Neutral Citation No: [2023] NIKB 109 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **ROO12206** **ICOS No: 20/084530** ***Delivered:*** **28/06/2023**

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 JR130
FOR JUDICIAL REVIEW

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Ms Fiona Doherty KC with Mr Sean Devine BL (instructed by J J McNally, Solicitors) for the Applicant
Dr Tony McGleenan KC with Mr Philip McAteer BL (instructed by the Departmental Solicitor's Office) for the Respondent
Mr Ciaran White BL (instructed by Peter McGettrick, Senior Legal and Investigations Officer, NICCY) for the Intervener

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ROONEY J

Introduction

[1] The applicant is an eight year old boy and an enthusiastic footballer. Since aged five, he has been affiliated to a local youth football club. Until restrictions were imposed following the Covid pandemic on outdoor sporting activities, the applicant enjoyed the benefits from playing football with his friends, training with his football club and playing organised football matches.

[2] In this application for judicial review, the applicant challenges the respondent's decision dated 19 November 2020 whereby it was determined that from 27 November 2020 until 10 December 2020 a package of measures to limit the spread of Covid-19 would include restrictions on outdoor children's sport (the Health Protection (Coronavirus Restrictions) (No. 2) Regulations (Northern Ireland) 2020, Regulation 5B(3)). The applicant also challenges a similar decision in the Health Protection (Coronavirus Restrictions) (No. 2) (Amendment) Regulations (Northern Ireland) 2021 dated 7 January 2021 amending the above Regulations and imposing similar restrictions from 8 January 2021 until 5 March 2021. The applicant also challenges a similar decision in the Health Protection (Coronavirus Restrictions) (No. 2) (Amendment No. 5) Regulations (Northern Ireland) 2021 dated 2 March 2021 amending the above Regulations and containing similar restrictions until 1 April

2021. The applicant further challenges the decision on 16 March 2021 extending the said restrictions until 12 April 2021.

[3] The applicant contends that the respondent has published documents detailing Covid-19 response strategies, which included the assessment of a significant number of activities and the rate of transmission. The applicant claims that there is no evidence that outdoor children's sporting activities has contributed to the transmission of Covid-19 and, accordingly, there is no valid reason as to why sporting outdoor pursuits among children in a controlled environment should be prohibited by the said Regulations.

[4] The applicant also argues that the physical and mental health benefits for children, especially vulnerable children, playing outdoor sports and participating in teams are well recognised. It is stated that the respondent has failed to make any or any adequate assessment of these benefits and has introduced measures which adversely affect the interests of children. Furthermore, the respondent failed to consult with the Northern Ireland Commissioner for Children and Young People (NICCY) which regard to the said measures.

[5] The respondent argues that the operative decision for the court's consideration is the decision of the respondent dated 16 March 2021 whereby the restrictions prohibiting the participation of children in outdoor sport ceased from 12 April 2021 as part of a wider package of measures agreed by the Executive Committee which were to be implemented by way of further amendments to the Regulations. In summary, sport clubs would be allowed to resume outdoor sports training in small groups of up to fifteen people. The respondent states that the decision of 16 March 2021 was taken against the most up to date information at the time.

The Relief Sought

[6] The applicant seeks the following relief:

(i) a Declaration that the impugned decisions were unlawful;

(ii) a Declaration that the Northern Ireland Commissioner for Children and Young People (NICCY) should have been consulted in respect of the impugned decisions;

(iii) an Order of Certiorari quashing those aspects of the Regulations and any associated guidance which prohibits children from playing outdoor sport;

(iv) interim relief;

(v) costs.

Grounds of Challenge

[7] The grounds of challenge are detailed in the Order 53 statement and comprehensively analysed by Senior Counsel in their skeleton arguments and oral submissions. I remain most grateful to Counsel for their invaluable assistance.

[8] It is proposed to consider this application under the following grounds:

(a) breach of Section 6 of the Human Rights Act 1998 ("HRA") on the basis of unlawful interference with the applicant's Article 8 ECHR rights;

(b) breach of Section 6 of the Human Rights Act 1998 (HRA) on the basis of an alleged breach of Article 14 ECHR read with Article 8 ECHR;

(c) breach of Section 75 of the Northern Ireland Act 1998 (NIA);

(d) breach of procedural unfairness in failing to consult with the Northern Ireland Commissioner for Children and Young People (NICCY);

(e) failing to take into account material facts and considerations;

(f) irrationality.

Background Facts

[9] In response to the Covid pandemic and in compliance with the UK wide "stay at home" order, participation in organised sport and "free play" ceased on 23 March 2020. From this date until 1 July 2020 the applicant remained almost exclusively within the family home with little or no physical exercise.

[10] In the first week of July 2020 restrictions were eased and the applicant was able to return to football training with his club. On 16 October 2020 restrictions were imposed which prohibited any indoor sport of any kind or organised contact sport involving household mixing other than at an elite level. It was stipulated that restrictions would remain in place for four weeks. On 12 November 2020 further restrictions were announced in respect of both indoor and outdoor sport, other than at elite level.

[11] On 19 November 2020 the Northern Ireland Executive announced further restrictions prohibiting any indoor and outdoor sport other than at an elite level. The restrictions were to remain effective from 27 November 2020 until 10 December 2020 (the Health Protection (Coronavirus Restrictions) (No. 2) Regulations (Northern Ireland) 2020 (Regulation 5B(3)).

[12] The applicant's mother alleges that the continued prohibition of the applicant's access to playing football was having a debilitating effect on both his physical and mental health, with a marked increase in temper tantrums and aggressive behaviour. The applicant's mother further indicated that, following research conducted by her on-line, she was unable to find any material to support the assertion that children playing sport outdoor were a contributor to transmission of the virus.

[13] On 23 November 2020, a pre-action letter was issued on behalf of the applicant. A response was received from the respondent dated 2 December 2020.

[14] In an affidavit from the applicant's mother dated 3 December 2020 she referred to media reports from senior public health experts who stated that they were not aware of any evidence indicating Covid-19 transmission in children playing sport outdoors. The applicant's mother, in her affidavit evidence, also referred to research conducted by Ulster University which investigated the impact of Covid-19 on children and young people. The research demonstrated the negative impact of the Covid-19 virus, stating that it was imperative that steps were taken to support children emerging from the pandemic and to recognise the critical importance of play in their lives and on their development.

[15] The applicant's solicitor, Mr Atherton, filed affidavits exhibiting materials and reports detailing expert opinion of the severe damage to children's health due to the continuing restrictions. For example, Mr Atherton referred to the report from the Play Safety Forum which specified that the "current UK interventions to deal with Covid-19 required urgent review as the social, emotional and physical benefits of play had been undervalued and completely ignored and, as a consequence, children were suffering harm." In essence, the applicant claims that the respondent should have been aware of these reports and expert opinions.

[16] The applicant's mother filed a further affidavit on 11 March 2021 exhibiting more materials which demonstrated the impact of restrictions on children, the low risk of transmission from outdoor sports, the counter-productive effects of the restrictions (e.g. obesity linked to hundreds of Covid-19 deaths) and a call for evidence supporting the ban on outdoor sport, given the emotional health benefits for children.

[17] Turning to the position of the respondent, the legislative and policy background is set out in the affidavits of Nigel McMahon (10 March 2021) and Liz Redmond dated 29 March 2021. At paras 5 to 82 of Nigel McMahon's affidavit, he sets out the chronological narrative which outlines the course of the pandemic over the relevant period and the Executive's response, including the impugned restrictions as contained within the various iterations of the Health Protection (Coronavirus Restrictions) (No. 2) Regulations (Northern Ireland) 2020 ("the Restriction Regulations").

[18] The respondent invites the court to focus its attention on Minister Swann's memorandum to the Executive dated 16 March 2021 exhibited to the affidavit of Liz Redmond. The said document is also referred to as 'Memorandum E.' The respondent emphasises that this material encompasses the rationale for the present policy position which effectively removes the restrictions impugned by the applicant from 12 April 2021.

[19] It is worth repeating paras 42-46 of the Memorandum E because they demonstrate an assessment as to the value of physical activity and sport to health and well-being of the population in general and children in particular.

> "42. A recent survey on outdoor recreation during the pandemic showed that following the COVID rules was the greatest reason for not spending time in the outdoors in November and December 2020[1]. The survey did not include children – 16 was youngest age-group – but parents of pre-primary and primary age children reduced time outdoors. While 44% of the Northern Ireland population spent less time taking part in outdoor recreation during this period than over the same period in 2019, 22% had increased the amount of time they spent outdoors. People most likely to decrease their time outdoors included those with disabilities, the oldest age groups, residents of the most deprived areas and people with no car access. Concerns over COVID-19 were the predominant reason for decreasing time outdoors. People most likely to increase their time outdoors included the youngest age groups, those with children at home and those who were working full time.
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> 43. The value of physical activity and sport to overall health and wellbeing is an important consideration, with considerable evidence to show the benefits as outlined in the risk assessment provided by DfC in Annex E and the UK Chief Medical Officers' report and physical activity guidelines[2]. Research carried out by Ernst & Young indicated that watching and participating in sport were two of the top nine things people missed doing during the initial lockdown period. The level of inactivity experienced over the course of the various periods of COVID restrictions has the potential to do long term harm to those who normally participate in sport and physical activity. It has also had a detrimental impact on the health and wellbeing of our communities as a whole and on the mental health of so many in society. Research by the Department of Culture, Media and Sport in GB has found that young people's participation in sport increases numeracy and other transferable skills,

[1] http://www.outdoorrecreationni.com/wp-content/uploads/2021/03/ORNI-Northern-Ireland-Population-Survey-November-and-December-2020-results-v2_compressed-1.pdf

[2] UK Chief Medical Officers' report and physical activity guidelines can be accessed at https://www.gov.uk/government/publications/physical-activity-guidelines-uk-chief-medical-officers-report

with particular benefit towards under achieving young people.

44. The Royal College of Psychiatrists recognise exercise prescription as a treatment modality for a wide range of mental health conditions, with evidence showing a 20-30% reduction in depression in adults who participate in physical activity daily. The college further reports that physical activity can increase self-esteem and reduce depression and anxiety in children, and that physical activity performed in an outdoor space can improve cognitive performance, self-esteem and reduce anxiety and symptoms related to attention deficit disorder. In addition, a study by the Harvard T.H. Chan School of Public Health has shown that even small amounts of exercise can improve mood and mental health, with a 26% decrease in odds for becoming depressed for each major increase in objectively measured physical activity.

45. Eime *et al.* (2013)[3] published a systematic review of the psychological and social benefits of participation in sport for children and adolescents, concluding that there "were many different psychological and social health benefits reported, with the most commonly being improved self-esteem, social interaction followed by fewer depressive symptoms. Sport may be associated with improved psychosocial health above and beyond improvements attributable to participation in [physical activity]. Specifically, team sport seems to be associated with improved health outcomes compared to individual activities, due to the social nature of the participation."

46. It follows, therefore, that prolonged periods of restricted access to physical activity and sport will be detrimental to the health and wellbeing of people of all ages and abilities."

[20] The proposal for the easing of restrictions from 1 April 2021 is set out at para 75:

"Outdoor gatherings (not in private dwellings)

75. At the last review, I proposed an amendment that the limit on the size of outdoor gatherings be increased from 6 to 10 people (including children under 12 years), from

[3] https://ijbnpa.biomedcentral.com/articles/10.1186/1479-5868-10-98

> no more than 2 households. I believe we can now allow further flexibility in this area and propose that the 10 people from 2 households can undertake outdoor sporting activities (as defined in the regulations.) This would allow walking in groups with two households, which is not currently permitted. In addition it would allow other outdoor activities, such as playing golf. However club house and sports facilities (changing rooms, showers, kitchens, meeting rooms) must remain closed apart from essential toilet facilities. "

[21] Para 80 in Memorandum E considers a proposal from the Department for Communities (DfC) to allow sports training to resume:-

> **"Sports training to resume in small groups**
>
> 80. DfC have submitted a proposal to allow sports training to resume in small groups, for people of all ages, under the auspices of clubs affiliated with the sports Governing Bodies. Group sizes would be limited to 15 people and it will be essential that DfC are able to monitor compliance with the mitigations proposed and provide assurance to the Executive that guidance is understood and is being adhered to e.g. no car sharing, no congregation of people on the side-lines etc. Club houses and indoor sports facilities (changing rooms, showers, kitchens, meeting rooms) must remain closed apart from essential toilet facilities. A review of the SportNI framework, current version May 2020, is also needed to ensure alignment with current regulations and the Executive Pathway, including consideration of further development of checklists to assist organisers to achieve good compliance. DfC has provided a detailed risk-benefit assessment which is provided at Annex E."

[22] The respondent argues that Memorandum E is a key document and should be considered in full. The respondent claims that the memorandum demonstrates a careful weighing up of the proposal to return to sport with appropriate mitigations. It also summarises, it is claimed, the evidence that has been considered, the detrimental impacts that have been identified, the risks associated with a removal of the restrictions and a comparison with other jurisdictions of the UK. The document also refers to input from the Chief Scientific Advisor (CSA), the Chief Medical Officer (CMO) and the Department of Health. Significantly, the document records that the proposal is based on advice received from the Return to Sport Expert Group and the Director of Performance and the Sports Institute at Sport NI regarding the framework for a return to sporting activities, squad training and ultimately competitive sport for children, youth and adults.

[23] I have taken into consideration the affidavit of Liz Redmond dated 29 March 2021 which was filed in response to issues raised in the second affidavit of the applicant's mother. In this affidavit, Ms Redmond specifically addresses the article published in the British Journal of Sports Medicine Studies which concluded that the risk of transmission during an adult rugby match is minimal. Ms Redmond states at para 9 of her affidavit:

> "Whilst this study offers limited evidence of in-match transmission in this particular context, it does provide evidential support for transmission in the course of interactions surrounding the subject sporting activity. As such, it encapsulates the point made by Sir Patrick Vallance on 3 November 2020, as quoted at paragraph 5 of [the applicant's mother's] second affidavit:
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> > 'It is not just the event itself but what happens in and around it, and it is then for policymakers to decide what policies they want to adopt on the basis of that.'"

[24] The said study concludes that "positive cases were most likely traced to social interactions, car sharing and wider community transmission and not linked to in-match transmission." However, the limitations of this research as a single case study in the context of one sport must be recognised. It is relevant that the article calls for further research to investigate transmission risk in other close-contact sport settings and training environments.

[25] At para 12 of Ms Redmond's said affidavit, reference is made to the Scottish Government's "Working Paper: Covid-19 Mitigation Measures Among Children and Young People." This study highlighted the difficulty of physical distancing for children aged under twelve. Specifically, a survey of parents and carers found:

> "(1) Parents and carers of 34% of the children have decided not to keep their child 2 metres apart from people when meeting other households.
>
> (2) 76% of parents and carers agreed that they had found it difficult or stressful to enforce physical distancing measures with their children.
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> (3) The parents and carers of half the children (50%) agreed that while they had tried to ensure physical distancing was maintained by their child, they had not been able to do so.
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> (4) The parents and carers of just over half the children (52%) agreed that their child had found physical distancing difficult or upsetting.

> (5) The parents and carers of 6% of the children agreed that although their child tried to maintain physical distancing they easily forgot.
>
> (6) The parents and carers of 36% of the children agreed that children did not understand the need to maintain physical distancing."

[26] The court is cognisant that the said study does not specifically deal with transmission risk during sporting activities. At para 14 of Ms Redmond's affidavit, it is relevant that the office of National Statistics' (ONS) Covid-19 Infection Survey estimated that at week-ending 6 February 2021, Northern Ireland had the highest prevalence of Covid in the UK. This was the most recent report at the time the relevant "ARC" paper was prepared and presented to the Executive on 8 February 2021.

[27] At para 17 of Ms Redmond's affidavit, it was noted that between 10 July 2020 and 10 February 2021, "14 outbreaks and 24 clusters of positive SARS-Cov-2 cases associated with sporting teams and clubs were identified in Northern Ireland. The range of cases associated was between 2-21 cases per cluster/outbreak."

Breach of Article 8 ECHR

[28] The applicant argues that the prevention of access to outdoor sporting activities by the impugned decisions is a prima facie infringement of his right to privacy and family life under Article 8 ECHR and must, therefore, be justified in accordance with Article 8(2) ECHR.

[29] The applicant has referred the court to evidence that children in particular can experience multiple and significant harms as a consequence of play deprivation. Research has shown the value of physical activity and sport to the overall health and well-being of many individuals, including children.

[30] It is significant that the respondent has also highlighted research carried out by *Eime et al* [2013] which identifies the psychological and social benefits of participation in sport for children and adolescents, leading to improved self-esteem, social interaction and a reduction in depressive symptoms. The research also associates team sport with improved health outcomes compared to individual activities, due to the social nature of participation. The research is referred to at para 45 of the said Executive paper (Memorandum E) dated 16 March 2021. It is relevant that, as highlighted in para 19 above, the following conclusion is reached in the said Executive paper:

> "46. It follows, therefore, that prolonged periods of restricted access to physical activity and sport will be detrimental to the health and well-being of people of all ages and abilities."

[31] Based on the said research, it is the observation of this court that general play and sporting activities plainly benefit not only physical well-being but also mental health. Physical activity, particularly in an outdoor environment, has the potential to increase self-esteem and reduce depression and anxiety in children.

[32] It is well established that a threat to an individual's mental health may be sufficient to engage Article 8. In *Bensaid v UK* [44599/98] ECtHR 6 February 2001, the court stated:

> "47. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 … Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, Burghartz, cited above, opinion of the Commission, p. 37, § 47, Friedl v. Austria, Judgment of 31 January 1995, Series A no. 305-B, p. 20, § 45). The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right respect for private life."

[33] In *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 at para [9], Lord Bingham stated as follows:

> "*Bensaid* establishes, in my opinion quite clearly, that reliance may in principle be placed on article 8 to resist an expulsion decision, even where the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough article 8 may in principle be invoked. It is plain that "private life" is a broad term, and the Court has wisely eschewed any attempt to define it comprehensively. It is relevant for present purposes that the Court saw mental stability as an indispensable precondition to effective enjoyment of the right to respect for private life. In *Pretty v United Kingdom* (2002) 35 EHRR 1, 35-36, para 61, the court held the expression to cover "the physical and psychological integrity of a person" and went on to observe that "Article 8 also protects a right to personal development,

> and the right to establish and develop relationships with other human beings and the outside world." Elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features which are integral to a person's identity or ability to function socially as a person."

[34] Having considered carefully the oral and written arguments of Counsel on behalf the applicant and the respondent, it is my decision that the impugned restrictions engage the applicant's Article 8 rights to privacy and family life and accordingly, any such interference must be justified. In reaching this decision, I note that the English Court of Appeal in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 at para [96] also concluded that similar regulations in England did constitute an inference with Article 8 although the Court of Appeal concluded that such interference was justified under Article 8(2) ECHR.

Article 8(2) ECHR

[35] Article 8(2) ECHR provides as follows:

> "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[36] In effect, it is for the respondent, as the public authority, to establish that the restrictions were in accordance with the law, in pursuit of a legitimate aim, proportionate and no more than the minimum required in the circumstances. I will deal with each seriatim.

In Accordance with the Law

[37] This test encompasses two main aspects, namely,

(i) whether the measure complained of has a legal basis;

(ii) whether it passes the "quality of law" test, ie is the law accessible and foreseeable to allow citizens to regulate their behaviour; does it have safeguards against arbitrariness and is it compatible with the rule of law? (See *Re Fox and Others* [2013] NICA 19).

[38] It is my view that the restrictions are plainly in accordance with the law.

Legitimate Aim

[39] It is for the respondent to demonstrate that the interference pursued a legitimate aim (see *Mozer v Republic of Moldova and Russia* [GC] 11138/10). This ground is easily satisfied on the facts, since the restrictions are clearly in the public interests and necessary in the interests of public safety, for the protection of health and for the protection of rights and freedoms of others. Correctly, in my view, the applicant accepts that this ground is satisfied and that the response to the pandemic falls into these categories.

Necessary in a Democratic Society

[40] The European Court of Human Rights has confirmed that in its determination as to whether the impugned measures were "necessary in a democratic society", the Court will consider whether the measures remain proportionate to the legitimate aim pursued and whether the Respondent State can demonstrate the existence of a pressing social need behind the interferences. Also, in determining whether the interference is necessary, the Court will consider the margin of appreciation left to the State authorities.

[41] The applicant strenuously argues that the respondent has failed to demonstrate that the said measures were proportionate. It was argued that, in order to satisfy the proportionality test, it is incumbent on the respondent to carry out the balancing exercise of the competing interests and concerns. The applicant maintains that the respondent has failed to take into account relevant material considerations. Firstly, the absence of any evidence which confirms transmission of the virus can take place during outdoor play and sporting activities. Secondly, the positive physical and mental health benefits of sporting activities and team events. Thirdly, the protected status of children in society and the requirement to consult with the NICCY. Fourthly, the efforts of sporting bodies and associations to ensure the safety and integrity of sporting activities, to include handwashing before and after such activities, closure of changing rooms, a prohibition on parents congregating and no car sharing.

[42] The respondent accepts that there is no evidence to confirm that outdoor sporting activities is a source of transmission of the virus. However, the respondent maintains that the research is very limited and calls for further research to investigate transmission risk in close-contact sport settings and training environments.

[43] It is clear that the restrictions in question were imposed to reinforce the general stay at home message and the need to avoid interaction between households.

[44] In his affidavit dated 10 March 2021, Nigel McMahon (Chief Environmental Health Officer in the Northern Ireland Department of Health) states as follows at para 77:

> "77. Indeed, the Chief Medical Officer considers that a primary reason for prohibiting sport among children is

> that it has the potential to undermine the approach taken by the Executive in order to keep schools open. While schools have been open for classroom teaching, they have operated in classroom "bubbles" as far as possible to limit the risk of transmission. Any outdoor sport which involves the mixing of children more widely would mean mixing of classroom "bubbles" and consequently break the integrity of this approach with the potential of making it increasingly difficult to keep schools open as cases would spread through the increasing mixing and disruption of the classroom "bubbles." This would be counter to the Executive agreed position recognising education as a priority ensuring schools can stay open as much as possible and recognising the detrimental impact on children's education attainment and mental health and well-being of absence as a consequence of self-isolation requirements and school closure. Secondary issues associated with this decision include considerations of parental mixing at events, shared transport etc. However, the primary reason for this action is to focus on keeping schools open as much as possible and to limit the detriment and adverse consequences for children."

[45] The applicant challenges the primary reason given for prohibiting sport among children, arguing that it is based on a presumption that there is a risk of transmission in an outdoor setting among children playing sport. In respect of the secondary reason, namely, parental mixing at events and shared transport, the applicant argues that there was a duty on the respondent to investigate whether such breaches had occurred, despite warnings, in the period when sport was permitted. The applicant also argues that, prior to any prohibition on outdoor sporting activities for children, the Executive should have considered the possibility of monitoring the said activities and adherence to the guidelines.

[46] In detailed oral and written submissions made on behalf of the applicant, Ms Doherty KC is at pains to emphasise that in the Executive papers dated 14 October 2020, 20 January 2021, 17 February 2021 and in the notes exhibited in relation to the Executive decision making, there is no reference whatsoever to the potential severe and enduring impact of depriving children access to outdoor sporting activities.

[47] The court is cognisant of the fact that the focus of attention on the Executive at this time was getting children back to school as soon as possible. It is noted that not long after the restrictions were introduced, the Minister of Education made a decision to maintain school closures after the Christmas break and to move to remote learning. The suspension of face-to-face classroom based learning reflected the gravity of the situation regarding the disease as this jurisdiction entered 2021

and the seriousness of the pressures on the health system.

[48] Dr McGleenan KC, Senior Counsel for the respondent, in comprehensive oral and written submissions argues that the inferences imposed by the Regulations are plainly proportionate. Dr McGleenan urges the court to accept that, in essence, the applicant is seeking to challenge a complex multi-factorial decision which involves resource, logistical, scientific and medical issues and which is intrinsically interlinked with a decision-making process regarding the overall coordinate response to the pandemic caused by the virus.

[49] The main thrust of the arguments advanced by the respondent is that the actions taken, which included the restrictions on children's outdoor sport, were part of an overall package of measures which were designed to prevent unsustainable pressures on the health and social care system, an increase in viral transmission, illness and loss of life. Such actions involved matters of contingency planning and management raising operational and policy issues which, it is argued, is not properly a matter for judicial determination. Deference to be shown to the Executive in these circumstances is high and a wide margin of appreciation should be afforded to the Executive in the court's review of decision making.

[50] In *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ. 1605, the English Court of Appeal stated at para [97]:

> "In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters."

[51] It is clear from the above analysis that the restriction on sporting activities from November 2020 until March 2021 was not an isolated action. The restriction on sport, including outdoor sporting activities for children, was one of a composite range of actions taken by the respondent with the primary objective of getting R under 1 for a significant amount of time to reduce the number of people infected with the virus.

[52] The rationale behind the impugned restrictions demonstrates, in my judgement, the careful weighing up by the respondent of the evidence which identified the risks against a return to sport and, thereafter, a consideration of

sporting activities with appropriate mitigations. The respondent analysed the attitude taken in the other jurisdictions of the UK and considered carefully the evidence from the Chief Scientific Adviser, the Chief Medical Officer, the Return to Sport Expert Group and Sport NI. The final decision, therefore, reflected the advice of Sport NI and was endorsed by the Department of Health consistent with expert input from the Chief Medical Officer, Chief Scientific Adviser and approved by the Executive.

[53] It is relevant that the decision identified 12 April 2021 as the appropriate date for easing of restrictions in relation to sport which was concurrent with the final return to school in relation to those school year groups that engaged in remote learning.

[54] This court concludes that the recent decision of the Executive dated 16 March 2021 demonstrates a full assessment of those factors and matters relevant to the restriction of sport, to include outdoor sporting activities for children. The court agrees that the restrictions were necessary due to the developing course of the pandemic at that time, namely between November 2020 and March 2021. The restrictions were revoked when they were no longer necessary. It is my view that the inferences complained of were plainly justified, particularly when a court takes into consideration a wide margin of judgement that must be afforded to the Executive. The Executive was of the opinion that a lesser inference would not have secured the necessary contribution to the critical reduction and maintenance of the R number to less than 1. It is my view that the respondent was entitled to proceed on the basis of the advice that it was receiving and that a fair balance was struck in the exceptional circumstances which pertained during this period.

[55] In conclusion, the impugned restrictions plainly constituted an interference with the applicant's Article 8 rights. However, in my judgment, the restrictions were justified under Article 8(2) ECHR, in that they were in accordance with the law, pursued a legitimate aim, namely the protection of public health and were proportionate in all the circumstances.

Article 14 ECHR

[56] Article 14 ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[57] Relying on Article 14 ECHR taken in conjunction with Article 8, the applicant asserts that he has suffered discriminatory treatment based on his status as a child and that this treatment has interfered with his right to respect for his private life. It is argued that the imposition of the impugned restrictions is incompatible with the

applicant's rights pursuant to Article 14 ECHR (read with Article 8 ECHR) in that, in relation to the decision to restrict the playing of outdoor sports, the applicant (child) has been treated the same as others (adults) who are in a relatively different situation.

[58] Article 14 ECHR, opposes both direct and, as alleged in this case, indirect discrimination. In *DH v Czech Republic* (2008) 47 EHRR 3, the Grand Chamber of the ECtHR said at para 175 that "discrimination means treating differently, without an objective and reasonable justification, persons in relatively similar situations."

[59] Article 14 also applies where public authorities, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (often referred to as "Thlimmenos discrimination").

[60] In *Thlimmenos v Greece* [GC], (2001) 31 EHRR 15, the ECtHR said at para [44]:

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification (see the Inze judgment cited above, p. 18, § 41). However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

[61] This type of discrimination was examined in *DA v SoS Work and Pensions* [2019] 1 WLR 3289 where the Supreme Court addressed *Thlimmenos* type discrimination. The Supreme Court found that 'discrimination' can mean, as exemplified by ECtHR in *Thlimmenos v Greece* (2000) 31 EHRR 12, "the natural formulation of the complaint is indeed that the complainants have been treated similarly to those whose situation is relevantly different, with the result that they should have been treated differently." (para 40).

[62] A recent example of a successful Thlimmenos type discrimination claim is demonstrated in the decision of the Court of Appeal in *O'Donnell v Minister for Communities* [2020] NICA 36, where the court found a breach of Article 14 ECHR read with Article 8 and Article 1 Protocol 1 in relation to the payment of bereavement support payment. The appellant's wife died, and it was determined that he was not entitled to a bereavement support payment because his deceased wife had not satisfied a contribution condition for payment of the said benefit. Due to a serious disability, the deceased could never have satisfied the contribution

condition. The decision of the Court of Appeal is succinctly summarised by Stephens LJ at para [90] of the judgment.

> "[90] The deceased who as a result of disability could not work and could never meet the contribution condition was treated in exactly the same way as an individual who could work and who could meet the contribution condition but did not do so. This means that the appellant and his children have been treated in the same way as others whose situation was significantly different by reason of the disability of the deceased. The 2015 Act has not differentiated between persons in significantly different situations and there has been a failure to treat differently persons whose situations are significantly different. The discrimination is by comparison to non-disabled persons."

[63] In *Re McLaughlin* [2018] UKSC 48, the Supreme Court considered in some detail the nature and extent of Article 14 ECHR and the relevant questions in which an Article 14 claim would be considered. Lady Hale (delivering the majority judgment) stated as follows at para [15]:

> "15 As is now well known, [Article 14] raises four questions, although these are not rigidly compartmentalised:
>
> (1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"?
>
> (4) Is there an objective justification for that difference in treatment?

[64] In *O'Donnell v Minister for Communities*, Stephens LJ highlighted the relevant questions for consideration of an Article 14 ECHR claim slightly differently at para [51]:

> "[51] In order to address the question as to whether there has been unjustifiable discrimination contrary to Article 14, Lady Hale in *DA and DS* at paragraph [136] stated:
>
> "In deciding complaints under Article 14 , four

questions arise:

(i) Does the subject matter of the complaint fall within the ambit of one of the substantive Convention rights?

(ii) Does the ground upon which the complainants have been treated differently from others constitute a "status"?

(iii) Have they been treated differently from other people not sharing that status who are similarly situated or, alternatively, have they been treated in the same way as other people not sharing that status whose situation is relevantly different from theirs?

(iv) Does that difference or similarity in treatment have an objective and reasonable justification, in other words, does it pursue a legitimate aim and do the means employed bear "a reasonable relationship of proportionality" to the aims sought to be realised (see *Stec v United Kingdom (2006) 43 EHRR 1017*, para 51)?" (We will refer to these questions as ("the *DA and DS questions*").

These questions are a slightly different formulation than given by Lady Hale in *Re McLaughlin* [2018] 1 WLR 4250 at paragraph [15]. However, we consider the *DA and DS questions* to be the appropriate ones to be used in a case involving the second category of discrimination identified in *Thlimmenos*."

[65] Pursuant to the decisions in *DA and DS* and *O'Donnell* the applicant's Article 14 ECHR claim will be analysed in the context of the following questions:

Question (1) - Ambit

[66] The question for consideration is whether the decision to restrict the applicant playing outdoor sports is within the ambit of Article 8 in that it has impacted on the applicant's physical and psychological well-being.

[67] The respondent does not dispute that, in the circumstances of this case, the

impugned restrictions as initially challenged by the applicant came within the ambit of Article 8. However, the respondent claims that the modified position reached as a result of the Executive Committee's decision on 16 March 2021 does not come within the ambit of Article 8.

[68] For the reasons given above, I have concluded that the decision to restrict the playing of outdoor sports does fall within the ambit of Article 8 ECHR and that it has impacted on the applicant's physical and psychological well-being and mental health.

[69] Ms Doherty KC, on behalf of the applicant, refers the court to the dicta of Lord Nicholls in *M v Secretary of State for Work and Pensions* [2006] UKHL 11 at para [14], namely that "the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article …"

[70] Ms Doherty KC argues that the alleged discriminatory provision in the present case "seriously and directly" impinges on Article 8, because of the specified impact on the applicant's ability to develop his personality as well as his physical and mental health.

[71] In *Aldegeur Tomas v Spain* (Application No. 35214/09) at para [74] the Court emphasised that Article 14 complements the other substantive provisions of the Convention and its protocols. It has no independent existence since it has effect solely in relation to the "enjoyment of the rights and freedoms" safeguarded elsewhere in the Convention. Although the application of Article 14 does not presuppose a breach of those provisions, and to this extent it is autonomous, there can be no room for its application unless the facts at issue fall within the ambit of the substantive provisions of the Convention.

Question (2) - Status

[72] The status of the applicant as a child does not fall within one of the characteristics listed in Article 14. The crucial question is whether the applicant as a child falls within the "other status" limb of Article 14.

[73] The respondent has most helpfully referred this court to a series of decisions relating to the status and whether, on the facts of each particular case, the discrimination alleged on the ground of "other status" is sufficient to meet the requirements of Article 14. In this regard, I have taken into consideration the decision of the House of Lords in *R (Clift) v SSHD* [2007] 1 AC 484, the decisions of the House of Lords in *Al (Serbia) v SSHD* [2008] 1 WLR 1434 and the Supreme Court in *Mathieson v Secretary of State for Work and Pensions* [2015] 1WLR 3250 and *R v Docherty* [2017] 1 WLR 181. I have also considered the decision of the Supreme Court in *DA v SoS Work and Pensions* [2019] 1 WLR 3289 and *R(Stott) v Secretary of State for Justice* [2018] UKSC 59.

[74] Having considered the relevant authorities, it is my decision that a child, in

distinction to an adult, falls within the "other status" limb of Article 14 ECHR. This status was recognised in *DG v Ireland* (39474/98) ECtHR 16 in May 2002; *Bouamar v Belgium* (9106/80) ECtHR, 29 February 1988, where the Court examined complaints of alleged discrimination on grounds of age in cases dealing with a difference in treatment between minors and adults as regards detention.

Question (3) Similar Treatment - Not Sharing the Same Status

[75] Ms Doherty KC, on behalf of the applicant, argues that the impugned decisions treat the application (child) the same as others (adults) who are in a relevantly different situation. (See *Thlimmenos; DA and DS; and O'Donnell)* In support of this argument, Ms Doherty emphasises the following: Firstly, physical exercise is vital for children's physical and mental health and well-being and their development. (See UN Committee on the Rights of the Child, General Comment 17 at para 9). Secondly, based on a review of international research carried out by Boast, Munro and Goldstein, "Covid 19 appears to affect children less often and with less severity, including frequent asymptomatic or subclinical infection. There is evidence of critical illness, but it is extremely rare. The role of children in transmission is unclear, but consistent evidence is demonstrating a lower likelihood of acquiring infections, and lower rates of children bringing infections into households." Thirdly, it is suggested that there is no data to confirm that children playing outdoor sports has an impact on the transmission rates of Covid 19.

[76] Having carefully considered Ms Doherty's submissions, I am not prepared to accept that in this case the applicant, as a child, is in a relevantly different situation from an adult. I accept that physical exercise is vital for children's physical and mental health and well-being, but it is equally important and beneficial for the physical and mental health of adults. Without the benefit of evidence, I cannot accept the applicant's contention that children playing sport has no impact on the transmission of the virus. Even if the court accepts the proposition that children suffer less often and less severely from Covid, this is not the relevant issue. Rather, as stated by the respondent, the impugned measures were intended to stop the spread and incidence of Covid in the population generally.

[77] For the sake of completeness, if I am wrong in my conclusion that the applicant as a child is not in a relevantly different situation to adults, I will consider the next question, namely, whether the identical treatment of these groups in relevantly different situations is justified.

Question (4) - Justification

[78] In *O'Donnell v Minister for Communities* [2020] NICA 36, Stephens LJ in his consideration of discrimination prohibited by Article 14 ECHR stated as follows:

> "… The State may have given consideration to the adverse treatment but in addition the State has to explain why it seeks to justify the adverse treatment as reasonable and in turn the court has an obligation to

> proactively examine and decide whether the adverse treatment has been justified. In this way, the State's duty to consider adverse treatment must not be elided with the State's duty to explain why it seeks to justify the adverse treatment. This means that even if the decision maker has undoubtedly considered the question whether to treat like cases alike or different cases differently, the court still needs to give its own careful proactive scrutiny as to whether there is a reasonable basis for the adverse treatment…"

[79] Applying the *Bank Mellat* test on whether the legislative objective is sufficiently important to justify limiting a fundamental right, Ms Doherty KC, on behalf of the applicant, argues that the impugned measures failed to strike a fair balance between the rights of the individual and the interests of the community. Specifically, it is argued that, in terms of the "balancing exercise", the respondent failed to give any consideration to:

(a) the absence of evidence of transmission of the disease during sporting activities;

(b) the mitigations and efforts made by the sporting bodies and concerned parents to facilitate sporting activities;

(c) the absence of any effort on the part of the respondent to monitor, test or examine the impact at the time when sporting activities were permitted;

(d) the fact that the measures involved thousands of children over a prolonged period of time.

[80] The applicant acknowledges that a State is accorded a margin of appreciation in its consideration of the balancing exercise. However, it is submitted that in this case, the court should expect the respondent to provide weighty reasons to justify the lack of difference of treatment in this specific restriction and that the reasons should be subjected to careful scrutiny.

[81] The respondent argues that, in a challenge as to whether a statutory instrument is Convention compliant, it is the outcome of the legislative process and not the process itself that is under consideration (see *SB v Denbigh High* [2007] 1 AC 100 per Lord Bingham at para 31). A measure will not be found to be incompatible with the Convention because of evidential insufficiencies in respect of the formation of policy or the legislative process. It is the effect of the legislation that requires to be closely analysed by the court and not the route by which it was generated.

[82] The applicant urges this court to focus on the applicant's individual personal circumstances. The respondent emphasises that the fact that the court might consider a different line could have been drawn will not suffice to justify intervention (see *Bank Mellat v HM Treasury (No. 2)* [2013] UKSC 38 at para [75].

[83] In *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1WLR 3820, the Supreme Court provided a general review of the function of rules of general application in the context of an Article 14 challenge. In *Re Gallagher* [2020] AC 185 Lord Sumption stated in para 50:

> "50 In those cases where legislation by pre-defined categories is legitimate, two consequences follow. First, there will inevitably be hard cases which would be regarded as disproportionate in a system based on case-by-case examination. As Baroness Hale PSC observed in R (Tigere) v Secretary of State for Business, Innovation and Skills (Just For Kids Law intervening) [2015] 1 WLR 3820, para 36, the Strasbourg court's jurisprudence "recognises that sometimes lines have to be drawn, even though there may be hard cases which sit just on the wrong side of it." Secondly, the task of the court in such cases is to assess the proportionality of the categorisation and not of its impact on individual cases. The impact on individual cases is no more than illustrative of the impact of the scheme as a whole. Indeed, as the Strasbourg court pointed out at para 109 of Animal Defenders 57 EHRR 21, the stronger the justification for legislating by reference to pre-defined categories, the less the weight to be attached to any particular illustration of its prejudicial impact in individual cases. …"

[84] As stated by the respondent, the discrimination alleged in this case is indirect in nature. In a case of indirect discrimination, the focus is on the rule itself not its effect on the individual (see *DH v Czech Republic* [2008] 47 EHRR 3 at paras 175-181 and *R (SG) v Secretary of State for Work and Pensions* [2017] UKHC 4 at para 13).

[85] In the circumstances, following an analysis of the affidavit evidence in the context of the alleged Article 14 discrimination, and taking into consideration the wide margin of appreciation afforded to legislature, it is my view that the inferences are proportionate and justified.

Breach of Section 75 Northern Ireland 1998

[86] Section 75 of the Northern Ireland Act 1998 ("the 1998 Act") provides:

> ***"Statutory duty on public authorities.***
> 75.-(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity-

(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

(b) between men and women generally;

(c) between persons with a disability and persons without; and

(d) between persons with dependants and persons without.

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group."

[87] Schedule 9 of the 1998 Act provides for the enforcement of a public authority's duties under Section 75 and is given effect by Section 75(4). In this case, the applicant relies upon the statutory duty in Section 75(1)(a), namely that when carrying out its functions relating to Northern Ireland, the public authority shall have due regard to the need to promote quality and opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation.

[88] Paragraph 1 of Schedule 9 outlines the role of the Equality Commission in reviewing the effectiveness of the duties imposed by Section 75. Schedule 9 includes the requirement for public authorities to submit to the Equality Commission for approval an Equality Scheme which sets out how the authority proposes to comply with its duties under Section 75. The Equality Scheme should include the public authority's arrangements for, inter alia, consulting on and assessing the likely impact of the proposed policies.

[89] Paragraph 10 of Schedule 9 makes provision for a complaints mechanism to the Equality Commission if a public authority has not complied with its Equality Scheme. The matter in which complaints are to be investigated is provided for in paragraph 11 of Schedule 9.

[90] The respondent's Equality Scheme at paragraph 1.3 states as follows:

"The Department in carrying out the functions as they relate to Northern Ireland is committed to the discharge

> of its Section 75 obligations and will commit the necessary available resources in terms of people, time and money to ensure that the Section 75 statutory duties are complied with and that this equality scheme can be implemented effectively."

[91] Chapter 4 of the respondent's Equality Scheme sets out the "arrangements for assessing, monitoring and publishing the impact of policies." In particular, paragraph 4.3 states as follows:

> "The Department uses the tools of screening and equality impact assessment to assess the likely impact of a policy on the promotion of equality of opportunity and good relations. In carrying out these assessments the Department will relate them to the intended outcomes of the policy in question and will also follow Equality Commission guidance."

[92] Paragraph 3.2.9 of the respondent's Equality Scheme provides that a consultation period will normally last for a minimum of twelve weeks. However, in exceptional circumstances when this timescale is not feasible (for example, implementing EU Directives or UK wide legislation, meeting Health and Safety requirements, addressing urgent public health matters or to comply with court judgments), the Department may shorten timescales to eight weeks or less before the policy is implemented. Also, under exceptional circumstances, where the Department must implement the policy immediately (as it is beyond the control of the Department) the Department may consult after the implementation of the policy in order to ensure that the impacts of the policy are considered.

[93] In this case, the applicant draws the court's attention to the fact that the Department has not complied with its Equality Scheme at any stage in relation to the introduction or maintenance of the restrictions on outdoor children's sport. In particular, it is argued that there has been no screening exercise and there is no evidence that the respondent has addressed its Section 75 duties in relation to the impugned decision.

[94] The applicant requests the court to have particular regard to guidance issued by the Northern Ireland Equality Commission relating to Section 75 duties during the pandemic. The guidance, which was issued on 21 April 2020 makes the following opening statement:

> "In these unprecedented times, the Commission recognises that policymakers may need to make quick and often challenging policy decisions. Yet, even if justified by the needs of the moment, it is important to recognise that such decisions may have different impacts on different groups of people. It is important that public

> authorities recognise that the duties set out in Section 75 of the Northern Ireland Act 1998 continue to apply, even when implementing Covid-19 related policies. These duties provide a mechanism to identify and mitigate any adverse impacts of policies being developed and are important duties, particularly at a time of crisis and when policies need to be developed at pace."

[95] The guidance reinforces the duties of public bodies during the pandemic as follows:

> "Public authorities should continue to follow their equality scheme arrangements in full in relation to any proposed policies that are not related to the ongoing Covid-19 crisis; such as policies that are being developed regardless of the crisis and which are not intended to alleviate or deal with the consequences of the crisis."

[96] Under the heading "The Section 75 Duties when developing Covid-19 related policies" the guidance further provides:

> "The Section 75 duties continue to apply at this time. The Commission has no legal authority to revoke them, or to suspend their operation at any time, including the present. Therefore, all of the advice provided above remains applicable and decisions made by public authorities when developing Covid-19 related policies may still be subject to challenge for alleged breaches of the duties. Such challenges may be by way of applications for judicial review or through complaints to and investigations by the Equality Commission. It would, therefore, be prudent for public authorities to be able to demonstrate how they have met their equality scheme commitments."

[97] The guidance also states that no changes have been made in relation to Section 75 duties or to anti-discrimination laws. The Equality Commission emphasises that the Section 75 duties are continuing and require public authorities to consider their statutory goals during the decision-making process, not afterwards.

[98] Ms Doherty KC, on behalf of the applicant, submits that, on the basis of the above, this is a clear case of a substantive breach of the respondent's Section 75 duty "to have due regard to the need to promote equality and opportunity." In essence, it is submitted that there is no evidence that the respondent complied with its Equality Scheme or engaged in a Section 75 exercise at any stage. On the basis of the facts, it is submitted that judicial review should be available to deal with the substantive breaches of Section 75 and to challenge the respondent's failure to comply with its Section 75 duties.

[99] Dr McGleenan KC, on behalf of the respondent, relying on the decisions in the Court of Appeal in *Re Neill's Application* [2006] NI 278 and in *Re Stach* [2020] NICA 4, argues that the primary enforcement mechanism for Section 75 obligations is as outlined in Schedule 9 of the 1998 Act. In cases where the Equality Scheme has not been complied with, there is provision within the statutory framework which provides for redress. In this case, Dr McGleenan KC makes the observation that no evidence has been produced regarding the remedies as outlined in Schedule 9. In the circumstances, it is submitted that judicial review does not lie in this case to challenge the validity of the impugned restriction.

[100] In *Re Neill's Application* [2006] NI 278, the Court of Appeal stated as follows:

> "[27] It is important, we believe, to focus on the context of the present dispute in deciding whether judicial review will lie to challenge the validity of the 2004 Order. At the kernel of this is the avowed failure of NIO to comply with its equality scheme. This is precisely the type of situation that the procedure under Sch 9 is designed to deal with. Equality schemes must be submitted for the scrutiny and approval of the Commission. It is charged with the duty to investigate complaints that a public authority has not complied with its scheme (or else to explain why it has decided not to investigate) and is given explicit powers to bring any failure on the part of the authority to the attention of Parliament and the Northern Ireland Assembly.
>
> [28] It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit. We have concluded that this was not the intention of Parliament. The structure of the statutory provisions is instructive in this context. The juxtaposition of ss 75 and 76 with contrasting enforcing mechanisms for the respective obligations contained in those provisions strongly favour the conclusion that Parliament intended that, in the main at least, the consequences of a failure to comply with s 75 would be political, whereas the sanction of legal liability would be appropriate to breaches of the duty contained in s 76."

[101] In *Re Neill's Application,* the Court of appeal decided that the only route by which the failure of the NIO to comply with its Equality Scheme could be challenged was by the procedures set out in Schedule 9 to the 1998 Act and that, on the facts, judicial review was not available to the appellant. However, it is significant that the Court of Appeal did not rule out the possibilities where a judicial review challenge to a public authority's failure to observe Section 75 would lie. At para [30], the Court

of Appeal stated as follows:

> "[30] The conclusion that the exclusive remedy available to deal with the complained of failure of NIO to comply with its equality scheme does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Sch 9 procedure ousts the jurisdiction of the court in all instances of breach of s 75. Mr Allen suggested that none of the hallmarks of an effective ouster clause was to be found in the section and that Sch 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section. It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe s 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis."

[102] The respondent drew the court's attention to the decision of the Court of Appeal in *Peifer v Castlederg High School & Others* [2008] NICA 49 where, regarding the appellant's attempt to rely upon Section 75 in the context of his appeal, the court held at para [20] that, "the effect of section 75(4) and Schedule 9 of that Act is to make the Commission the body responsible for enforcement of the relevant duties imposed by that provision." The court's attention was also drawn to the dicta of Morgan LCJ in *JR1's Application* [2011] NIQB 5 at paras [27]-[34] and the decision of Maguire J in *McCords' (Raymond) Application* [2016] NIQB 85 and Deeny J in *SK's Application* [2017] NIQB 9.

[103] As identified by the parties, the only case in this jurisdiction where a decision has been quashed as a result of a failure to comply with Section 75 is the case of *Re Toner* [2017] NIQB 49. In this case, the court found that the Council's failure to conduct an equality screening exercise for a policy relating to the impact of the lowering of kerb heights for disabled persons was a substantive breach of the Section 75 obligation. In that case, the failure identified was long standing in nature. The court stated at para [163]:

> "Most particularly, when the matter came before the EDC and the Council (twice) in 2014 the opportunity was not taken to rectify the situation notwithstanding that the matter had by this stage become one of high controversary."

[104] It is plain that the facts of *Re Toner* illustrate an exceptional example of procedural and substantive failings that could give rise to judicial intervention. The facts in *Re Toner* can be readily distinguished from the circumstances in this case. It is evident that there have been procedural breaches. The respondent has failed to follow its own Equality Scheme. There was no screening exercise carried out in relation to the proposed restrictions before or after their initial or subsequent adoption. There was no equality impact assessment (EQIA). However, I am not persuaded that the respondent failed to have due regard to the need to promote equality of opportunity. On the basis of the evidence considered above, and in particular the evidence relating to the easing of restrictions and the specific consideration of children in sport, it is my view that there has been no substantive breach and that due regard has been given to the promotion of equality of opportunity.

[105] As referred to above, it is significant that the Equality Commission recognised that, "In these unprecedented times, … policy makers may need to make quick and often challenging policy decisions." In the circumstances of this case, it is clear that difficult judgements were made about medical and scientific issues after taking advice from medical experts. Whilst the court accepts that the respondent's Section 75 duties remained so as to identify and mitigate any adverse impact of the decisions, I am not satisfied based on the evidence that there has been a substantive breach of Section 75.

Procedural Unfairness: Failure to Consult

[106] In paragraphs 5(i)(b) and (ii)(a) of the (Amended) Order 53 statement and the further amended statement of 12 March 2021, the applicant submits that, before the promulgation of the impugned Regulations, the Northern Ireland Commissioner for Children and Young People ("NICCY") should have been consulted. Accordingly, the applicant submits that the failure to consult with NICCY represents a fundamental flaw in the decision-making process thereby rendering the decision unlawful.

[107] Ms Koulla Yiasouma, the Northern Ireland Commissioner for Children and Young People "the Commissioner", made an application to intervene dated 18 February 2021. The application was granted. Mr Ciaran White BL appeared on behalf of the Commissioner. In his comprehensive written and oral submissions, Mr White BL does not contend that there was a failure to consult with the Commissioner in relation to the announcement on 17 November 2020 which led to the first iteration of the impugned Regulations. The reason advanced was that the Regulations as then promulgated also reflected the Commissioner's views as to how best manage children's rights and interests in the context of the emergency and thus the consultation would serve no purpose. In this regard I refer to paragraph 7 of Commissioner Yiasouma's affidavit dated 4 March 2021. However, it is submitted that there was a failure to observe the duty to consult the Commissioner in relation to the announcement of 19 December 2020 which led to the adoption of the second iteration of the impugned Regulations. In relation to those Regulations, it is

submitted that they marked a change from the first impugned Regulations in that schools would be closed together with restrictions on team-based sport. It is further submitted that a mechanism existed at the time of the second impugned Regulations which would have facilitated a consultation between the respondent and the Commissioner. In any event, the Commissioner states that she made it clear to the Government Departments and public bodies that her office, if approached, stood ready to offer its advice.

[108] According to the Commissioner, this judicial review application raises an important issue in relation to the requirement of legislators and policy-makers to consult with the NICCY, as the statutory body established to safeguard and promote the rights of children and young people in NI, prior to the enactment of legislative instruments, or the making of policy changes, affecting children and young people. During consultation with the NICCY, it is submitted that the Commissioner can advise the Executive Office, or the relevant Northern Ireland Government Department in relation to the development of laws, strategies and policies touching on the lives of children and young people before they come into effect. Crucially, it is argued that consultation allows the Commissioner to fulfil her statutory role in ensuring the adequacy and effectiveness of children's rights in Northern Ireland.

The Role of the Northern Ireland Commissioner for Children and Young People

[109] The office of the Commissioner for Children and Young People was established by the Commissioner for Children and Young People (Northern Ireland) Order 2003 (hereinafter the "2003 Order"). The legislation charges the Commissioner with safeguarding and promoting the rights and best interests of children and young persons [Art 6(1), 2003 Order] and that in determining whether, and if so, how to exercise its functions, the Commissioner's paramount consideration shall be the rights of the child and young persons [Art 6(2)(a)]. In determining whether and, if so, how to exercise her functions under the 2003 Order, the Commissioner shall have regard to, *inter alia*, any relevant provisions of the United Nations Convention on the Rights of the Child [Art 6(3)(b)]. Pursuant to Article 7(1) of the 2003 Order, the Commissioner has a duty to promote an understanding of the rights of children and young persons and to promote an awareness of the importance of those rights and matters relating to the best interests of the children and young persons. Further, the Commissioner must also keep under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young persons [Art 7(2)] and the adequacy and effectiveness of services for children [Art 7(3)]. The Commissioner shall advise the Secretary of State, the Executive Committee of the Assembly and a relevant authority of matters concerning the rights or best interests of children, when asked, and on occasions as the Commissioner thinks appropriate [Art 7(4)].

[110] Article 8 of 2003 Order sets out the Commissioner's powers. The Commissioner may, after consultation with such bodies and persons as she thinks appropriate, issue guidance on best practice in relation to any matter concerning the rights or best interests of children and young persons [Art 8(2)] and the

Commissioner may "for the purposes of any of [her] functions), conduct such investigations as [she] considers necessary or expedient" [Art 8(3)]. They may compile "compile information concerning the rights or best interests of children" [Art 8(5)(a)] and "publish any matter concerning the rights or best interests of children and young persons" including (i) research, (ii) outcome of any investigations, (iii) any advice provided by the Commissioner [Art 8(5)(c)]. Under Article 8(6), "The Commissioner may make representations or recommendations to anybody or person about any matter concerning the rights or best interests of children and young persons."

[111] NICCY is the relevant Independent Human Rights Institution (IHRI) for Northern Ireland in relation to the implementation of the United Nations Committee on the Rights of the Child ("UNCRC").

Duty to Consult

[112] In *R (On the application of Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577 (hereinafter "*Article 39 case*"), Baker LJ stated that consultation about legislative and regulatory change is a significant feature of modern governance. In identifying the extent of the duty to consult, Baker LJ stated that it was instructive to consider -

(a) when the duty to consult arises;

(b) how the duty should be carried out; and

(c) why the duty arises in the first place - that is to say, what is the purpose of the consultation.

I will deal with each seriatim.

(a) When does a duty to consult arise?

[113] The legal principles governing the duty to consult were summarised by the Divisional Court in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice and others* [2014] EWHC 1662 Admin (hereinafter "*Plantagenet Alliance*"). The judicial review proceedings concerned decisions about the re-interment of the remains of King Richard III. The Divisional Court stated at para 97:

> "A duty to consult may arise by statute or at common law. Where a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted. The common law recognises a duty to consult but only in certain circumstances."

[114] In *R (Moseley) v Haringey LBC* [2014] 1WLR 347, the Supreme Court stated that, in the absence of an express statutory requirement to consult, the common law does not recognise a generally applicable obligation of consultation. A duty of

consultation will, however, exist in circumstances where there is a legitimate expectation of such a consultation. As stated by Lord Reed at para [35]:

> "[35] The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in R (BAPIO Action Ltd) v Secretary of State for the Home Department [2007] EWCA Civ 1139; [2008] ACD 20, paras 43–47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by the cases of R v Devon County Council, Ex p Baker [1995] 1 All ER 73 and R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213, cited by Lord Wilson JSC, with which the BAPIO case might be contrasted."

[115] In *Plantagenet Alliance*, at para 98(2), the Divisional Court summarised the circumstances in which a duty to consult may arise in the following terms:

> "There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional circumstances, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult …."

[116] In R(*Moseley)*, Lord Reed not only highlighted the principle of legitimate expectation to explain the limits of the common law duty of consultation, he also illustrated the limitations by means of a comparison between the *Baker* and *Coughlan* cases on the one hand and *BAPIO* on the other. *Baker* and *Coughlan* involved the closure of nursing homes in which there were representations of consultation and a focused group of beneficiaries. In *BAPIO,* the applicant was part of a pool of overseas doctors affected by changes in immigration rules. It was determined that fairness did not require consultation. In *BAPIO*, Sedley LJ explained the limitation of the common law obligation to consult at paras 44 and 45:

> "44. …The appellants have not been able to propose any limit to the generality of the duty. Their case must hold good for all such measures, of which the state at national and local level introduces certainly hundreds, possibly thousands, every year. If made good, such a duty would bring a host of litigable issues in its train: is the measure one which is actually going to injure particular interests sufficiently for fairness to require consultation? If so, who is entitled to be consulted? Are there interests which ought not to be consulted? How is the exercise to be publicised and conducted? Are the questions fairly framed? Have the responses been conscientiously taken into account? The consequent industry of legal challenges would generate in its turn defensive forms of public administration. All of this, I accept, will have to be lived with if the obligation exists; but it is at least a reason for being cautious.
>
> 45. The proposed duty is, as I have said, not unthinkable - indeed many people might consider it very desirable - but thinking about it makes it rapidly plain that if it is to be introduced it should be by Parliament and not by the courts. Parliament has the option, which the courts do not have, of extending and configuring an obligation to consult function by function. It can also abandon or modify obligations to consult which experience shows to be unnecessary or unworkable and extend those which seem to work well. The courts, which act on larger principles, can do none of these things."

[117] In the *Article 39* case in relation to the question of legitimate expectation, Baker LJ stated as follows:

> "[32] For a practice to give rise to a legitimate expectation, it must be "so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group … of treatment in accordance with it " (per Lord Wilson in *R (Davies and another) v Revenue and Customs Commissioners* [2011] UKSC 47 at paragraph 49). A party seeking to establish a legitimate expectation must identify "practice of the requisite clarity, unequivocality and unconditionality" (the Divisional Court in the *Plantagenet Alliance* case at paragraph 98(10))."

(b) When should a duty to consult be carried out?

[118] In *R(Moseley)*, Lord Wilson stated at para [23]:

> "Irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted."

[119] Further guidance was provided by Lord Woolf MR in *R v North and East Devon Health Authority Ex Parte Coghlan* [2001] QB 213, when he stated at para 108 as follows:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168."

[120] Therefore, when a duty to consult is deemed to arise, the consultation should be carried out properly and fairly to include identifying the proposals, the reasons for the proposals and permitting those consulted adequate time to respond to the proposals. Also, as stated by Baker LJ in the *Article 39* case once a duty to consult has been deemed to exist, it is for the decision maker to determine the parties who should be consulted. Any determination made by the decision maker is open to challenge on the grounds of irrationality (see *R (Liverpool City Council) v Secretary of State for Health* [2003] EWHC 1975 Admin.*)*

(c) The purpose of the consultation.

[121] In the *Article 39* case, Baker LJ stated as follows:

> [37] The purpose of consultation has various strands. First, experience shows that fair and broad consultation improves the quality of decision-making. Secondly, as a general proposition, those affected by prospective regulatory change may, in certain circumstances, have a right to be consulted about it and may feel a sense of injustice if they are not. Thirdly, and more broadly, consultation about regulatory change is part of a wider democratic process.

[38] These strands were identified by Lord Wilson in *Moseley* at paragraph 24, immediately following the passage cited above:

> "Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2013] UKSC 61, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' (para 67). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?'"

The Submissions

[122] The applicant submits that failure to consult with the Commissioner amounts to a fundamental deficiency in the decision-making process, thereby rendering the impugned regulations unlawful. In detailed submissions which emphasise the Commissioner's statutory role in safeguarding and promoting the rights of children and young persons, Ms Doherty KC alerts the court to the fact that Commissioner was not consulted in relation to the impugned regulations, the prohibition on children's outdoor sports and the potential detrimental impact on children.

[123] The applicant relies heavily on the recent decision in the *Article 39* case where the Court of Appeal granted a declaration that the Secretary of State had acted unlawfully by failing to consult with the Children's Commissioner and other bodies

representing the rights of children.

[124] The respondent argues that the decision of the Court of Appeal in the *Article 39* case is distinguishable from the facts in this case. It is submitted that the only similarity between the factual circumstances in each case is the fact that the impugned regulations were enacted during the pandemic. On the facts of this case, it is submitted that the impugned regulations involved general restrictions which applied to everyone.

[125] The *Article 39* case involved a challenge to the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 introduced by the Secretary of State for Education and related to a range of temporary amendments to ten statutory instruments governing the children's social care system. The issue arising on the appeal was whether the Secretary of State acted unlawfully in failing to consult bodies representing children in care, including the Children's Commissioner for England, before introducing the Amendment Regulations.

[126] In *Article 39*, the Children's Commissioner expressed concern about a number of specific amendments, to include the relaxation of the requirement for social workers to visit children in care and the provision for making independent panels to approve foster care and adoption placements optional. The Commissioner made a statement that the Regulations made significant temporary changes to the protections given in law to some of the most vulnerable children in the country, most of whom were not in school and less able to have direct conduct with family and other trusted professionals. The process for scrutiny lasted at least five weeks.

[127] In this case, in my judgment, the factual context is plainly distinguishable, in that the Children's Commissioner expressed no contemporaneous concern about the promulgation of the Regulations which imposed the impugned restrictions. Also, the timeframe for implementation lasted days not weeks.

[128] In *Article 39*, the Court of Appeal concluded that a duty to consult arose on the facts for three reasons. Firstly, with respect to one set of Regulations, there had been a statutory duty to consult but only such persons as the Secretary of State considered appropriate. In this case, however, as accepted by the Children's Commissioner, no independent or "stand alone" statutory duty to consult arises.

[129] Secondly, in the *Article 39* case, it was acknowledged that there was an established practice of consultation with children's rights interest groups, including the Children Commissioners whenever substantive changes to the Regulations and questions were being made. It is relevant that no such established practice applied in relation to the impugned restrictions in this case. Nor indeed was there a promise to consult.

[130] It is significant that the Commissioner states that, whilst Government Departments have at times in the past consulted with the Commissioner before embarking upon legislative or policy changes, this practice has not been uniform. The Commissioner accepts, to adopt the terminology in the Article 39 case, that there

was no expectation that she should be consulted arising from an established practice which was clear, unequivocal or unconditional. [see *Article 39*, para 32].

[131] In the *Article 39* case, Baker LJ stated as follows at para 85:

> "85. Given the impact of these proposed amendments on the very vulnerable children in the care system, it was in my judgment conspicuously unfair not to include those bodies representing their rights and interests within the informal consultation which the Secretary of State chose to carry out. … He decided to undertake a rapid informal consultation, substantially by email. In the circumstances, it was plainly appropriate for the consultation to be conducted in that fashion, rather than a more formal, drawn-out process. But having decided to undertake the consultation, there was no good reason why that process should not have included the Children's Commissioner and the other bodies. On the contrary, there were very good reasons why they should have been included."

[132] In this case there was no consultation process in which the respondent irrationally engaged with some key stakeholders and other appropriate persons but excluded the Children's Commissioner.

[133] It is relevant that the Commissioner does not contend that there was a failure to consult in relation to the announcement on 17 November 2020 which led to the first iteration of the impugned regulations. The reason given by the Commissioner is that the said Regulations reflected the Commissioner's views as to the best management of children's rights and interests in the context of the emergency and, therefore, a consultation would have served no purpose.

[134] Nevertheless, the Commissioner submits that there was a failure to consult prior to the announcement on 19 December 2020 which led to the adoption of the second iteration of the impugned regulations. The reason given by the Commissioner is that, in December 2020 regulations imposed a marked change from the first impugned regulations in that schools would be closed, together with restrictions on team based sport.

[135] The respondent argues that the issue in relation to the proposal to close schools is clearly different from restrictions on sporting activities. It is further submitted, with some justification in my judgment that, since the Commissioner did not raise any complaint about restrictions on children's sporting activities arising out of the November regulations, no conspicuous unfairness arises out of a failure to consult prior to the December regulations.

[136] I agree with the Respondent that, for the reasons given above, the factual

background in this case is clearly distinguishable from the circumstances that arose in the *Article 39 case*. Significantly, in this case, no statutory duty of consultation arises.

[137] It is my decision that the applicant has failed to establish that there was a past practice of consultation with the Commissioner giving rise to a legitimate expectation that she should have been consulted prior to the impugned regulations, and in particular the December 2020 Regulations. Furthermore, in my view, in response to the pandemic, it was plainly necessary for the respondent to act urgently and expeditiously. In this regard, I concur with the conclusion reached by Singh J in *R (Christian Concern) v SOSHSC* [2020] EWCA 1546 (Admin) at para 74;

> "Furthermore, and in any event, even if there had in the past been a sufficient practice of consultation to generate a legitimate expectation, that would clearly have been capable of being overridden by the need to act swiftly in the context of the current emergency."

[138] To combat the effects of the pandemic, a two-week circuit breaker had been put in place from 27 November to 10 December 2020. From 11 December 2020, the Executive eased restrictions in the run up to Christmas and the schools remained open. However, faced with the evidence of increasing pressures on the health and social care systems and concerns in relation to the trajectory of the pandemic, it was clear that the restrictions imposed from 27 November had not produced the desired results. The respondent had to act swiftly in response to the serious and imminent threat to public health. Extensive consultation and engagement with stakeholders, statutory advisers and representative bodies was plainly not possible. Even the normal scrutiny of the Assembly and approval of the regulations by resolution was suspended.

[139] The duty to consult is an aspect of procedural unfairness. The court acknowledges the important statutory role of the Northern Ireland Commissioner in promoting and protecting the rights and best interests of children and young people. The powers of the Commissioner are a vital safeguard to ensuring the adequacy and effectiveness of the law and practice relating to the rights and welfare of children and young persons. Due to the nature of the Commissioner's statutory role and powers, there will be instances when the Commissioner will have a legitimate expectation of consultation, or the circumstances will give rise to an established practice of consultation. However, for the reasons given above, the duty to consult is not deemed to arise on the facts of this case and that no conspicuous unfairness arose out of the lack of consultation with the Commissioner.

Failure to take into account material facts and considerations and irrationality.

[140] The Amended Order 53 statement pleaded both a failure to take into account material facts and considerations and irrationality. However, the parties focused correctly, in my judgment, on unlawful interference with the applicant's Article 8 and 14 ECHR rights, breach of section 75 of the Northern Ireland Act 1998 and

breach of procedural fairness. Written and oral submissions did not consider in any detail irrationality and a failure to take into account material considerations. I am not persuaded that these grounds add any particularity or significance to the application for judicial review.

Conclusion

[141] For the reasons given, the claim for judicial review is refused.