2014] NIQB 82. That case concerned an application for leave to judicially review a decision of the Planning Appeal Commission to allow the University of Ulster's appeal against the refusal by the Department of the Environment to grant it planning permission. The applicant, despite public advertisement, did not participate at any stage of the process. Treacy J relying on *Axa* [2011] UKSC 46 and on *Walton v Scottish Ministers* [2013] TPSR 51 held that the applicant did not have a sufficient interest given her lack of participation in the process. In this case the applicant's mother did not participate in

all the stages of the process. If the applicant's mother had brought this application then, on that basis, I would have held that she did not have a sufficient interest and lacked standing. However the applicant is XY, rather than XY's mother. The Attorney General indicated, in my view correctly, that he was not relying on this point as against XY given the context that the applicant is a child and the lack of participation should be seen in that context. Mr McLaughlin also agreed with this concession by the Attorney General. I consider that this is not a point which can be taken against the applicant XY. It is a point which could have been taken against the applicant's mother, but she is not the applicant. It does not alter my conclusion that XY has a sufficient interest and has standing in relation to all the grounds of challenge.

Verifying affidavit

[18] The verifying affidavit has been sworn by the applicant's mother and next friend. One could not expect a detailed affidavit from the applicant given XY's age and XY's personal circumstances but there could have been a short affidavit from XY supporting the application.

[19] *In the Matter of an Application by Emen Bassey* [2008] NIQB 66 I gave consideration to the question as to whether in a judicial review application the affidavit to be lodged verifying the facts relied on requires to be sworn by the applicant, rather than by another person on behalf of the applicant. Order 53 Rule 3(2)(b) does not expressly require the applicant to verify the facts which is in contrast to Order 54, Rule 1(3) which requires an affidavit supporting an application for a writ of habeas corpus to be made by the person restrained see *Re Copelands Application* [1990] NI 301 at 305E. In *Re Cullens Application* [1987] NIJB 5 and in relation to a judicial review application governed by Order 53 Lord Lowry LCJ giving the judgment of the court said:

> "And finally, we wish to deprecate a procedure which is becoming too common in applications by persons in custody, namely, the swearing of the grounding affidavit by the applicant's solicitor from information and belief instead of by the applicant. This should be done only where the solicitor is unable to gain access to his client, and the Court will rely on the prison authorities to facilitate access by solicitors to their clients in these circumstances."

That condemnation has informed practice in judicial review applications which practice continues and for good reason. For instance in relation to this application the better practice would have been for a short affidavit to be sworn by the applicant XY. This would have ensured that the applicant's legal advisors satisfied themselves that the case was brought on XY's instructions and not at the instigation of others. However I do not consider that it is a requirement that the affidavit is

sworn by the applicant but rather if it is not, then that is a matter to be taken into account in evaluating the evidence. It can also be taken into account in that judicial review is a discretionary remedy and that failure of the applicant to swear an affidavit verifying the facts could, depending on the context, be a significant feature in the exercise of discretion.

[20] The fact that there was no affidavit sworn by the applicant is not in accordance with good practice but it is not a requirement.

Whether the application is in fact the application of XY

[21] The failure of the applicant to swear any affidavit together with other features in this case led the Attorney General to submit that in reality this is not an application by the applicant XY but is an application by XY's mother at the behest of the Avoniel Concerned Parents Group.

[22] The Minister made the impugned decision on 15 May 2015. On 29 May 2015 a consultation took place between the Parents Group and their solicitor. Following that consultation another parent agreed with the solicitor "for her (child) to be *put forward* as the applicant to these proceedings". An application for legal aid was made in the name of that child but despite an earlier understanding it transpired that the child did not have a Statement of Special Educational Needs and this was perceived to create problems for a successful legal aid application. Accordingly on or about 18 June 2015 the applicant's mother was approached "to *put* XY *forward*" as the applicant. The solicitor for the Group then came to her home so that legal aid forms could be signed and to take "some instructions *about*" XY from XY's mother. There is no reference in the mother's affidavit to XY agreeing to bringing the proceedings. There is no reference to the solicitor taking instructions *from* rather than *about* XY or satisfying himself that these proceedings were in accordance with the wishes and feelings of XY.

[23] At the outset of the hearing I enquired as to whether XY was aware of or had agreed to bring these proceedings. I was informed that the applicant's solicitor had not spoken to the applicant. However I was also informed from the bar of the court that XY's mother had spoken to XY. That XY was aware of the proceedings and supported them. I am prepared to accept that assurance in this case given XY's personal circumstances. Accordingly I consider that the applicant is XY. I am not prepared to dismiss this application on the basis that the application has in fact been brought by somebody else as opposed to being brought by XY. However I make it clear that those professionals bringing cases on behalf of a child have to satisfy themselves, in accordance with the age and maturity of the child, that the child wishes to bring the case rather than that child is being *put forward* by others irrespective of the child's wishes and feelings.

Factual background

[24] I will deal with the factual background in distinct sections and will also in this part of the judgment give consideration to the statutory procedure under article 14 of the Education and Libraries (Northern Ireland) Order 1986.

(a) The two schools and the Inner East Cluster of schools

[25] There are two primary schools within 800 metres of each other in east Belfast. They are Avoniel Primary School on the Avoniel Road and Elmgrove Primary School on the Beersbridge Road. They are both situated in what has been termed the "Inner East Cluster." That is a cluster of five primary schools which also includes Euston Street Primary School, Harding Memorial Primary School and Nettlefield Primary School. By a significant margin the largest school is Elmgrove with 572 pupils attending in 2013/14, followed by Nettlefield with 261, by Euston with 195, and then Harding Memorial with 195. The school with the smallest numbers of pupils attending is Avoniel with 152.

[26] Avoniel Primary School has an approved enrolment of 383 pupils. The total number of pupils attending was 141 in 2007/08. The number of pupils attending has fluctuated over the subsequent years with a decrease to 140 in 2009/10 but overall an increase to 159 in 2012/13. That is an increase over that period of 18 pupils. In 2012/13 it had 224 unfilled places. It was the Primary School with the smallest numbers of pupils attending in comparison to the other four schools in the Inner East Cluster and at 224 it had the most unfilled places again in comparison to the other four schools. The number of unfilled places in 2013/14 increased from 224 to 231. The number of 141 pupils attending in 2007/08 was just one pupil above the Department of Education's minimum enrolment threshold of 140 and in 2009/10 the number of 140 pupils attending was just at the enrolment threshold. The numbers attending falls considerably short of the 200 pupils required to operate seven classes. The school achieves good standards. The school premises are listed and require refurbishment.

[27] Elmgrove Primary School has an approved enrolment of 592 pupils. In 2007/08 there were 467 pupils attending and in 2012/13 there were 545. That is an increase of 78 over that period. Year on year there was a steady pattern of the pupil numbers increasing. It has the largest number of pupils attending in comparison to the other four schools in the Inner East Cluster. In 2012/13 it had 47 unfilled places which compares favourably with other schools in that cluster in that there is only one school with fewer unfilled places. The numbers attending clearly exceeds the 200 pupils required to operate seven classes which are operated. The school achieves good standards. The school premises are listed and require refurbishment.

[28] There is a marked contrast between the number of pupils attending and the number of unfilled places in Avoniel Primary School and in Elmgrove Primary School. It is rational for decision makers to conclude that Avoniel has a number of

viability issues and that Elmgrove is a strong, sustainable primary school with year on year growth in numbers.

(b) The applicant

[29] The applicant is a 10 year old child who has special educational needs. XY has attended Avoniel Primary School for a considerable period. XY is established and settled in that school environment. The applicant's parents consider that the small school setting, provided by Avoniel Primary School, has been extremely beneficial for XY facilitating a lot more individual attention which they consider would not be possible if XY was forced to attend a larger school. The applicant's mother is extremely concerned about the effect on the applicant and on XY's education of sending XY to a larger school particularly given the special educational needs. She states that Avoniel is like a big family, everyone knows everyone and everyone knows what XY is like. If Avoniel Primary School is closed then she would prefer that XY attend Elmgrove. This is because it is the closest school and she imagines that XY's friends would be going there from Avoniel, so in the absence of Avoniel it was the best option.

[30] The applicant's primary objective is to maintain the status quo and thereby to remain in a small school. However, it is recognised, correctly, that school provision in the area has to be rationalised, which will inevitably mean that the applicant will be attending a larger school. The primary objective cannot be obtained. The secondary position is that during the decision making process in relation to rationalisation adequate consultation leading to adequate consideration ought to have been given to amalgamation of Avoniel and Elmgrove. By this means it is suggested, for instance, that teachers, with whom the applicant was familiar, would also be present in the new amalgamated school.

(c) The need for and the policy in relation to rationalisation of the school estate

[31] The Bain Report in 2006 spelt out that in Northern Ireland there is a pattern of provision of education that is both unsustainable educationally and financially. The problem is that schools in Northern Ireland have too many spare places and accordingly resources are being spent on maintaining schools which are significantly under capacity. That diverts resources and adversely affects education. For instance in 2011 there were almost 85,000 spare school places in Northern Ireland which is equivalent to more than 150 schools. It has long been recognised that there is a need to rationalise the number of schools in order to guarantee high quality education rather than spending resources on maintaining all the existing institutions. The need to rationalise is both at a local level, as in this case, and also throughout Northern Ireland. The applicant accepts that there is a need to rationalise in the catchment area of the two schools in this case.

[32] On 26 September 2011 in a statement to the Assembly entitled "Putting Pupils First: Shaping Our Future" the Minister adverted to the problem of over provision of school places and the need for rationalisation in respect of schools which were too small or too empty. By way of contrast he also stated that there were many schools which enjoy the confidence of parents, pupils and communities which are currently over-subscribed. He was intent that these schools should be allowed to grow. He also made it clear that decisions to invest capital were to be co-ordinated with decisions to rationalise the school estate so that the capital was invested in sustainable schools rather than in further over provision of places. The criteria of access to capital investment was to be founded on the Sustainable Schools Policy. Accordingly there was a clear link between tackling over provision by rationalisation and capital investment. The Minister put in place area planning to achieve these objectives.

(d) The area plan for the Inner East Cluster of schools

[33] The area plan relevant to this case was published in draft on 19 March 2013 by the BELB. It showed that

(a) in the Inner East Cluster of five primary schools there were 527 unfilled places between them. The total of 527 unfilled places is the equivalent of the over provision of, at the very least, one school in that cluster; and

(b) that pupils living in the vicinity of Elmgrove Primary School were travelling to Avoniel Primary School and the pupils living in the vicinity of Avoniel Primary School were travelling to Elmgrove Primary School.

[34] The draft area plan referred to a recent ministerial announcement of a new build (or major refurbishment and extension) for Elmgrove Primary School which "will include a rationalisation of Elmgrove Primary School and Avoniel Primary School". It was envisaged that the rationalisation would reduce the number of unfilled places in the area by around 300. The proposal for rationalisation of Avoniel and Elmgrove Primary Schools was based upon their physical proximity, the high number of unfilled places, the pupil travel patterns, the need for refurbishment of both schools, and the recent ministerial announcement of the availability of capital funding. The draft area plan did not state how rationalisation should be achieved.

[35] There is no challenge by the applicant in these proceedings to the proposition that rationalisation is required. In practical terms rationalisation would necessarily involve consideration of a number of options including:

(a) closure of Avoniel Primary School with a consequential increase in the numbers attending Elmgrove Primary School;

(b) closure of Elmgrove Primary School with a consequential increase in the numbers attending Avoniel Primary School; and

(c) amalgamation of both schools on either Avoniel site or the Elmgrove site with as a consequence a larger number of pupils attending the amalgamated school than previously attended either Avoniel or Elmgrove.

The choice of the site and the method by which rationalisation could be achieved was influenced by the listed status of both schools and the availability of land in the vicinity of each site. For instance an earlier planning application in relation to Avoniel Primary School was withdrawn as the then proposal involved redevelopment of a new building to the front of the listed building. The availability of land for the construction of new buildings for larger pupil numbers was considered in conjunction with Belfast City Council and the Northern Ireland Housing Executive. As a result it became apparent that it would be possible to extend and refurbish the buildings on the Avoniel Primary School site in conjunction with Belfast City Council with the partial use of the Avoniel Leisure Centre site.

[36] The draft area plan was not only published but went out for public consultation. This was the first public consultation process in relation to the rationalisation of Avoniel and Elmgrove Primary Schools. The consultation was between 19 March 2013 and 20 June 2013. The consultation responses were received without any suggestion being made of amalgamation of the two schools.

[37] After considering the consultation responses and in July 2014 the BELB published the area plan for primary education. This made public the Belfast Education and Library Board's preferred option for rationalisation which was the closure of Avoniel Primary School, an increase in the numbers attending Elmgrove Primary School, refurbishing and extending the school premises on the Avoniel Primary School site which would use some adjoining land belonging to Belfast City Council on the Avoniel Leisure Centre site and then moving Elmgrove Primary School to these refurbished and extended premises. The area plan went on to state that:

> "It is important to note that delivery of this rationalisation is subject to statutory development proposals and approval by the Minister for Education. Delivery is also dependant on funding for the reconfiguration, refurbishment and extension of the Avoniel school building."

Accordingly by July 2014 the proposal by BELB to close Avoniel Primary School was in the public domain and there was a clear public indication that the proposal was subject to a statutory procedure.

(e) The statutory procedure under article 14 of the Education and Libraries (Northern Ireland) Order 1986

[38] The statutory procedure is set out in Article 14 of the Education and Libraries (Northern Ireland) Order 1986. Where a Board proposes to discontinue a school and before submitting the proposal to the Department the Board shall consult the following persons (or representatives of them) –

(a) The Board of Governors of the school concerned;

(b) The teachers employed at that school;

(c) The parents of registered pupils at that school.

After that consultation the Board, if it wishes to continue with the proposal has an obligation to submit it to the Department and to publish an advertisement which advertisement must include a statement that objections to the proposal can be made to the Department over a two month period. The Department after considering any objections to the proposal may after making such modifications, if any, in the proposal as …, it considers necessary or expedient, approve the proposal and inform the Board accordingly.

[39] It can be seen that there are two consultation periods and that the consultation involves two different bodies. The first consultation period is before the proposal is submitted to the Department and the consultation involves the BELB. That consultation has to include certain categories of person. The second consultation period is after the proposal has been submitted to the Department and it involves the Department in that there is an advertisement stating that objections can be made to the Department and the Department has an obligation to consider those objections.

[40] The statutory procedure also provides that after approval the Board has a duty to implement the proposal unless the Department modifies the proposal upon, in this case, a request from the EA.

[41] Article 14(1) of the Education and Libraries (Northern Ireland) Order 1986 requires a proposal to be submitted to the Department to establish a new controlled school or a proposal to discontinue a controlled school. It also requires a proposal to make a significant change in the character or size of a controlled school. Article 14 (1) does not expressly provided for a proposal to amalgamate two controlled schools. This means that a Board (now the EA) contemplating the amalgamation of two or more schools must bring forward linked proposals to close those existing schools and establish a new school. There was no proposal from the BELB to close both Avoniel Primary School and Elmgrove Primay School and to establish a new school. Article 14(7) empowers the Department to approve a proposal, subject to such modifications as it considers necessary or expedient. Amalgamation, involving as it does the closure of both schools, would not be a modification but rather three new

and different linked proposals. The definition of a school amalgamation as contained in both the Department's Circular 2014/21 and in the Sustainable Schools Policy is that an amalgamation is a new school formed to replace two or more schools of similar size coming together. Avoniel Primary School and Elmgrove Primary Schools are not of a similar size. Furthermore an amalgamation of Avoniel Primary School with Elmgrove Primary School would still lead to the closure of Avoniel. The difference would be that Elmgrove Primary School would also close and a new school would be established. So it can be seen that amalgamation still amounts to the closure of Avoniel and a change (to a larger school) for the applicant.

(f) The first statutory consultation process with the BELB

[42] Prior to the publication in July 2014 of the area plan BELB had started the statutory procedure of consultation. On each occasion that the BELB consulted with the different persons specified in article 14(5A) the procedure adopted was to meet with the individuals, to make a PowerPoint presentation, to have a question and answer session and then to leave a seven page consultation response document so that the individuals, whether a governor, a teacher or a parent, could submit written consultation responses. The consultation response document gave those responding two options and an opportunity to put forward alternative options as follows:

(a) Option 1 "Status Quo" with the ability to tick signifying that the consultee agreed, was uncertain or disagreed.

(b) Option 2 "BELB's Proposal to Rationalise Avoniel and Elmgrove Primary Schools" with the same ability to tick signifying agreement, uncertainty or disagreement.

(c) It also gave a large space below the following heading "Please Use the Space Below to Comment Further or to *Detail any Alternative Options*." (emphasis added).

The PowerPoint presentation and the consultation response document did not give any reasons for rejecting amalgamation of the two schools. The consultation response document did not invite consultees to specifically consider amalgamation. It did not give consultees the ability to tick signifying agreement, uncertainty or disagreement with amalgamation. The same consultation response document was used in relation to the consultation in respect of Elmgrove Primary School. The written responses were to be submitted by 17 October 2014 to either Avoniel Primary School or Elmgrove Primary School or by post to BELB (363). The consultation process was not confined to the written responses but included all the responses received by the BELB at the meetings and subsequently in writing. The PowerPoint presentation was detailed setting out the proposal. It did not give any reasons for rejecting amalgamation of the two schools.

[43] On 18 June 2014 the Belfast Education and Library Board consulted with the Board of Governors.

[44] On 29 August 2014 the Belfast Education and Library Board consulted with the staff of Avoniel Primary School.

[45] Between Tuesday 16 September 2014 and Friday 19 September 2014 consultation meetings took place with parents of registered pupils. The minutes of those meetings revealed that amalgamation was raised (374) and it is apparent from the mother's affidavit that amalgamation was raised. The consultation meeting with the parents on 18 September 2014 also included political representatives from the area namely Mr Sammy Douglas and Mr Gavin Robinson. Each of the parents was given the consultation response document.

[46] The written consultation responses were then collated by the BELB (381-394). The numbers from Avoniel agreeing to the proposal was 5 whilst 213 disagreed. 87 agreed with the status quo and 136 disagreed. 158 utilised the third box in the consultation response document to support amalgamation as an alternative option. The reasons given for supporting amalgamation were diverse including, for instance, a new school and a new beginning for the area.

(g) The decision by the BELB

[47] On 6 November 2014 a public Board meeting of the BELB took place in order to consider both development proposals. In advance of the meeting officials prepared a paper explaining both proposals which paper was considered by the Board during its meeting. Before making a decision the Assistant Senior Education Officer outlined the context of development proposals No. 223 and 224. The Chief Executive advised that development proposals No. 223 and No. 224 underpinned a significant capital investment project for east Belfast and any delay may impact on the progression of this project with a consequent negative impact on children and young people in this area. In the ensuing discussion a number of issues were raised including the rationale for closure of Avoniel Primary School rather than amalgamation with Elmgrove Primary School. Accordingly before taking a decision the Board specifically considered amalgamation which was one of the consultation responses. The Board elected to defer the decision on whether to publish the development proposals and it requested that officials provided updated information on a number of issues including the rationale of closure of Avoniel Primary School rather than amalgamation.

[48] The matter was considered again by the Board at its meeting on 4 December 2014. A further updated paper was prepared by officials to assist Board members. A delegation of parents from Avoniel Primary School attended the meeting and made an address to the Board members. They also circulated the results of a community survey and emphasised a range of factors including consistent enrolment numbers, the strong financial position of the school, its focal point within

the community, disruption to children, the high number of pupils with special educational needs and the benefit of smaller class sizes. After hearing these representations the Board discussed the matter in committee and ultimately decided that it should publish both development proposals. It also recommended that dialogue should take place between all interested parties with a view to developing a new identity for a school on the site of Avoniel Primary School. These were matters which the Board considered should be taken forward by the Board of Governors of the newly expanded Elmgrove Primary School if the Minister approved the proposals.

(h) The second statutory consultation process with the Department

[49] On 11 December 2014 BELB advertised the two development proposals inviting objections to be submitted to the Department. The two month objection period ran from 11 December 2014 to 11 February 2014. During this time anyone interested or affected could contact the Department directly to relay their views and opinions on either proposal.

[50] On 12 December 2014 the development proposals were submitted to the Department by BELB. BELB also prepared a detailed paper explaining the two development proposals, the procedures which it had followed and rationale behind the proposals. This document was entitled "Rationalisation of Avoniel and Elmgrove Primary Schools: Case for Change". This document was sent to the Department.

[51] On 4 February 2015 the Minister for Education attended a meeting at Avoniel Primary School which was also attended by the First Minister, officials from the Department and the current member of Parliament for the area. In that document it was stated that "the closure of Avoniel and enlargement of Elmgrove is proposed for the following reasons.

(a) Elmgrove is a strong, sustainable primary school with an enrolment over three times greater than Avoniel;

(b) Avoniel is much smaller than Elmgrove and has a number of viability issues;

(c) An amalgamation is in effect the closure of both schools and the establishment of a new school which involves considerably more disruption and consequently higher risk than the proposed rationalisation;

(d) An amalgamation would take longer to implement than the proposed rationalisation and could have a negative impact on the progression of the capital investment project for Elmgrove Primary School;

(e) An amalgamation is likely to be strongly opposed by the majority of Elmgrove stakeholders and a significant minority (30%-40%) of the Avoniel stakeholders, potentially increasing further the time required to implement proposals.

(i) The Minister's decision

[52] At the conclusion of the two month objection period and on 24 March 2015 officials in the Department sent a submission to the Minister to help inform his decision on the proposals. The submission noted that "although Elmgrove PS supports the published proposals, Avoniel PS does not. It favours an amalgamation of the two schools." However, it is then explained that the option of amalgamation was not a feature of the published proposals. Therefore the Minister's decisions on proposals 223 and 224 necessarily related to those proposals as published. For instance it would not have been possible to decide to close Elmgrove without this option having been consulted upon by the Board. The Minister might, of course, have refused to approve proposals 223 and 224. This would have left it open to the EA to consult on three new development proposals, i.e. to close two schools and establish a third (new) one, to publish its response to that consultation and to propose to the Minister the closure of two schools and the opening of a third. It was not possible to modify proposals 223 and 224 to achieve amalgamation.

[53] On 14 May 2015 the Minister made his decision on both of the linked proposals. Confirmation of those decisions was conveyed by Departmental officials to the EA Belfast Region on 15 May 2015 and was also confirmed by the Department through the issue of a press release which was subsequently published on its website on 15 May 2015.

[54] The decision-making process has not been influenced by savings brought about by the decision to close Avoniel Primary School as the total project costs involve investment of approximately £9-£10m in the refurbishment and extension of buildings. This represents a major investment in primary school provision in East Belfast, the aim of which is to achieve long term sustainability and educational attainment for the benefit of the local population.

(j) Hardship and prejudice to third party rights and detriment to good administration

[55] This judicial review application has been brought during the school vacation when all the plans and arrangements necessarily have had to be made to implement both proposals 223 and 224. If an order was now made to quash the decision to close Avoniel Primary School there would be damage in terms of hardship and prejudice to third party rights and also detriment to good administration as follows:

(a) As of 9 July 2015, 86 of the 131 remaining pupils at Avoniel Primary School had submitted forms to transfer to other schools

for 1 September 2015. Of these 74 pupils had requested a transfer to Elmgrove Primary School.

(b) The principal of Avoniel Primary School has applied for and has been successful in obtaining a post as principal of a different school with effect from 1 September 2015.

(c) 5 permanent teachers at Avoniel Primary School have been redeployed to other schools from 1 September 2015 as part of the Education Authority's transferred redundancy scheme. These teachers have been accepted for new positions in different schools and have been allocated classes, and on this basis five teachers in other schools have been approved for redundancy by the Department.

(d) One permanent teacher at Avoniel Primary School has accepted an offer of voluntary redundancy.

(e) Three temporary teachers at Avoniel Primary School have taken up alternative positions in other schools commencing in September 2015.

(f) 5 members of non-teaching staff at Avoniel primary School have accepted positions in Elmgrove Primary School from 1 September 2015.

(g) Elmgrove Primary School has employed four additional temporary teachers as a result of the reorganisation and has restructured its classes and year groups to accommodate and integrate Avoniel pupils.

(h) Elmgrove primary School has revised pick up and drop off times in order to facilitate those parents who may need to make arrangements to drop children off at two different sites each morning, and collect them from two different sites in the afternoon.

It is contended on behalf of the respondent and the notice party that if the court were to grant the relief sought by the applicant at this stage this would present very substantial difficulties to educational provision and would not be in the interests of good administration or those third parties (principally parents, teachers and other staff) who have already made arrangements on the basis of the Ministerial decision.

Legal principles

(a) Consultation process

[56] I seek to apply the principles set out by the Supreme Court in *R (on the application of Moseley) v Haringey London Borough Council* [2015] 1 All ER 495. The headnote to that report states

> "A public authority's duty to consult before taking a decision could arise in a variety of ways. Most commonly, the duty was generated by statute. However, not infrequently, it was generated by the duty cast by the common law upon a public authority to act fairly. *Irrespective of how the duty to consult had been generated, the same common law duty of procedural fairness would inform the manner in which the consultation should be conducted. The requirements of fairness had to be linked to the purposes of the consultation.* The following well-established requirements were essential: (i) consultation had to take place when proposals were still at a formative stage, (ii) sufficient reasons had to be given for any proposal to permit of intelligent consideration and response, (iii) adequate time had to be given for consideration and response, and (iv) the product of consultation had to be conscientiously taken into account in finalising any statutory proposals." (emphasis added)

In relation to the question as to whether the public authority had to provide information about options which had been rejected Lord Reed stated

> "40. That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions, as it was in *R (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, (2012) 126 BMLR 134. To the extent that the issue is left open by the relevant statutory provisions, the question will generally be whether, in the particular context, the provision of such information is necessary in order for the consultees to express meaningful views on the proposal."

The statutory obligation in this case under article 14 of the Education and Libraries (Northern Ireland) Order 1986 is to consult in relation to the proposal to discontinue Avoniel School. There was also a statutory obligation to consult in relation to the proposal to make a significant change in the size of Elmgrove School. There was no proposal to amalgamate Avoniel and Elmgrove. There was no statutory obligation to consult in relation to amalgamation.

[57] There are two statutory consultations that are required under article 14 of the Education and Libraries (Northern Ireland) Order 1986. The first consultation is to be conducted by BELB before submitting a proposal to the Department. The second consultation is with the Department over a two month period after a proposal has been submitted to it. The statutory purpose of the consultation process and the impact of a defect in the first consultation were considered by Gillen J in *McDonnell's (Mary) Application* [2007] NIQB 125. He considered that any flaws in the first consultation could be and in that case were rectified by the second consultation. In that case Gillen J held that there was no prejudice whatsoever accruing to the applicant through any defect which might have occurred in the first stage. It was apparent that the applicant and her family were fully aware of the second phase and that they availed of it. Gillen J held that the applicant was able to make all of the points that she wished to make to the Department about the alleged inadequacy of the first consultation process. In this case the respondent and the notice party, contend that the applicant was made aware of the second consultation process and though the applicant's mother did not participate in it, she had an opportunity to inform the Department about the alleged inadequacy of the first consultation process. So any inadequacies in the first consultation process were cured by the opportunities afforded by the second process.

(b) Delay

[58] The issue of delay in commencing an application for judicial review in the context of a proposal to discontinue a school, the application of article 14 of the Education and Libraries (Northern Ireland) Order 1986, alleged defects in the first consultation process and with the challenge only being brought after the second consultation process and after the decision by the Minister has been taken, was considered by Gillen J in *McDonnell's (Mary) Application*. In that case he considered "that the appropriate time to have made the challenge … was when the proposal was first made by" in that case the CCMS which was the equivalent body to the BELB. He stated that "virtually the whole focus of the applicant's claim has been on the alleged defects in the consultation exercise carried out by CCMS" and went on to state that it "would provide a striking asymmetry if an applicant were able to claim that the first stage process of consultation was fatally flawed but did not have to address that flaw until many months later when the Department had come to a conclusion." He also observed that by "waiting several months until the later stages had been completed it serves to bring about a wholly undesirable consequence namely that the effect of the remedy being granted would be to require the school to completely reopen a process that has been ongoing for a very substantial period.

That is particularly so in this instance where, since the date of the proposal, it has been known to all the parties that ongoing steps have been taken in relation to redeployment of prospective pupils, existing pupils, and teaching staff."

[59] In approaching the matter of delay in *McDonnell's (Mary) Application* Gillen J stated that he regarded a good overview of the principles to be applied were to be found in *R v Secretary of State for Trade and Industry, ex parte Greenpeace Limited* [2000] Env LR 221 where Kay J posed three questions:

(a) Is there a reasonable objective excuse for applying late?

(b) What if any, is the damage in terms of hardship or prejudice to the third party rights and detriment to good administration, which would be occasioned if permission were now granted?

(c) In any event, does the public interest require that the application should be permitted to proceed?

I will seek to proceed on the same basis.

The grounds of challenge

[60] I will deal with the applicant's grounds of challenge though some of them overlap.

(a) (i) Consultation at the formative stage/closed mind

[61] It is the applicant's case that the consultation did not take place when the proposals were at a formative stage.

[62] On 4 July 2014, after the first statutory consultation process had commenced and before it had concluded, a meeting took place between officials of the Belfast Education and Library Board and the Department of Education. Paragraph 6 of the minutes, which minutes were prepared by the Department and sent to the BELB the following was noted:

> "There followed general discussion with BELB about how it had arrived at this particular area solution over any other (e.g. amalgamation of the two schools). BELB explained that amalgamation had been ruled out as an option because the Board had given undertakings to the principals, staff and governors of these school that Avoniel only would close and it would difficult to go back on those."

That minute raises two important issues. The first was whether an undertaking had been given to anyone prior to consultation and the second is whether amalgamation "had been ruled out as an option", prior to the conclusion of the first statutory consultation process.

[63] Mr McConkey, Assistant Senior Education Officer, was one of the officers who attended the meeting on behalf of BELB. His evidence is that the minute of the meeting is inaccurate. He states that in the course of the meeting the Department asked whether consideration had been given to amalgamation rather than closure of Avoniel Primary School and that the BELB officials generally explained the rationale for the closure of Avoniel Primary School. The rationale was that amalgamation was not considered appropriate due to the significant difference in size between the two schools, the increased disruption and consequently higher risk associated with an amalgamation relevant to the closure of Avoniel Primary School and the temporary enlargement of Elmgrove. Further, that an amalgamation would take longer to implement than the proposed rationalisation and could have a negative impact on the progression of the capital investment in Elmgrove. An amalgamation was also likely to be strongly opposed by the majority of Elmgrove stakeholders potentially increasing further the time required to implement the proposal. Finally the Department's Sustainable Schools Policy indicates that amalgamation of two schools would normally take place only where both schools are of a similar size.

[64] The minute states that an undertaking had been given to amongst others certain individuals in Avoniel Primary School but there is no evidence that any undertaking was given to any of them. If there had been an undertaking to the principal or to the staff or to the Governors of Avoniel Primary School that amalgamation would not take place then I have no doubt that there would have been evidence about it. There was no such evidence. I consider that the minute is inaccurate in suggesting that such an undertaking had been given. I also consider it inaccurate in suggesting that amalgamation had been ruled out as an option. I accept the evidence of Mr McConkey. Furthermore it is apparent from the sequence of events that amalgamation had not been ruled out as it was considered subsequently both by the BELB and by the Minister.

[65] I reject the contention that the consultation did not take place when the proposals were at a formative stage or that there was a closed mind.

(a) (ii) Insufficient reasons to allow intelligent consideration and (a) (iii) failure to consult in relation to amalgamation

[66] It is the applicant's case that the consultation failed to include sufficient reasons for the proposal to allow those consulted to give intelligent consideration and response. The thrust of this contention relates to the lack of reasons given during the consultation process with the BELB as to the reasons for rejecting amalgamation. This ground of challenge overlaps with the applicant's case that the consultation failed to include an outline of the alternative to proposals numbered

223 and 224 which alternative was to amalgamate Avoniel and Elmgrove Primary Schools by closing both and creating a new school.

[67] It is correct that the statutory consultation carried out by BELB did not give any reasons for rejecting amalgamation of the two schools however, as I have indicated, there was no statutory obligation to consult in relation to amalgamation. The obligation to consult is in relation to the proposal. The statutory procedure does not involve consultation on options or possible alternatives. Furthermore in the particular context of this decision making process I do not consider that the provision of the reasons for rejecting amalgamation was necessary in order for the consultees to express meaningful views on amalgamation. In the event they did express views in relation to amalgamation which were meaningful. In addition Mr Coll declined to state how it was that if BELB had set out its reasoning for rejecting amalgamation any consultation response in relation to those reasons could have led to the potential for a different outcome. The policy in relation to amalgamation would remain. Elmgrove is a viable, successful and popular school with pupil numbers increasing. It is much larger than Avoniel Primary School. Those facts cannot be changed. There could be no rational reason for closing a successful school with the inevitable risks of disruption that would ensue in order to achieve amalgamation with Avoniel Primary School.

[68] On that ground I reject these particular grounds of challenge.

[69] I also reject those grounds of challenge on the basis of delay. These grounds relate to the consultation carried out by the BELB and the appropriate time to challenge that consultation process was at the latest immediately after the decision by the BELB on 4 December 2014. I consider that there has been delay by the applicant. It is not a sufficient answer to say that the subsequent decision of the Minister was flawed in that it proceeded on the basis that the first consultation was adequate. That is an inappropriate attempt to circumvent the obligation to act promptly.

[70] I do not consider that there is any reasonable objective excuse for applying late. I consider that if the court were to grant the relief sought by the applicant at this stage this would present very substantial difficulties which I have set out to educational provision and would not be in the interests of good administration or those third parties (principally parents, teachers and other staff) who have already made arrangements on the basis of the Ministerial decision. Furthermore I consider that there are no public interest considerations which outweigh the very considerable potential prejudice so as to justify the grant of any relief.

(a) (iv) Time to respond and (a) (v) inadequate consideration

[71] It is the applicant's case that the consultation failed to give the parents adequate time to submit their responses and that the product of the consultation was not adequately taken into account by BELB.

[72] I reject these grounds of challenge on the basis of delay for the same reasons given in relation to the previous grounds.

[73] On a factual basis I also reject these grounds of challenge.

[74] There was consultation in relation to the draft area plan between 19 March 2013 and 20 June 2013. The statutory consultation started in June 2014. The consultation meetings with the parents took place between 16 September 2014 and 19 September 2014. The written responses were to be made by 17 October 2014. There was clearly sufficient time to respond.

[75] The BELB considered the consultation responses at two meetings. The first was on 6 November 2014 and the second on 4 December 2014. There was a delegation of parents at the second meeting. I reject the contention that the BELB did not consider the consultation responses.

(b) Minister's mistaken belief that the earlier consultation process had been fair and proper

[76] It is the applicant's case that the Minister's decision was irrational in that it was based on his mistaken belief that the consultation process carried out by BELB had been fair and proper whilst in reality it was procedurally unfair.

[77] As I have indicated I do not consider that it is a sufficient answer to the issue of delay to say that the subsequent decision of the Minister was flawed in that it proceeded on the basis that the first consultation was adequate. That is an inappropriate attempt to circumvent the obligation to act promptly. I reject this ground of challenge on the basis of delay for the reasons that I have already given.

[78] I also reject the contention that the consultation process carried out by BELB was procedurally unfair. I have rejected the proposition that the consultation process was procedurally unfair on the basis that the BELB did not give reasons for rejecting amalgamation. The applicant also contends that the consultation process was procedurally unfair in that there was no ability in the written responses to signify agreement, uncertainty or disagreement with amalgamation. However there was clearly space for consultees to indicate alternative options and in that space many suggested amalgamation and gave reasons for doing so.

[79] I reject this ground of challenge.

(c) Inaccurate information to the Minister

[80] The Minister was provided with inaccurate information in relation to the consultation that had in fact been carried out in that, for instance, he was informed that BELB had consulted with three options namely the status quo, rationalisation

and amalgamation whereas in fact whilst there had been consultation responses in relation to amalgamation there had been no consultation in relation to it.

[81] The Minister was informed that an amalgamation of the two schools was likely to be *strongly* opposed by a majority of Elmgrove stakeholders. The applicant correctly contends that there were no written consultation responses which would support the proposition that amalgamation was opposed, let alone *strongly* opposed as there was no consultation as to amalgamation. However the consultation process is not confined to the written responses and particularly given the context that amalgamation would involve the closure of Elmgrove Primary School, I accept the proposition that this was a rational professional assessment informed by the consultation process that the parents, teachers and governors of a sustainable good school would oppose its closure. I do not consider that it was inaccurate to inform the Minister that amalgamation was likely to be strongly opposed by a majority of Elmgrove stakeholders.

[82] The Minister was erroneously informed that the first statutory consultation with BELB included the third option of amalgamation. However this was of no material significance but rather drew the attention of the Minister to the importance some parents placed on amalgamation. The information, whilst erroneous, had no adverse impact given that the Minister was aware of the arguments in favour of amalgamation.

[83] The Minister was also informed that a significant minority (30%-40%) of the Avoniel stakeholders opposed amalgamation. The applicant contends that no such figure could be taken from the written consultation responses. However the figure of 30%-40% was a legitimate deduction from the numbers who wanted to keep both schools open. If 30%-40% wanted to keep both schools open then they would oppose amalgamation which would necessarily involve closure of both schools. I do not consider that the information provided to the Minister was erroneous.

[84] I reject this ground of challenge.

(d) Failure to engage in reasonable enquiry

[85] It is the applicant's case that the Minister failed to adequately consider the alternative of amalgamation and failed to engage in reasonable enquiry in relation to BELB's submission that amalgamation would cause more disruption, take longer to implement than the proposed rationalisation, have a negative impact on the progression of the capital investment project for Elmgrove Primary School.

[86] The applicant contends that the Minister ought to have enquired as to the reasons given by BELB for rejecting amalgamation. The reasons can be found in a number of documents including a document prepared for the meeting on 4 February 2015 between the Minister, the First Minister and the current Member of Parliament

for the area. I do not consider it necessary for the Minister to have enquired as to those reasons. It was clear that Elmgrove Primary School was a strong, sustainable primary school with an enrolment over three times greater than Avoniel, that Avoniel is much smaller than Elmgrove and has a number of viability issues. It was also clear that an amalgamation is in effect the closure of both schools and the establishment of a new school. I consider that it is self-evident that closing two schools and establishing a new school involves considerably more disruption and consequently a higher risk than closing one school and increasing the numbers in the other. I also consider that an amalgamation, involving as it does the closure of two schools, would take longer to implement and that this *could* have a negative impact on the progression of the capital investment project for Elmgrove Primary School.

[87] I reject the ground of challenge that the Minister ought to have made more enquiries as to the reasons for rejecting amalgamation.

Discretion

[88] If there has been any unlawful activity by the Minister then I do not consider that there has been any substantial prejudice to the applicant. Consultation was carried out in relation to the draft area plan, the draft BELB proposals and by way of objections to the Minister. The consultation process included representations on separate occasions from politicians either at a local level or at the highest level. A delegation of parents from Avoniel Primary School attended the BELB meeting at which the decision was made and they made an address to the Board members. There was plenty of opportunity to bring amalgamation to the attention of BELB and of the Minister. Both BELB and the Minister considered amalgamation and rejected it and that rejection was in accordance with policy. The proposition that to close two schools and to from a new school involves higher risks is self-evidently correct. There has been extensive consultation and detailed and extensive consideration of all of the issues. If there has been any defect in the decision making process I consider that there has been no prejudice to the applicant and I would refuse relief on that ground in the exercise of discretion.

Conclusion

[89] There was a sufficient case to grant leave to apply but in the event I dismiss all the grounds of challenge.