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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY ROBERT McMILLEN, CHAIRMAN OF THE BOARD OF GOVERNORS OF BALLYCLARE HIGH SCHOOL, FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for Judicial Review by Dr Robert McMillen, Chairman of the Board of Governors of Ballyclare High School. The application concerns two matters, being in the first place the dress and appearance code of Ballyclare High School, as set out in rules contained in "Ballyclare High School Uniform 2007/2008" and secondly the school disciplinary procedures, as set out in "School Policy – Discipline". The applicant seeks declarations that the adoption and application of the uniform policy and the disciplinary policy are lawful and in particular that they are not discriminatory under the Sex Discrimination (Northern Ireland) Order 1976 and not in breach of obligations under the European Convention of Human Rights, Article 8, the right to respect for private life, Article 10, the right to freedom of expression, Article 14, the right to freedom from discrimination and Article 2 of the first protocol, the right to education.

[2] Four boys at the school refused to comply with the uniform policy in relation to the length of hair and all were made notice parties to this application. Representatives of two of the boys were made respondents in the application and they are to be known as GS and MR. Notice was also given to the Northern Ireland Commissioner for Children and Young Persons (NICCY) who were represented at the hearing. Mr O'Donoghue and Mr Doran appeared on behalf of the applicant, Mr O'Hare appeared for GS, Mr McGleenan appeared for MR and Ms Higgins and Ms McMahon for NICCY.

[3] The affidavit of Dr McMillen explains the reason for the decision by the school to take these proceedings –

> 'Those responsible for the running of the school are extremely concerned that the matter is now getting out of control, with other boys being encouraged to defy the school's policy and with the heightened public interest created in the local media. The school has been forced to issue press statements in response to accusations against the school in order to set out its position. The Board of Governors has decided, however, that in order to protect the interests of the school as a public education establishment, the interests of the individual students affected by the policy and the interests of all students at the school, the court should be invited to rule on whether the school's policy - and the application of disciplinary procedures of publics who have failed to adhere to it - is lawful.'

[4] Dr McMillen describes Ballyclare High School as a long established grammar school, the ethos of the school being one in which self discipline is promoted and pupils are encouraged to accept responsibility for themselves and others within the school community. To that end, a code of practice has been drawn up which encourages compliance with discipline and uniform. The policy has had the consensus of parents and pupils for the last 7 years. Parents and pupils have signed the code of practice to indicate their agreement with the terms. That sense of pupils taking a pride in themselves, which the policy encapsulates, is at the heart of the ethos of the school. A strong sense of shared identify is developed through the implementation of the uniform policy. Pupils have a sense of ownership because their voice is heard through the School Council and the school prefects. Last year a review of the school discipline policy involved consultation with pupils and parents. The school's complaints policy has not been used to challenge the terms and conditions of the discipline policy, the uniform policy or the code of practice.

[5] The four pupils concerned are GS, who has been subject to detention and a period of suspension and is now segregated within the school. His younger brother RS has been in detention. The third pupil MR has also served periods of detention and a fourth pupil DD has a medical condition and is being dealt with in a different manner.

[6] An affidavit was filed by GS. He believes that the length of his hair does not have anything to do with or affect neatness or self discipline or his sense of belonging to the school or any other aims of the code of practice. He questions the consistency of the school, in so far as he has been suspended and other boys have not, including boys who have been in detention for having very short hair. He also makes comparisons with the rules in relation to girl's hair as they are allowed to have long hair, although it must be tied back. The school would not agree that he would wear a ponytail under his jacket collar. He complains about the lack of

meetings with his parents as provided by the discipline policy. He refers to his father having engaged solicitors and that a solicitor's letter had been sent to the school on the 5 December 2007.

[7] An affidavit was filed by MR's mother. She explains that MR is fond of music and that he is involved in a band that is serious about a music career and the members of the band wish to commence gigs now that they are becoming known. MR believes that the hair restriction negatively impacts on the image he wishes to portray in his music. MR's mother raised the issue of hair length with the school in June 2007 and sought information about the school's policy. She refers to minutes of meetings of the School Council in November 2007 where the issue was raised. MR's mother made a Freedom of Information application and refers to the manner in which the school responded. She had consulted the Children's Law Centre, which wrote to the school on her behalf on 15 November. She also draws attention to the fact that the school's discipline policy added a note to the effect that those who had been through the disciplinary process may not be admitted to the sixth form. To this may be added that at a Board meeting on 25 June a parent raised this issue and it is noted that advice was being sought. The matter came before the Board again on 17 September, at which point the Board approved the appearance code. However the Board asked the Principal to seek legal advice about how to deal with the issue. At a meeting of the Junior School Council in November 2007 this issue was raised and a subcommittee of the Senior School Council referred the issue to the School Council.

[8] An affidavit was filed by Patricia Lewsley, the Northern Ireland Commissioner for Children and Young People. She refers to the requirements of the United Nations Convention on the Rights of the Child and to Article 12 which provides that the voices of the child and young person should be heard in relation to matters that affect them and that their views be given appropriate weight. This is obviously an issue that has been exercising NICCY, which has published Children's Rights in Northern Ireland in 2004, which referred to concerns about children being heard. It was noted that children and young persons raised, as a key issue, discrimination on the grounds of gender by uniform rules, giving as examples that girls could not wear trousers and boys could not have long hair or wear earrings. Ms Lewsley refers to various other important publications that include the Northern Ireland Report to the United Nations Committee on the Rights of the Child; NICCY guidance documents for schools seeking to develop a best practice approach to active participation of children within the school system, including 'Having Your Say' as a guidance for School Councils and for anti-bullying policies and ' Being part and parcel of the school'; a NICCY submission to the United Nations Committee on the Rights of the Child on the child's right to be heard. Ms Lewsley concludes by expressing concern about the schools disciplinary policy and uniform policy being introduced without taking any or proper account of the views of young people who attend the school; the disciplinary policy not allowing the voice of the young people to be disciplined to be heard and taken into account; the content of the disciplinary failing in particular to give clear guidance, for instance on the segregation of pupils.

[9] In reply to Ms Lewsley, Dr McMillen refers to the School Council which comprises elected representative and deputy representatives from all years and is overseen by a teacher. The Vice Principal has visited the Council to hear the views that have been expressed. Members of the Council have participated in meetings with the Board of Governors. There was a review of the disciplinary policy in 2006 which involved the Council. In 2006 and 2007 the Vice Principal gave a presentation to the Council on uniform policy. The issue of hairstyle was currently on the agenda for the Senior Council. The issue was raised at a subcommittee of the Senior Council and this was the first time that length of hair has been raised as an issue by pupils at the Council. Dr McMillen states that if the Council were to recommend that the policy should be changed that may, but would not necessarily, lead to that course being adopted. Any proposed change of policy of that nature would be forwarded first to the senior management team and if approved at that level would have to be approved by the Board of Governors. The issue will be before the Senior Council in February 2008.

[10] Dr McMillen refers to GS and his father having taken what he describes as a media campaign by appearing on a radio programme to make their complaint. He refers to the segregation arrangements for GS as affording facilities for education in the school where GS is on his own; he has visits from his friends at break time and lunchtime; access to subject teachers; access to the school canteen at specified times; access to audio visual learning when required; access to computers when required and access to specialised studies and skilled tutorials with a group of other pupils. The explanation offered for segregation is that when GS returned from suspension, a rigid application of the discipline policy to GS would have entailed further suspension on the basis of his persistent refusal to adhere to the regulation concerning hair length but the school decided that the better course of managing this difficult and protracted situation would be not to suspend him further but to remove him from the other pupils. Dr McMillen refers to the absence of an opportunity to discuss the matter with the parents because the pupil's father refused to come to the school and speak to the Headmaster about the matter. He indicates that the school discipline procedures were adhered to, there being provision for three meetings with parents before suspension. The first two meetings did not take place because of the failure to co-operate with the school, so when the parents eventually came to the school on 5 November that was treated as a stage three meeting and led to the suspension.

[11] Other affidavits were filed engaging in increasing detail about various matters in dispute. Judicial Review does not lend itself easily to the resolution of factual disputes as evidence is provided on affidavit and not orally and the issues generally concern policy and procedure. That is not to dismiss all the details, because they are important matters, but this Court is concerned with a broader sweep relating to the lawfulness of the policy and its application.

[12] The Education (NI) Order 1998 provides for a scheme of management to be devised in respect of schools which are to be governed by their Boards of Governors and managed by the Principals. Article 3 of the 1998 Order provides for a scheme of management where the duty of the Board is to ensure that policies are designed to promote good behaviour and discipline on the part of pupils and that it is the duty of the Principal to determine measures that are to be taken to promote self discipline and proper regard for authority, to encourage good behaviour and respect for others on the part of pupils and prevent bullying and secure that standards of behaviour of pupils are acceptable and otherwise regulating the conduct of pupils. The Education (School Information and Prospectuses) Regulations (Northern Ireland) 2003 provide for the publication of certain matters that include the policy or rules of the school, if any, in respect of the way in which pupils are to be dressed, including in particular any recommendations for rules relating to the wearing of school uniform.

[13] The uniform policy states –

> "Uniform is the outward identity of the school and the means by which our pupils are distinguished in the wider community. It is therefore important that they have a pride in wearing it, and this can best be encouraged if all items comply with the regulations which the school specifies. The wearing of our uniform develops habits of neatness and self-discipline and instils a sense of belonging to Ballyclare High School."

A list sets out the girls' uniform and a separate list sets out the boys' uniform. They are not the same, as one would expect. For example the first item in the girls' uniform provides for a regulation skirt, the second item is a blouse of a certain type and the fourth item requires girls to wear a blazer. In relation to hair for girls it is provided that "Hair must be neat and no extreme style or colour is permitted. Long hair should be tied back with a red or navy ribbon or clips". For boys the first item relates to shirts and the second to trousers, which is not an item in relation to girls, although it has become an issue as appears from the discussions in the Schools Council. Boys too must wear blazers. In relation to hair it is provided that "Hair must be neat and should conform with current school regulations as announced in assembly. No extreme style or colour is permitted. Such fashions as hair touching the blazer collar and a number one haircut are not acceptable. Facial hair is not permitted."

[14] The School Discipline Policy provides that "The school aims to promote self-discipline and acceptance by pupils of responsibility for themselves and others within and beyond the school community." The policy states that "Current regulations on school uniform are applicable to all occasions when school uniform is worn within and beyond the school day." Under the heading "Disciplinary policy - working through the system" it is provided that "Classroom teachers are responsible for the establishment and maintenance of discipline within their own

class and where they witness problems in corridors, in assembly or elsewhere on the premises." It is provided that "Responses by staff should be predictable, consistent, proportionate and measured." Measures that might be taken include contact with the child or the parents, detention, temporary withdrawal of a pupil from a class, suspension and ultimately expulsion.

[15] The disciplinary procedures set out four stages which involve meetings with the parents, first of all with the Head of Year, secondly, with the Vice Principal, thirdly, with the Principal and finally leading to suspension. It provides that where parents are unable or unwilling to respond to letters or phone calls or invitations the school will endeavour to support the pupil within the limitations that imposes. The school code of conduct is appended to the discipline policy and the parents and pupils sign to confirm their agreement to the terms, which include conforming with all school uniform regulations.

[16] I refer to the United Nations Convention on the Rights of the Child. Article 3 provides that in all actions concerning children, public authorities, including schools, will ensure that the child's best interests shall be a primary consideration. Article 12 provides the right of a child to have their views heard on all decision affecting them and for those views to be given due weight. Articles 28 and 29 provide the right to education that develops each child's personality and talents to the full. It encourages them to respect their parents, the rights of others and their own and other cultures. School discipline should be administered in a manner consistent with human dignity and conformity with European Convention rights. The effect of these provisions, as Ms Higgins contends, is that the courts, where possible, will interpret domestic and Convention law consistently with the provisions of the United Nations Convention and will act in accordance with Treaty obligations unless domestic legislation requires otherwise. I adopt the words of Baroness Hale in Smith v The Secretary of State for Work and Pensions [2006] UKHL 35 at [78] -

> "Even if an international treaty has not been incorporated into domestic law, our domestic legislation has to be construed so far as possible so as to comply with the international obligations which we have undertaken. When two interpretations of these regulations are possible, the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Convention on the Rights of the Child."

The provisions of the Convention are relevant to the interpretation of the European Convention and as Lord Bingham stated in Dyer v Watson [2004] 1 UKPC at [23] "colour the courts approach".

[17] I should emphasise that it is not for the Court to decide the policy for dress and appearance for a school. I propose to look at three issues, first, sex discrimination, secondly, the European Convention and in particular the right to respect for private life and thirdly, the treatment of GS.

[18] The Sex Discrimination (NI) Order 1976 article 3 provides that:

> "3.-(1) … a person discriminates against a woman if –
>
> (a) on the ground of her sex, he treats her less favourably than he treats or would treat a man,"

The provision applies equally if the genders are reversed. There is specific provision in article 24 concerning access to educational benefits. The 1976 Order provides of course for a system whereby complaints of sex discrimination are brought before Tribunals. The issue that arises is whether or not the conduct of the school amounts to discrimination contrary to the Order. The requirements that establish discrimination are that there be -

(i) less favourable treatment;

(ii) on the grounds of gender;

(ii) detriment to the person affected.

There is no dispute that there is different treatment in the present case on the grounds of sex, ie the males and females are treated differently because of gender, so the second requirement is satisfied. Further, I am satisfied that there is detriment to the three boys concerned, to the extent that they are subject to the disciplinary policy when they do not comply with the requirements of the appearance code. So the issue in the present case concerns the first requirement, whether the different treatment of boys and girls amounts to less favourable treatment for the boys.

[19] There is a parallel on this issue in the employment sphere where employers require workers to comply with dress and appearance codes at work. It is instructive to look at the approach that has been taken in the employment cases. The starting point is Schmidt v Austicks [1978] ICR 85, a decision of the Employment Appeal Tribunal in England. Employment rules prohibited trousers for female workers, a dress code that was upheld by the Tribunal. It was decided that there was no detriment. The EAT found that as there was no comparable restriction for men it was not possible to say that women were treated less favourably than men. In Smith v Safeway [1996] ICR 868 employment rules did not permit men to wear ponytails at work. The Tribunal's finding that the appearance code did not involve less favourable treatment was upheld by the Court of Appeal. Two further cases of a similar nature were Fuller v Mastercare [2001] EAT 0707/00 again involving men wearing ponytails at work and the employment code was

upheld by the Employment Appeal Tribunal and Department of Work and Pensions v Thompson [2003] EAT 0254/03 where men were required to wear collar and tie and women were only required to dress smartly. The EAT referred the case back to the Tribunal to make findings on the means by which men might achieve the objective of the code.

[20] Smith v Safeway establishes a number of matters and broadly I propose to adopt the approach that has been taken in the employment cases, recognising as I do that the context is different, but I do not believe the principles to be different. First, the approach to a dress and appearance code. A dress and appearance code does not have to be identical for men and women. It can recognise the differences between men and women. Further it is clear that the code should be taken as a package, that is one does not pick out an item in the code in order to determine whether or not it is less favourable treatment to require that particular item. One looks at the whole of the package and all of the items to determine whether or not, as a package, there is less favourable treatment. However it may be that one item within the code is so startling that it might indicate less favourable treatment. In addition, the above approach applies to the ephemeral and the permanent. The ephemeral includes clothes, rings and jewellery and the permanent includes characteristics such as tattoos and hair length.

[21] Secondly, the approach to less favourable treatment. There are interrelated questions as to whether the restriction on appearance could properly be justified by the objective of the code and whether the restriction, in the context of the code as a whole, resulted in less favourable treatment for the boys. The initial assessment is made with reference to the objectives of the code in question. In other words, it is not a question of making comparisons with other people who would adopt the dress or appearance that is prohibited, but rather it is a question of assessing the restrictions that have been introduced against the objectives of the code. That, of course, requires one to identify the objectives. This approach is not to judge the quality of the reasons or the motives for introducing the code, because there can be no justification if there is direct discrimination, but it is to consider whether there is less favourable treatment by establishing a legitimate objective for the code and then assessing the treatment of those affected against the standard that has been adopted by the code to determine whether males or females are disadvantaged compared to each other. Thus in the employment context the objective of the restrictions may be to promote a concept of smartness on commercial grounds and that has been accepted as a legitimate objective. The code might define the particulars of smartness for commercial reasons, for example by no ponytails for men or collar and tie for men. The issue is not concerned with the extent of the general use of the prohibited items but whether a package that includes requirements which differ between men and women, is directed at the objective of the code and whether it imposes a particular disadvantage on one or other sex. In schools the context is different and the objective will be different.

[22] Thirdly, a code applying conventional appearance is not of itself discriminatory. Convention may vary with the context of the code that is being applied. For example in employment it may include the wearing of certain items that are not generally what may be described as dress of choice outside the workplace. There may be requirements about wearing caps or hats or waistcoats or coloured blouses or aprons depending upon the nature of the employment. In schools there is the conventional look of school uniforms and again, the items generally may not be the dress of choice outside school, such as girls wearing blazers.

[23] There must always be scope for exceptions. In the present case an exception is recognised to the haircut rule on medical grounds. There may be disability grounds or health and safety reasons or religious reasons, for example the wearing of turbans or the wearing of headscarves by the Plymouth Brethren. Mr O'Donoghue has recognised that such exceptions apply at the school.

[24] Mr McGleenan criticised the approach in the employment cases. The first criticism is that the Court of Appeal in Smith v Safeway did not apply what is called the "but for" test in James v Eastleigh [1990] 2 AC 751. This requires that the treatment in question would not have been accorded to the person concerned "but for" the sex of that person. This point deals with the basis for the different treatment, rather than the issue of the treatment being less favourable. That the basis of the different treatment was gender is not in issue in the present case and was not the issue in the cases referred to above. The absence of discussion of the "but for" test in Smith v Safeway does not impact upon the overall approach because the Court was concerned with a different aspect of discrimination.

[25] The second criticism arises because it is said that less favourable treatment can be equated with deprivation of choice. Therefore if a workman wants to wear a ponytail and the code prevents him from doing so that is a deprivation of choice and therefore less favourable treatment. If such an approach were applied strictly it would prevent any code being introduced, but Mr McGleenan does not go so far. He relies on R(EOC) v Birmingham City Council [1989] 2 WLR 520 to contend that there is less favourable treatment when the choice denied is one that is valued by the person concerned "and which (even though others may take a different view) is a choice obviously valued, on reasonable grounds, by many others." That may be an appropriate test for exclusion from facilities and services on the basis of gender, but dress and appearance codes proceed on the basis of different requirements for males and females. The application of the same standard to all would involve different treatment for males and females because there is a universal gender based difference in dress and appearance in this jurisdiction. Indeed, the same requirement being imposed on all, as the Court of Appeal stated in Smith v Safeway, may itself be less favourable treatment because it may in certain circumstances impose a requirement to wear certain items or have a form of appearance which would be regarded as conventional for one gender, but which would not be conventional for the other gender. The Court of Appeal in addressing

the issue of dress and appearance did not approach the matter in terms of deprivation of choice. I do not accept that an approach based on deprivation of choice is appropriate to the consideration of dress and appearance codes.

[26] A further criticism of the approach in the employment cases, perhaps more from Ms Higgins, is that the entitlement to adopt a conventional approach, if that is what the employer or the school considers it should do, is not compatible with the rationale for sex discrimination legislation which seeks to challenge various assumptions about the sexes. The Court of Appeal discussed this point in Smith v Safeway and concluded that an appearance code based on the conventional would be even-handed and would not be discriminatory. However it is implicit that such an approach should not become a fixed approach. What is required is that there be a vehicle for change within the procedures of the employer or the school which allows changing patterns and changing habits and changing lifestyles to influence the contents of the code.

[27] That leads to the further requirement for a mechanism to alter the codes and to update the codes. In employment that may arise through the employer union negotiating system. In schools there must also be such a vehicle and in this case it is said that there is because of the existence of the School Council. Of course, coupled with that is the emphasis that I placed at the beginning on the views of the child and the opportunity for the children's views to be taken into account and given appropriate weight. A School Council is one means by which such an exercise might be undertaken.

[28] The interrelated questions are whether the restriction complained about can be justified by the objectives of the code without less favourable treatment of boys and whether there are proper procedures for consideration of the contents of the code that engage those who are affected. What then are the objectives of the dress and appearance code? I consider this, not in order to identify reasons for treatment or to justify treatment, or to establish motive, but to assess the restriction against the objectives of the code. The objectives are stated to be neatness, self discipline and a sense of belonging to the school. The general character of uniform policy was stated in Playfoot v Millais School [2007] EWHC 1698 (Admin) to create an atmosphere of allegiance, discipline, equality and cohesion where school uniform policy minimises peer pressures that mark differences on grounds of wealth and status. The objectives are not limited to neatness. There will be other items that satisfy the neatness objective, but the length of ones hair is not a neatness issue.

[29] There is a challenge to a policy that seeks to establish conformity and does not permit diversity. Of course, it is inherent in every uniform policy that it seeks to achieve uniformity. However I do not accept that a uniform policy undermines respect for diversity within society. It is to be hoped that all schools applying uniform codes also seek to promote diversity and respect for diversity and that task would not be affected by a uniform policy.

[30] It is apparent from the contents of the code that it seeks to achieve its objective by applying what might be described as a conventional school dress and appearance. Of course, if one is applying the conventional to girls and boys then that will produce different requirements. Of course different schools may set different requirements on the broadly conventional standard. That some boys have very short hair and some boys have very long hair and that neither would be unconventional in every day life is beside the point. The lawfulness of the code does not depend upon simple comparisons with general dress and appearance but on whether the whole package of dress and appearance furthers the objective of the school and is not less favourable treatment for males or females. Most may agree on certain matters that are clearly conventional and most may agree on certain matters that are clearly unconventional. There will be boundaries where different schools will have different approaches and there may be debate about whether a particular item should be restricted or not. School trousers for girls seem to be a good example. Various schools may have that provision and other schools may not. A change to trousers for girls, at least in the winter, is proposed for this school and may be adopted.

[31] It is necessary to establish that there is capacity for review of the code and there is capacity for the voice of the child to be heard and of course not only the voice of the child but the voice of all interested parties because this is an issue that concerns the school, the pupils, the parents, the teachers, the Headmaster, the Board of Governors and all will be involved in the management of the issue. There is a School Council which represents the views of the pupils and the issue was raised before a subcommittee of the School Council in November 2007. The issue will go to the Council and may proceed to the management team and the Board. The Children's Commissioner has some criticisms of the School Council. Meetings once per term are considered to be insufficient and the capacity to meet in order to address a matter of urgency has not been identified. There may be such capacity but it is not clear what the mechanism is for the calling of a Council meeting or whether there are fixed meetings that are set from time to time. Further, the Commissioner queries the reference to the pupils in the Council making suggestions rather than recommendations. Thirdly there was reference to the teachers writing the minutes although it seems there is a pupil secretary and it is in his/her absence that the teacher takes the minutes. No doubt the school will take account of the Commissioners papers and publications in relation to the conduct of these meetings.

[32] On the issue of hair length, the process in the School Council has not been tested, because the issue was raised in the Council only in November 2007. It is correct that the parent of MR had raised the issue in June 2007 and advice was sought and the Board decided to hold its present position and the Head was required to take legal advice on handling the issue. There were a number of crucial issues arising in November 2007. The school regarded the non compliance with the school appearance policy as a disruptive issue; the suspension of GS had been completed; the issue had gone public in that it had been aired by GS and his parents on the radio; lawyers had been consulted, solicitors' letters were being written, the

Law Advice Group had advised and the Equality Commission had been engaged. The whole issue had escalated and then the Council considered the issue. Perhaps Council meetings should have responded earlier to events. An earlier meeting in September might have permitted the issue to be brought before the Council at that time. With escalation of the issue in November and consideration of the issue by the subcommittee, an earlier meeting of the Senior Council might have been warranted. In essence, this is an issue which was only raised through the School Council in November 2007 and the outcome of that exercise remains unknown because the process has not been completed. It is not appropriate to criticise a system that was only initiated in November and was largely overtaken by the events in that crucial month.

[33] Overall, considering the basis of the code and the ingredients of the code and the approach that has been taken by the school and the opportunities for the pupil voices and the available vehicle for change, I conclude that the requirements of the code taken as a package are not more onerous on males than females. The inevitable disputes about individual items in this package may be addressed through the School Council, where all concerned, to include the pupils and the teachers and the parents and the Principal and the Board, may contribute to the decision making. The code does not involve less favourable treatment of boys and does not amount to discrimination under the definition in the Sex Discrimination (NI) Order.

[34] The second matter that I propose to discuss concerns the European Convention rights and in particular Article 8 and the right to respect for private life. Dress and appearance are aspects of private life and the existence of a dress and appearance code in an organisation, whether it be in employment or whether it be in school, is not in itself a lack of respect for private life. When the appearance code impacts on life outside that organisation, as it may do with work or school, as will be the case with permanent features such as hair and tattoos, Article 8 may be engaged. It may be that Article 8 is engaged within the workplace or within the school, as Miss Higgins sought to emphasise. Certainly when there is impact within an organisation and its effects carry over into life outside the organisation, Article 8 may be engaged. I am satisfied that in a case such as this where there is that outreach beyond the organisation that the right to respect for private life is engaged.

[35] For present purposes I will assume that there has been interference with the right to respect for private life by the introduction of the code which regulates the length of hair. Such interference requires justification. Such justification requires the restriction to be prescribed by law and for a legitimate purpose and proportionate.

[36] R (SB) v The Governors of Denby High School [2007]1 AC 100 concerned restrictions on the wearing of the jilbab at school. The case was considered under the Article 9 right to freedom to manifest religious belief. There were differences of opinion on whether the restrictions amounted to interference with the manifestation

of religious belief. However the House of Lords held the restrictions to be justified as being prescribed by law, for a legitimate purpose and proportionate. The pupil had subscribed to the system for some years and had then reached a point in her life where she committed more seriously to her religious beliefs. There was the opportunity to attend other schools where she might have been able to wear the jilbab. There had been extensive consultation and consideration of the issue.

[37] In Playfoot v Millais School [2007] EWHC 1698 (Admin) a pupil at school wanted to wear a chastity ring when jewellery was forbidden. She regarded the ring as a manifestation of her religious belief in chastity before marriage. The Court held that it was not a manifestation of religious belief and in any event the restriction would have been justified. It was said in relation to justification that the schools uniform policy was plainly prescribed by law, as it was set down and clearly understood. The rules were made for the legitimate purpose of protecting the rights and freedoms of others. They were clearly communicated to the claimant. Proportionality was the issue. It was said that the uniform policy served a number of important functions, in that it fostered school identity and an atmosphere of allegiance, discipline, equality and cohesion. A school uniform policy minimises peer pressures that mark differences on grounds of wealth and status, reduces the risk of bullying which may arise when school pressures develop around peer expectations, may assist standards of achievement in all aspects of life, including attitudes and conduct. It appears that the stated functions of the school uniform policy followed draft guidance issued to schools on school uniform policy issued by the Department of Education in England.

[38] In X v Y School [2007] EWHC 298 (Admin) which concerned restrictions on the wearing of the niqab, it was found to involve the manifestation of religious belief, but there was no interference with the right and in any event the measures would have been justified. The functions of school uniform policy were upheld as being legitimate and proportionate. Silber J referred to the issue of changing times and circumstances. The girl was not allowed to wear the niqab but her sisters had been allowed to do so in earlier years when they had been at the school. The evidence of the Head Teacher showed that matters moved on from the time the sisters were at the school, there were more Muslim girls, there was an increased sense of security, a time gap between X and her sisters being at the school, the Head Teacher had changed, there had been changes in policy which the school was entitled to introduce. Times change, regimes change, Principals change, pupils change and circumstances change. The policy today may not be the policy tomorrow.

[39] For the reasons set out above I am satisfied that the appearance code is prescribed by law and for a legitimate aim and is proportionate. There is no breach of Article 8.

[40] Article 10, the right to freedom of expression, does not add anything to the matters discussed under Article 8. Were it necessary to do so I would find justification for any interference for the reasons relied on above.

[41] Articles 8 and 10 in conjunction with the Article 14 right not to be discriminated against may give rise to a breach in combination in the absence of a freestanding breach of Article 8 or 10. On the application of the code I am satisfied there was no discrimination, even though the test is different to the less favourable treatment approach. There is a different issue about discrimination in relation to unequal enforcement of the uniform code between girls and boys. It may be that there is an uneven approach to the enforcement of the rules between boys and girls but it is largely a factual issue and it is not one that I propose to examine. There is also an issue as to whether there is unequal enforcement between GS and the other boys and that issue will be considered below.

[42] Article 2 of the first protocol concerns the right of access to education. This requires the provision of access to the education system. I am satisfied that there has been no breach of that requirement in the present case. There is differential treatment for GS in that he is separated from the others in his class for a large part of the school day but the separation is not such as to deny him adequate access to education. While it places him in a different regime to the others I am not satisfied that the regime, comprising the elements referred to by Dr McMillen, constitutes a denial of adequate access to the system.

[43] The third matter I propose to deal with concerns GS's segregation. In dealing with GS there were issues other than compliance with the appearance code that were raised by the school. There was a request for a meeting with the Headmaster and that meeting took place on 5 November. GS was subject to detention on 9 November as a result of a refusal to undertake to comply with the rules. He then wrote an essay in detention and that seems not to have been well received by the school and he was subject to further detention as a result. There was a suspension warning on 19 November and suspension on 21 November for three days. On the other hand MR's parents had a meeting very much earlier when the issue of hair length was raised by MR's mother in June 2007. There had been correspondence on Freedom of Information issues. Detention took place on 16 November and following Fridays. The exchanges about Freedom of Information were not considered by MR's mother to be satisfactory. There is a difference in treatment between GS and MR and I do not propose to delve further into the detailed differences because broadly speaking there were a number of other issues involving GS.

[44] In relation to the suspension of GS, there is a challenge by Mr O'Hare to the suspension itself. There was an absence of the meetings between the parents and the school as referred to in the discipline policy. There had been contacts between school and parents about meetings but the parents had been unable to attend. It can not be the position that suspension of a pupil which is otherwise justified can not be undertaken if the parents are unable to attend meetings. The footnote to the

discipline code indicates that the process may continue where parents are unable or unwilling to subscribe to the process. In this case there were efforts made to arrange meetings and a third stage meeting, as the school classed it, took place when the parents met with the Headmaster on 5 November.

[45] Inconsistency is alleged and is disputed. Again I do not propose to examine whether one pupil was treated better or worse than another. The suspension was the outcome of repeated breaches of the school rules and that is one of the grounds where there may be suspension. I note the concerns that have been expressed in other publications from responsible bodies on the use of suspension for uniform breaches but it remains within the power of the school to suspend and its legality is the issue rather than its wisdom. I do not accept that the suspension of GS was unlawful in the circumstances.

[46] That leads to the issue of GS's return to school on 26 November when he was placed in segregation rather than further suspension. The school takes the line that segregation was an alternative to suspension because the school had reached the point where they did not want to suspend the pupil further. It is apparent that sensitive handling was required and the school decided not to pursue the further suspension route. As Dr McMillen puts the position, the school was attempting to provide for GS's education needs while at the same time making it clear to GS that a return to normal schooling would not be appropriate, having regard to his persistent breaches of discipline. Dr McMillen described the decision in relation to GS as a "management" response to the position. By that it was intended to convey that it was a non-disciplinary matter.

[47] The reference to a "management" decision is of some significance because the disciplinary policy declares and it should be the case that particular sanctions are foreseeable consequences of a breach of discipline. If the separation of GS was undertaken as a disciplinary measure then it was not in accordance with disciplinary policy. If it was a management decision it is taken out of the sphere of discipline. Another effect is that while the courts have examined issues in relation to school discipline they do not examine issues of school management. It is necessary first of all to determine whether there is a disciplinary aspect to the separation of GS. It is difficult to resist the conclusion that there was a disciplinary element to the action taken. GS had been subject to detention, he had been suspended from school, he returned from suspension and he declared that he would not adhere to school policy, the school responded by separating GS from the other pupils. This was done in an essentially disciplinary setting. The courts will not intrude on school management issues but will require procedural fairness in disciplinary issues or in non-disciplinary suspensions that may lead to adverse consequences for a pupil. Procedural fairness applies in disciplinary settings and that requires foreseeable consequences for disciplinary action. The foreseeable consequences in the present situation may have been detention or suspension or expulsion, but not segregation. As the school did not want to repeat the suspension and as there was an element of discipline in the actions they were taking, the sanctions that remained were

detention or other measures short of detention. I am satisfied that there was a lack of procedural fairness in relation to the imposition of segregation of GS.

[48] In summary, I am satisfied that the dress and appearance code is not unlawful under either the Sex Discrimination (NI) Order 1978 or the European Convention on Human Rights. Such a code must be a living instrument and there must be in place appropriate mechanisms for change and for engaging the voice of the pupil and engaging all the other properly interested voices. The School Council is the vehicle through which these issues should be addressed. The criticisms that have been made will no doubt be taken on board as this issue continues through the School Council. Further, the disciplinary policy should have foreseeable consequences and segregation is not part of the present disciplinary process. As the school had made up its mind not to repeat the suspension, which appears to be appropriate in the circumstances, detention or some lesser sanction could have been applied.

[49] I have decided not to make any declaration in this case as this judgement contains a sufficient outline of the approach which the Court has taken. As the Court is dealing with sensitive issues involving pupils and staff and the management of schools and as there has been significant escalation of the matter beyond the school setting I believe it would not be appropriate to resort to formal declarations.