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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY 'JR230' (A MINOR)
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF
THE BOARD OF GOVERNORS OF A SCHOOL

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Maria Mulholland (instructed by Peter Bowles & Co, Solicitors) appeared for the minor applicant
Denise Kiley (instructed by the Education Authority Solicitors) appeared for the proposed respondent school

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SCOFFIELD J

This judgment has been anonymised to protect the identity of the children to whom the proceedings relate. Nothing can be published which will identify the children or the school concerned.

Introduction

[1] By this application the applicant ("Pupil A"), a girl commencing her Year 11 education at School B ("the School"), seeks to challenge a decision of the School's Board of Governors ("the Board") made on 29 June 2022, whereby the Board determined *not* to recommend the expulsion of another pupil, C, to the Expulsion Committee of the Education Authority ("EA"). Rather, the Board decided to re-admit Pupil C to the School on an extended behaviour contract. The applicant avers that Pupil C seriously assaulted her, in a pre-meditated attack and with knowledge that she was vulnerable (including that she suffers from particular medical condition), in circumstances which were such that a recommendation for his expulsion was the only appropriate sanction open to the Board.

[2] The application for leave to apply for judicial review was heard on an expedited basis on the grounds of the potential impact of Pupil A recommencing her education in the same year as Pupil C. Ms Mulholland appeared for the applicant; and Ms Kiley for the proposed respondent. I am grateful to both of them for their well prepared and succinct oral submissions.

[3] In light of the request for expedition I undertook to provide this ruling on leave as quickly as possible; and the reasoning below is therefore set out more succinctly in some respects than might otherwise have been the case.

Factual background

[4] The immediate backdrop to these proceedings is a significant incident which occurred on 16 May 2022. On that date, during the course of the school day and on school premises, Pupil C assaulted the applicant. The incident was captured on video. I have had the opportunity of viewing the relevant footage. There is no dispute that the applicant suffered significant injury, in the form of dislocation of her right knee. She was in significant pain at the scene, was later taken to hospital by ambulance, and was off school thereafter for a period of some seven weeks or so. She required emergency hospital treatment and a full leg cast, followed by further leg support and physiotherapy. The contact between Pupil C and Pupil A has been described as being like a 'slide tackle' from behind, with Pupil C's legs raised. The video footage supports the view that the applicant was taken completely unawares and had no chance to prepare herself for the impact.

[5] The basic details of the incident on 16 May are not in dispute, particularly since video footage of the event is available. There are some factual issues which remain at large or contentious. For instance, the applicant's parents take the view that the attack was obviously pre-planned and premeditated (as evident from the fact of its being recorded and what is seen at the start of the video recording) and that Pupil C was well aware of Pupil A's medical condition and therefore the likely effects upon her, or at least the risks to her, of his behaviour. Having viewed the video, I proceed on the basis – on the balance of probabilities and for the purpose of these proceedings – that the assault was intentional and premeditated. It is much harder to assess what Pupil C may have expected in terms of the effects on the applicant. For my part, I am prepared to accept that he is unlikely to have anticipated that her injuries would turn out to be as serious as they were. On any view, however, the incident was a particularly nasty one. At the very least it was highly reckless. At worst, it was a callous and malicious attack on a vulnerable girl for the gruesome entertainment of others. The fact that it was intentionally recorded is a particularly unsavoury feature. I entirely understand the applicant's parents' strength of feeling on the matter.

[6] There are other factual details at issue in the application, some of which are contentious and others of which are not, which I need not go into in great detail for present purposes. However, the applicant's parents contend that Pupil C had previously performed a similar manoeuvre on another pupil causing a broken ankle;

but the school authorities say that they have no knowledge of this. There is also some evidence of what the applicant's parents refer to as a "build-up" in the weeks before the incident involving, for instance, inappropriate messages being shared with the applicant on group chats and her being verbally abused or called names. Immediately before the incident on 16 May, the applicant is said to have had a basketball kicked at her repeatedly, which hit her in the stomach, arm and leg; and a carton of juice punctured so as to soak her blazer. The pupil who filmed the assault, Pupil D, had been involved in some of this behaviour.

[7] The evidence in support of the application suggests that the applicant has suffered significant emotional and psychological effects as a result of the incident and, in particular, the dissemination of the footage of it amongst her peers. This is addressed in the grounding affidavit of the applicant's next friend but need not be set out in detail here. There is also some suggestion that the applicant may have a permanent weakness in her knee as a result of the dislocation.

[8] After the incident occurred, the applicant was taken to hospital. While there she received a number of text messages from Pupil C asking if she knew who had assaulted her and what she would do when she found out. It appears that these were sent *after* Pupil C had been suspended by the School as a result of the incident.

[9] Pupil C was suspended that day. The applicant's parents were contacted the next day by her Year Head and told that the perpetrator had been identified and suspended for five days. It was said that he was claiming that it had been a football accident and there was no malice intended; although the member of staff also said that Pupil C had said that he was "aiming for her left knee, it was just the way she fell", which does not appear consistent with the incident having been a football accident. Indeed, the applicant clearly does not appear to have been playing football at the time.

[10] A meeting was held at the school on 18 May, at which the applicant's parents attended. They explained how seriously they viewed the incident and their view that it was sufficiently serious to warrant expulsion. The principal of the school is said to have stated at that time that he did not believe the incident was serious enough for expulsion. However, he went on, in the course of the meeting, to indicate that expulsion procedures would be commenced, that there would be a meeting of the Board of Governors, and that the applicant's parents should attend to canvas for expulsion. Meanwhile the video footage of the incident appears to have been widely distributed amongst the school population. At an assembly which was also held in the School on 18 May pupils were told that the video must be removed from their devices and deleted, this message later being reinforced by a letter to parents of 20 May. (The pupil who recorded the video has also been suspended from the School.)

[11] On 20 May, the applicant's parents received an invitation from the school principal inviting them to attend a meeting of the Board of Governors on 24 May in order for them to address the Board in relation to expulsion procedures. The applicant's parents attended this meeting and made a case as to why they felt Pupil C

should be expelled, including by virtue of the seriousness of the assault and its impact on their daughter. The governors who attended the meeting watched the video footage. The evidence on behalf of the applicant is that, at the end of this meeting, the governors who were there appeared to be in support of a proposal that Pupil C be permanently excluded from the School (although it was recognised that this would ultimately be a decision for the EA).

[12] The meeting of 24 May was followed by a further letter from the school principal on 25 May, which stated:

> "Thank you for attending the meeting on the evening of Tuesday 24 May, and for putting forward your case to the Governors.
>
> The Governors have duly given feedback of the salient points from discussion to the Principal and Vice-Principal.
>
> The School is now looking into expulsion procedures with regards to [Pupil C], and his involvement in this most unfortunate of incidents.
>
> In acknowledging the serious psychological and physical harm to your daughter, [Pupil A], the School will now invoke the expulsion process with the Education Authority."

[13] The applicant's parents have indicated that they were content when they received this correspondence, since they considered the matter was now being treated with the level of gravity which it deserved. They were further advised that Pupil C would remain suspended until the process had been completed.

[14] The decision which is at issue in these proceedings was then set out in a further letter of 29 June 2022 from the school principal in his capacity as Secretary to the Board of Governors. It said:

> "You have made requests regarding the progress of the Board of Governors, regarding the expulsion procedures of the people involved in the incident in which your daughter was injured.
>
> I wish to inform you that this process has reached its conclusion and that [Pupil C] has not been expelled from [School B].

> Following the Consultation meeting on 22 June with officers from the Education Authority and the Parent and Child, Governors met and reviewed the case on 29 June.
>
> In a balance of judgement, the Governors will be re-admitting [Pupil C] at the start of the new academic year on an extended Behaviour Contract.
>
> The seven-week suspension is the longest ever given to a pupil who has not subsequently been expelled."

[15] The applicant complains that this correspondence does not include any explanation of the reasons for the decision not to expel; and fails to give any indication that the impact of the assault upon her, or of Pupil C's return to school with her, were considered adequately or at all.

[16] Between the meeting which was held with the applicant's parents on 24 May and the meeting of the Board of Governors on 29 June giving rise to the impugned decision in this case, the Board of Governors met with Pupil C and his parents, along with an officer from the Education Authority, on 22 June and also 29 June.

[17] The applicant's parents also rely upon the fact that Pupil C has shown no remorse towards their daughter. This is another disputed issue. At the meeting with the applicant's parents on 18 May the Head of Year said that Pupil C was remorseful. Perhaps more importantly, at the key meeting of the Board of Governors on 29 June, it is said that Pupil C personally attended and, in the view of the Board of Governors, was remorseful. He has also provided a handwritten letter to the applicant to say sorry, although the applicant's parents have taken the decision not to share this with her because of their view of the limited remorse it shows. I have seen a copy of the letter and it is open to interpretation. It does say "sorry" and that Pupil C would "do anything" to take back what had happened. Perhaps predictably, parts of the letter tend to minimise his involvement or ill intent. One might query whether the remorse is genuine or an expression of self-pity in view of how things turned out. However, it was clearly intended to represent some form of comfort for the applicant and recognition of wrongdoing on Pupil C's part.

[18] The applicant's parents were also concerned that, by mid-August, the School had not been in touch to arrange a safeguarding meeting to discuss the measures which might be put in place to reassure and protect their daughter when she returned to school along with Pupil C. They emailed the School on 16 August and received a reply by phone arranging a meeting for 24 August 2022. By the time of the leave hearing in this case, this meeting had occurred and I have been provided with a range of information from the School as to the measures which have been put in place for the applicant's return.

[19] Pupil C is now on a 'behaviour contract' upon his return to school. He will spend his first two weeks in a specialist behaviour unit. In the minutes of the meeting of 24 August it is noted that, "If [Pupil C] breaks the Behaviour Contract, Governors have expressed that full expulsion procedures will be undertaken with the Education Authority." The proposed respondent has described the applicant as being subject to a high level of pastoral monitoring at the moment; and Pupil C the subject of close behaviour monitoring.

[20] The mitigation plan which has been put in place to reassure and protect the applicant is wide-ranging and varied. In her submissions, Ms Mulholland accepted that the plan was "impressive", if it operated as intended. Perhaps most significantly, the applicant provided a list of four pupils whom she does not wish to be near (including Pupils C and D); and the School has changed class timetables in order to accommodate this and to ensure that those pupils are not in the applicant's classes. She also provided the School with a list of four pupils from whom she wishes to be separated in class; and the School has revisited class lists and devised seating plans for her classes, with the applicant's input. Relevant pupils have been told that they are to have no contact with the applicant. The applicant will be closely monitored at break and lunch times to ensure her safety. She also has access to a pastoral mentor; and a variety of means to express concerns or to advise of any incidents or worries. The applicant's parents welcome these arrangements, although they contend that they are not sufficient (since Pupil C ought to have been, and ought to be, expelled) and may well not work in practice. At the leave hearing there was reference to a recent incident by virtue of which the applicant's parents claimed the new arrangements were already not working. The School denied that any such incident had been brought to their attention. I am unable to adjudicate on the rights and wrongs of that in light of the lack of evidence about it.

Summary of the parties' cases

[21] The applicant relies on a range of grounds of challenge, including illegality and error of law, particularly in relation to a claimed failure to properly apply para 5.8 of the relevant Scheme for Expulsion, discussed below; failure to take material considerations into account; procedural unfairness, particularly by failure to engage with the applicant and her parents and a failure to provide reasons; irrationality; breach of article 3 of the UNCRC; and breach of her Convention rights under articles 3 and 8 ECHR.

[22] In her well-presented oral submissions in relation to the application Ms Mulholland did not abandon any of these grounds, although she focused her submissions on the issues of procedural fairness, absence of reasons, and irrationality.

[23] Ms Kiley for the proposed respondent expressed understanding of the applicant's position but characterised the challenge as an unmeritorious merits challenge in light of the fact that the School had carefully considered all relevant

matters and reached a decision which was within the range of reasonable responses available to it.

The Scheme for Expulsion

[24] Each party relies to some degree on various aspects of the Scheme for Suspension and Expulsion of Pupils in Controlled Schools ("the Scheme" or "the Scheme for Expulsion"), which was published by the EA in April 2015 pursuant to Article 49 of the Education and Libraries (Northern Ireland) Order 1996. The Education Authority is required to prepare a scheme specifying the procedure to be followed in relation to the suspension or expulsion of pupils from schools under its management. The Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995 further specify matters which must be included in such a scheme.

[25] Section 5 of the Scheme deals with expulsions. In relation to controlled schools, such as School B, the EA is the expelling authority and the decision to expel rest solely with it. However, controlled schools have the power, through their Board of Governors, to recommend to the EA that a pupil be expelled. A pupil may be expelled from school only after serving a period of suspension.

[26] In this case the School relies in particular on para 5.1 of the Scheme, which provides, "All parties involved should adhere to confidentiality at all times."

[27] The procedure to be followed by a Board of Governors which is contemplating expulsion is briefly summarised in paras 5.5 and 5.6 of the Scheme, in the following terms:

> "5.5 A pupil may be expelled from a school only after consultation has taken place between the Principal, the parent/guardian of the pupil, the Authorised Office of the EA and the Chairperson of the Board of Governors.
>
> 5.6 The consultations must include consultation about the future provision of suitable education for the people concerned."

[28] Further details about the relevant processes are set out in section 6 of the Scheme and, as regards the Expulsion Committee of the EA, in section 7.

[29] The applicant relies in particular upon para 5.8 of the Scheme, which is in the following terms:

> "Expulsion should be used only in response to serious breaches of a school's discipline policy and only after a

> range of alternative strategies to resolve the pupil's disciplinary problems have been tried and proven to have failed; and where allowing the people to remain in school would be seriously detrimental to the education or welfare of other pupils and staff, or of the pupil himself or herself. However, there may be circumstances where it is appropriate to expel a pupil for a first or 'one off' offence. These might include serious actual or threatened violence against another pupil or a member of staff; sexual abuse or assault; supplying an illegal drug; or carrying an offensive weapon."

Consideration

[30] I turn now to consider each of the applicant's proposed grounds of challenge to the decision of the Board of Governors, addressing whether they are arguable grounds with a realistic prospect of success (see *Re Ni Chuinneagain's Application* [2021] NIQB 79 at paras [14]-[15]).

Illegality and para 5.8 of the Scheme

[31] The applicant contends that the proposed respondent has misdirected itself and erred in law by failing to properly apply para 5.8 of the Scheme for Expulsion. I do not consider that this is an arguable ground with a realistic prospect of success. Para 5.8 of the Scheme is designed to make clear that expulsion will be a relatively rare sanction. It will generally only be used in response to a serious breach of a school's discipline policy, after a range of alternative strategies have been tried without success, and where allowing the pupil to remain in school will have serious detrimental consequences. The applicant contends that all of these conditions are met. Alternatively, para 5.8 explains that there may be circumstances where a one-off incident will warrant expulsion. That can include an incident of serious violence against another pupil, which again the applicant's parents understandably contend to be the case in this instance.

[32] However, there is no proper basis on which I could conclude that the School has not taken into account the guidance contained in para 5.8 of the Scheme; or that the School has misdirected itself in relation to the meaning of the guidance contained in that paragraph. Crucially, para 5.8 does not purport to be prescriptive as to when an expulsion *must* follow. It is designed to make clear that expulsion should only be used in serious cases but does not seek to prescribe any case, or category of case, in which the sanction of expulsion must be used. A recommendation in that regard will always be a matter for the school authorities to consider in the particular circumstances of the case before it, taking a range of considerations into account (including, as is clear from para 5.6, issues around the future provision of suitable education for the pupil concerned). The mere fact that a case may be one in respect of which, applying the guidance in para 5.8, expulsion *may* be available as an appropriate

sanction does not mean that a Board of Governors (or the EA Expulsion Committee) is required to recommend or impose expulsion. Any suggestion that the circumstances of the case required expulsion as the only appropriate sanction is really a rationality challenge. The applicant has expressly mounted such a challenge in this case, which is discussed below.

Material considerations

[33] The applicant also contends that the proposed respondent has failed to take into account a wide variety of material considerations. These include: the seriousness of the assault; aggravating features of the assault (such as the applicant's known vulnerability; pre-meditation; previous bullying of the applicant by Pupil C; and the deliberate filming of the event); the impacts on the applicant; that Pupil C is being investigated by the police for assault occasioning grievous bodily harm arising from the incident; that Pupil A was entirely innocent; that the assault was a serious breach of the school's discipline policy; Pupil C's previous behavioural problems and failure to respond to alternative behavioural strategies; the need to protect the applicant and others from harm; and the need to condemn violence throughout the school. These are not exhaustive of the pleaded considerations which the School is alleged to have left out of account, many of which are repetitive to a greater or lesser degree.

[34] I have little hesitation in refusing leave to apply for judicial review on this ground since it is an extremely thinly veiled attack on the merits of the Board's decision. All of the matters referred to were raised by the applicant's parents with the group of Governors with whom they met. Many of them were self-evidently considered by the Board. In respect of the others, there is no proper evidential basis, such as is required (see *Re SOS (NI) Ltd's Application* [2003] NIJB 252, per Carswell LCJ, at para [19]), on the basis of which the court could conclude that these factors were left out of account. The applicant has really just listed all of the factors upon which she has relied in support of her (or her parents') contention that expulsion was the appropriate sanction.

[35] The one factor about which there may be some complication is Pupil C's alleged previous violent behaviour. As I have indicated above, the applicant contends that Pupil C was previously engaged in a similar incident involving someone else, although few details have been provided about this. The School's response to pre-action correspondence says that the school authorities "have no knowledge of any such incident." The appendix to the Scheme for Expulsion which sets out the chairperson's agenda for pupil consultative meetings makes clear that there must be consideration of the relevant pupil's behaviour record and the behaviour modification strategies that have been employed by the school. The School has set out in correspondence, and I have been assured by its counsel, that Pupil C's full behavioural history was considered in the course of the Board of Governors' decision-making. This will not, however, at least in the majority of cases, require any form of wide-ranging investigation of other incidents about which the School is unaware or which are not apparent from the behavioural records available to it (for instance, in

relation to incidents which may have happened outside school). Primarily, this obligation will involve consideration of incidents of which the school was previously aware and which have been dealt with, successfully or unsuccessfully, by prior behavioural strategies introduced by the school. Where, as here, there appears to be some doubt about whether and in what circumstances the alleged earlier incident occurred, and (importantly) it is not related to the applicant, the school will generally not be required to conduct some investigation into it, unless failure to do so would be irrational, which I do not consider to be the case here. I am content from the materials before me that the School was aware that Pupil C was a pupil who had previously exhibited poor behaviour and took that into account.

Procedural unfairness

[36] The applicant contends that the proposed respondent has failed to engage with her in its decision to re-admit Pupil C; and that the School has failed to give any reasons or explanation for its decision, which is having a serious effect on the applicant's well-being.

[37] I refuse leave to apply for judicial review in respect of the contention that the respondent failed to engage with the applicant in its decision-making, which I do not consider to be arguable on the evidence. The applicant's parents were in discussion with the School about the incident in the days following it and, more importantly attended a meeting at the school on 18 May 2022 with the principal and another senior staff member and a further meeting with a cohort of the School's governors on 24 May. This latter meeting was expressly for the purpose of the applicant's parents making representations about the procedures which the School would follow (and, in the words of the minutes of the meeting of 18 May 2022, for them "to canvass for expulsion"). There is nothing to suggest that the points which were no doubt strongly made by the applicant's parents at that stage were later ignored or left out of account in the final decision-making on the part of the Board.

[38] In assessing what fairness requires in this context, I also cannot ignore the context which is set by the statutory scheme (both the EA Scheme, discussed above, and the 1995 Regulations on which it is modelled). The consultative meeting which must be held prior to an expulsion is to be attended by the school authorities, an authorised officer of the EA, and the parent or guardian *of the pupil concerned* (as well as the pupil himself or herself, if that is appropriate given their age, ability and aptitude). The meeting is considering the sanctions to be taken against *that pupil* and *that pupil's* further educational provision. It is that pupil (in this case, Pupil C) who is primarily at risk of being adversely affected by the decision-making process.

[39] This issue was discussed in the case of *R v Camden LBC, ex parte H (a minor)* [1996] ELR 360, which bears some similarities to the present case, and in which the applicant, H, contended that the interests of the wrongdoers were given undue emphasis above his own, when he had been shot in the head with a pellet from an air gun at school. Kennedy LJ, giving the judgment of the Court of Appeal in England

and Wales, said that he entirely accepted that the school authorities were right to give considerable weight to the background of the wrongdoers, including their individual problems and their apparent contrition. However, he made clear that the effect on the 'victim' was a relevant consideration for the expelling authority and should be considered (including by means of making appropriate enquiry, where required). However, unlike counsel for the applicant in that case, the judge was not critical of the evidence of the local education authority in the following terms:

> "Exclusion procedures are required by law to centre upon consideration of the case for and against the pupil who is being excluded. The interests of a 'victim' are less directly the subject of formal consideration by the governing body or local education authority, although they should form part of an overall case."

[40] Kennedy LJ commented on this passage in the evidence, as follows:

> "Read in the context of the legislation and other guidance to which I have referred that paragraph does not, in my view, misrepresent the position, but where, as here, there was a child victim the overall case did require some serious investigation of the effect that the proposed setting aside of the Head's decision would have on the injured boy."

[41] I consider this to be authority that in a case such as the present – where another pupil has been involved in an incident and will have their welfare influenced by the outcome of the disciplinary process – that pupil's concerns and representations will or may be a relevant consideration. They should be permitted some input into the process in order that their views can be taken into account. However, as I have observed above, that happened in the present case. Provided that such views are appropriately fed into the process, another pupil in the position of the applicant is not entitled to participate in the pre-expulsion procedure as if it was an adversarial process. It is not.

[42] Ms Mulholland submitted that it was procedurally unfair for the applicant's parents not to be engaged at the stage of the consultative meeting held under the Scheme for Expulsion and/or the meeting of the full Board of Governors which followed that, at which the final decision was made. I do not consider that to be an arguable ground with a realistic prospect of success. The School was bound to take into account the applicant's wishes and concerns; but the procedure it adopted was adequate to do that. There is no authority for the applicant being entitled to be involved in the consultative process itself as a party. That is inconsistent with the statutory scheme and with what fairness requires given the nature of the process (which is directed mainly towards the sanction to be imposed on the wrongdoer) and the position of the school (acting in the interests of the school community as a whole). When the impugned decision was made, Pupil C was required to be subject to an

extended behaviour contract (which I have now seen). It lists goals for the student, the very first of which is that he would ensure that he did not approach or speak to or about the applicant when in school or outside of school. When the impugned decision was made, the School would obviously have been thinking ahead to steps which might be included in the contract which would protect the applicant's position.

[43] The question of whether the respondent is obliged to provide reasons for its decision to the applicant is perhaps more difficult. I am inclined to accept Ms Kiley's submission that there is no common law duty on the part of the School to give detailed reasons for the decision it has taken to the applicant in this case, notwithstanding its obligation to take her position into account. For the reasons given above, the statutory scheme and the EA's published Scheme do not require this (and, indeed, emphasise the importance of confidentiality in the process). They therefore point to a conclusion that no obligation to give detailed reasons to the applicant arises. That is partly because the School is obliged to take into account wider considerations than simply the incident itself (although that will plainly be a very important, and probably the pre-eminent, consideration) or its effects on the applicant, including for instance the future educational provision of the pupil concerned and other factors relating to him or her. Some of the issues which it is required to consider may be confidential to the pupil concerned.

[44] It might be arguable that procedural guarantees inherent in article 8 ECHR may give rise to an obligation, at least in a case such as the present, on the part of the school authorities to give reasons for their decision to an individual such as the applicant whose interests are likely to be significantly affected by its decision. Even assuming that to be so, some allowance would have to be made for the potential confidentiality of certain information relating to Pupil C. Ms Kiley did not seek to strongly defend the adequacy of the reasoning contained in the School's letter to the applicant's parents of 29 June; and, indeed, I think it could have helpfully contained much more information. Nonetheless, it might well also be said that the basic reasoning behind the Board's decision is easily discernible: they considered that Pupil C should be given one further chance to conform to the behavioural standards required before imposing the most serious sanction available to them. The letter of 29 June 2022 refers to re-admitting Pupil C on an extended behaviour contract. The letter also mentions that the decision was "in a balance of judgement" in circumstances where the seven week suspension which Pupil C had already served was the longest given to a pupil who had not subsequently been expelled. Reading this with an informed eye, the Governors clearly concluded that Pupil C could have been recommended for expulsion as a result of this incident but, having been subject to a very significant suspension, and with strict controls on his behaviour going forward which had not previously been tried, and with the summer break in between, he could be given one further chance to continue his education in the school.

[45] In any event, judicial review is a discretionary remedy and I would not be prepared to grant leave to apply for judicial review on a reasons challenge alone in this case. That is because the School is likely to provide a greater level of reasoning in

its replying affidavit evidence which is likely to dispose of the issue but, even assuming the applicant were ultimately to succeed, the prospect of the court granting intrusive relief is slim. By the time the judicial review proceedings (and possibly any appeal on the part of the School or Pupil C, participating as a notice party) were to conclude, and in the absence of interim relief (which is not sought and which is unlikely to be granted in any event), Pupils A and C will have been back at the School for some time. Either there will have been further difficulties, in which case the present application is likely to have been superseded (see para [55] below); or matters will be proceeding as planned, with Pupil C adhering to his behaviour contract. In the latter circumstance, the likelihood of the Board reaching a different decision if the only ground on which relief were granted was a reasons challenge, or of the EA Expulsion Committee deciding to expel on the basis of matters as they then stood, are extremely slim.

[46] I would observe, as I think the school authorities belatedly recognised, that their communication with the applicant and her parents in relation to the disciplinary process could have been much better. The applicant's parents appear to have left the meeting of 24 May in the expectation that Pupil C was likely to be expelled. The different outcome communicated to them on 29 June then came as a bolt from the blue, without their having been made aware of relevant meetings and developments in the intervening period. At that time the school term was coming to an end and there was little (if any) opportunity for further engagement throughout most of the summer. Crucially, the failure to take any significant steps until late August to plan for the applicant's return to school and put in place reassurance and protective measures led the applicant's parents to the understandable conclusion that her needs and concerns were not being prioritised. I have little doubt that this will have added to the applicant's own worries. Although I cannot be sure that better and more prompt engagement with the applicant's parents would have averted the requirement for these proceedings, there is a much greater chance that the parties would not have found themselves in court if the School's communication with the applicant and her parents had been better.

Legitimate expectation

[47] I also consider that the applicant has failed to raise an arguable case, with a realistic prospect of success, in respect of the claimed breach of legitimate expectation. The relevant correspondence on the part of the School dated 25 May made clear that the expulsion process would be instigated but did not guarantee any outcome, much less so in a way which was sufficiently lacking in qualification to give rise to an enforceable substantive legitimate expectation in public law. It said, "The School is now *looking into expulsion procedures* with regards to [Pupil C]" and that the School would "*invoke the expulsion process* with the Education Authority", as indeed it did by holding the required consultative meeting. As Ms Kiley emphasised, the notes of guidance for parents and guardians which is appended to the Scheme for Expulsion identifies that there are a range of possible outcomes where a consultative meeting has been convened. It says:

> "Following the Consultative Meeting, the Chairperson will recommend one or a number of outcomes. The important thing for you to remember is that no decision has been made beforehand and that the final recommendation can only be determined after consideration of all the facts of the consultative meeting.
>
> Examples of possible outcomes might include a recommendation that your son/daughter:
>
> - return to school having accepted the seriousness of the situation and offered guarantees in respect of his/her future behaviour in the school;
> - return to school having agreed and signed a 'Discipline Contract' which has been specifically drawn up to suit the particular circumstances;
> - return to school having agreed to avail of outreach and counselling assistance as deemed appropriate by the school authorities;
> - remain registered at the school in order to avail of alternative off-site opportunities and programs or other placements if deemed to be appropriate by the school and other agencies;
> - be considered for expulsion from the school by the full Board of Governors."

[48] In the event, the process resulted in the School adopting the second potential outcome contained in the list of bullet points. Ms Kiley submitted, which I accept, that the School could not have entirely bound itself to recommend suspension, since it could not pre-determine the outcome of the required consultative process. In any event, as explained above, I do not consider that the School did indicate that expulsion would be the result, simply that the process which *could* end up in expulsion would be initiated. I appreciate that the way in which matters progressed may have raised the hopes or expectations of the applicant and her parents; but not in a way which is enforceable in public law as a breach of substantive legitimate expectation.

Irrationality

[49] In my view, the applicant's challenge really boils down to a contention that the Board's decision was irrational, because the circumstances of the incident between Pupils A and C was such that expulsion was the only rational outcome of the disciplinary process. (As a matter of logic, it follows that, if that was correct, the Expulsion Committee of the EA would also be legally bound to expel Pupil C.) The applicant's case on irrationality is advanced by reference to many of the factors which she contends that the School left out of account. In the alternative, she contends that,

if these factors were taken into account, it was irrational for the Board not to conclude that a recommendation for expulsion was the only appropriate sanction.

[50] There are many areas in the life of the community, including those (such as education) in which there is a public element, where the courts are not well placed to manage behaviour or dictate outcomes. I make no criticism of the applicant or her parents, for whom I have very significant sympathy, for bringing these proceedings; but issues of school discipline such as those raised by this case are, by and large, best left to the educational authorities who have the experience and expertise of dealing with them on a regular basis. In the absence of legal error, it is not for the courts to seek to manage the maintenance of discipline in the classroom or playground. Legal error in the form of irrationality is likely to be rare in cases such as this, given the various considerations which school authorities will be required to take into account and their intimate familiarity with the children concerned and the strategies available to them to deal with both behavioural and pastoral issues.

[51] Having recognised the appropriate margin of discretion which should be afforded to the Board of Governors, I also conclude that the applicant's case based on irrationality has no realistic prospect of success. The incident which has given rise to these proceedings could clearly, in my view, have lawfully been considered to warrant expulsion. But it is another thing to say that it could only lawfully be dealt with by means of expulsion. It was not irrational for the Board to consider that, in light of the significant suspension period which Pupil C had served and the steps which could be taken to moderate his behaviour and protect the applicant, expulsion was not required at this point.

Article 3 of the UNCRC

[52] The applicant further contends that the Board's decision was in breach of its duty under article 3 of the United Nations Convention on the Rights of the Child to give primary consideration to the best interests of the applicant. This ground is unarguable. Article 3 is not directly enforceable as a matter of domestic law: see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, per Lord Reed, at paras [76]-[79]. In any event, it is meaningless to assert that the UNCRC, even if directly enforceable, would give rise to an obligation to expel in the circumstances of this case. It is an obligation (in international law) to take into account the best interests of the child as a primary consideration. In this case, of course, there are two children whose futures are at stake, each of whose best interests must be considered. Although there is support for the suggestion that the innocent child's best interests should be accorded a degree of priority, consideration of those interests does not inexorably lead to one outcome only.

Convention challenge

[53] As to the applicant's challenge based on articles 3 and 8 ECHR, I accept the proposed respondent's submission that the minimum level of severity which must be

attained in order to engage the article 3 prohibition on torture or inhuman and degrading treatment has not been reached in this case. I accept, for the purposes of argument, that the applicant's article 8 rights may be engaged but, bearing in mind the area of discretionary judgement available to the school authorities in this field, and the detailed and varied measures introduced by means of the extended behaviour contract and mitigation plan which have been put in place, I do not consider the applicant to have raised an arguable case with a realistic prospect of success that any interference with her rights will be found to be disproportionate or unjustified. For a pupil to have a 'human right' that another pupil be expelled would, in my view, require a case of a different order to the present.

Conclusion

[54] For the reasons given above, I propose to dismiss the application for leave to apply for judicial review. Notwithstanding that outcome, as I have emphasised in the course of this judgment, I have great sympathy for the position of the applicant and the views of her parents. The incident which gave rise to these proceedings was utterly unacceptable. The applicant has valid concerns about her ongoing welfare in school. Pupil C might properly be considered lucky not to have been expelled. However, none of that means that the proposed respondent has acted unlawfully, even arguably so to the requisite standard for the grant of leave to apply for judicial review. It is not for the courts to micro-manage discipline within schools. In this case, the Board of Governors permitted the applicant and her parents an appropriate opportunity to express their concerns and to make representations. The Board then took that into account. It was faced with a difficult decision in which it had to take into account the interests of two children and it made a decision which – albeit the applicant's parents may legitimately disagree with it – was legally open to the Board. As I have also noted above, it now appears to be accepted that the School could have communicated more effectively with the applicant's parents throughout the process, so as to offer more information about what was happening and more reassurance that the applicant's concerns and welfare were being considered. I am encouraged to see that, belatedly, communication in relation to the applicant's ongoing welfare in school appears to have improved.

[55] As I have already adverted to, the minutes of the child protection and safeguarding meeting held with the applicant and her parents on 24 August 2022 notes that, "If [Pupil C] breaks the Behaviour Contract, Governors have expressed that full expulsion procedures will be undertaken with the Education Authority." The obvious reading of that statement – that "full" expulsion procedures will be undertaken "with the Education Authority" – is that, if Pupil C breaks the contract, he *will* be recommended for expulsion to the EA's Expulsion Committee. That appears to have been stated to the applicant's parents in even more stark terms than may appear in the behaviour contract itself, which contains an acknowledgement that breach of its terms may result in suspension or expulsion, amongst other things. In the event of further misbehaviour, the Board of School B will of course have to consider all of the circumstances as they then stand. However, Ms Kiley described

Pupil C as being "on his final warning." The letter of apology from Pupil C to which I have referred at para [17] above says, "I have certainly learn't [sic] my lesson from this and will never do anything like this again." I very much hope that that is the case. However, I find it difficult to see how he could have any cause for complaint if he misbehaves further in any significant respect – especially if this in any way impacts Pupil A whom he has promised not to approach or speak to or about – and he is then expelled as a result. Indeed, that is what I would expect to happen in light of what the proposed respondent has told this court.