

Neutral Citation No: [2023] NIKB 112

Ref: HUM12326

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 17/11/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY JR267
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**IN THE MATTER OF THE PROPOSED DISCONTINUANCE OF
ST MARY'S PRIMARY SCHOOL, FIVEMILETOWN**

John Larkin KC & Helena Wilson (instructed by Worthingtons) for the Applicant

Laura Curran (instructed by Napiers) for the first proposed Respondent

**Matthew Corkey (instructed by the Education Authority) for the second proposed
Respondent**

Philip McAteer (instructed by the Departmental Solicitor's Office) for the Notice Party

HUMPHREYS J

Introduction

[1] In any case involving a proposed school closure, two fundamental points apply. Firstly, such proposals do invariably generate strong emotional reactions. The education of our children is a vital public service, and every parent wants their child to be the beneficiary of the best possible experience, laying as it does the foundations for life.

[2] Secondly, the courts do not set education policy, nor do they make decisions around the allocation of resources. In this field, as in others, the courts are only concerned with the legality of decision making processes.

[3] The applicant in this case is now in Primary 7 at St Mary's Primary School in Fivemiletown, Co Tyrone ('the school'). He has a statement of special educational needs dated 18 January 2022 and has had access to a classroom assistant as part of

his educational provision. The evidence indicates that he has benefitted greatly from the environment at the school.

[4] In October 2022 the Council for Catholic Maintained Schools ('CCMS'), the first proposed respondent, submitted a 'Case for Change' document to the Education Authority ('EA'), the second proposed respondent, in which it proposed the closure, or discontinuance, of the school with effect from 31 August 2023 or as soon as possible thereafter.

[5] The EA then published Development Proposal no 694 ('the DP') on 8 February 2023, together with its views thereon, following a meeting on 31 January 2023.

The Impugned Decisions

[6] In this application for leave to apply for judicial review, as now constituted, the applicant seeks to challenge the following decisions:

- (i) The Case for Change document as proposed to the EA on 31 January 2023;
- (ii) The DP published on 8 February 2023;
- (iii) An ongoing failure by CCMS and the EA to conduct a full and effective Equality Impact Assessment;
- (iv) The Rural Needs Assessment dated 10 January 2023;
- (v) The decision by the CCMS Education Provision Committee not to withdraw the DP on 24 August 2023; and
- (vi) The decision of the EA Strategic Planning and Policy Committee dated 5 September 2023 whereby it augmented its support for the DP.

The Statutory Framework

[7] Some 10 years ago, the United Kingdom Office of Parliamentary Counsel launched the 'Good Law Initiative' with the laudable aim of making statute law clear, coherent, effective and accessible. Sadly its reach has not, as yet, stretched to education law in Northern Ireland. There are around a dozen pieces of primary and well over 100 pieces of secondary legislation which govern the rights, obligations, procedures and policy making of all those involved in the educational sector in this small jurisdiction. Such laws do not exist for the benefit of lawyers but for parents, pupils, teachers, school leaders, civil servants and governors who share the common goal of educational excellence. The Byzantine morass of legislative provisions does little to promote such an outcome.

[8] The law governing the establishment of a new school or the making of significant change to or the discontinuance of an established school involves three separate public bodies – the CCMS, the EA and the Department of Education ('DE'). DE is the ultimate decision maker.

[9] Article 6 of the Education and Libraries (Northern Ireland) Order 1986 ('the 1986 Order') provides:

“the Authority shall secure that there are available ... sufficient schools for providing primary and secondary education and the schools available... shall not be deemed to be sufficient unless they are sufficient in number, character and equipment to afford for all pupils opportunity for education offering such variety of instruction and training as may be desirable in view of their different ages, abilities and aptitudes, and of the different periods for which they may be expected to remain at school, including practical instruction and training appropriate to their respective needs” [the 'Authority' in this context being the EA]

[10] Article 141 of the Education Reform (Northern Ireland) Order 1989 ('the 1989 Order') establishes the CCMS and article 142 prescribes its functions:

- “(1) The Council shall –
- (a) advise the Department or a board on such matters relating to Catholic maintained schools as the Department or board may refer to the Council or as the Council may see fit;
 - (b) promote and co-ordinate, in consultation with the trustees of Catholic maintained schools, the planning of the effective provision of Catholic maintained schools;
 - (c) promote the effective management and control of Catholic maintained schools by the Boards of Governors of such schools;
 - (d) with the approval of the Department, provide or secure the provision of such advice and information to the trustees, Boards of Governors, principals and staff of Catholic maintained schools as appears to the Council to be appropriate in

connection with the Council's duty under sub-paragraph (c);

(e) exercise such other functions as are conferred on it by the Education Orders.

(2) The Council may advise any body (other than the Department or a board) on such matters relating to Catholic maintained schools as that body may refer to the Council or as the Council may see fit.

(3) The Council shall consult with the trustees, Boards of Governors and principals of Catholic maintained schools about the exercise by the Council of its functions.

(4) The Council may require the managers of a Catholic maintained school to make such reports and returns, and give such information, to the Council as the Council may reasonably require for the purposes of its functions, being reports or returns or information which cannot (for whatever reason) be obtained by the Council from the Department or a board."

[11] Article 14 of the 1986 Order governs, inter alia, the discontinuance of a controlled or voluntary school. It provides:

"(2) Where a person other than the Authority proposes –

(c) to discontinue a voluntary school;

then –

(i) where the school is, or is proposed to be established or recognised as, a Catholic maintained school, the person making the proposal shall submit it to the Council for Catholic Maintained Schools which, after making such modifications (if any) as may be agreed with the person making the proposal, shall submit the proposal to the Authority... together with the Council's views thereon;

(3) It shall, where the Department so directs, be the duty of the Authority to submit to the Department a proposal –

- (b) that a controlled or voluntary school should be discontinued;
- (4) A proposal under paragraph (1), (2) or (3) shall be in such form and contain such particulars as may be required by the Department.
- (5) Before a proposal concerning an existing school is submitted to the Authority under paragraph (2), the person making the proposal shall consult the following persons (or representatives of them) –
 - (a) the Board of Governors of the school concerned;
 - (b) the teachers employed at that school; and
 - (c) the parents of registered pupils at that school.
- (5A) Before a proposal concerning an existing school is submitted to the Department by the Authority under paragraph (1) or (3), the Authority shall consult the following persons (or representatives of them) –
 - (a) the Board of Governors of the school concerned;
 - (b) the teachers employed at that school; and
 - (c) the parents of registered pupils at that school.
- (5B) Before a proposal concerning any school is submitted to the Department by the Authority under paragraph (1), (2) or (3), the Authority shall consult the trustees and managers (or representatives of them) of any other school which would, in the opinion of the Authority, be affected by the proposal.
- (6) A board, after submitting a proposal to the Department under paragraph (1), (2) or (3), shall –
 - (a) forthwith furnish to the trustees and managers of every school which would, in the opinion of the Authority, be affected by the proposal such particulars of the proposal as are sufficient to show the manner in which the school would be affected;

- (b) forthwith publish by advertisement in one or more newspapers circulating in the area affected by the proposal a notice stating the nature of the proposal, that the proposal has been submitted to the Department, that a copy of the proposal can be inspected at a specified place and that objections to the proposal can be made to the Department within two months of the date specified in the advertisement, being the date on which the advertisement first appears;
- (c) furnish to any person, on application, a copy of the proposal on payment of such reasonable sum as the Authority may determine.

(7) Subject to Article 15(3), the Department, after considering any objections to a proposal made to it within the time specified in the notice under paragraph (6)(b), may, after making such modification, if any, in the proposal as, after consultation with the Authority or person making the proposal and, in a case to which paragraph (2)(i) applies, the Council for Catholic Maintained Schools, it considers necessary or expedient, approve the proposal and inform the Authority or person accordingly.

(8) In relation to a proposal made under paragraph (3), paragraph (7) shall have effect with the substitution for the references to the person making the proposal of references to the trustees and managers of the school to which the proposal relates.

(9) A proposal under paragraph (1), (2) or (3) shall not be implemented until it has been approved by the Department.

(9A) Subject to paragraph (9B), where a proposal under paragraph (1), (2) or (3) is approved by the Department after 1st April 1987, it shall be the duty of the Authority or person making the proposal to implement the proposal.

(9B) The Department may modify any proposal which is required to be implemented under paragraph (9A), but shall not do so except at the request of the Authority or person making the proposal.

(9C) Where the Department approves under paragraph (9) a proposal submitted to the Authority under paragraph (2)(i) by the Council for Catholic Maintained Schools, it shall be the duty of the Department to make such amendments (if any) to the scheme under Article 141(4) of the 1989 Order as appear to the Department to be necessary or expedient in connection with the implementation of that proposal.”

[12] This scheme of decision making in the context of a voluntary maintained school was summarised by Maguire J in *Re SK's Application* [2016] NIQB 92:

- “(a) The CCMS consults with representatives of the parents, teaching staff and Board of Governors of the school.
- (b) The CCMS submits a development proposal to the EA.
- (c) The EA consults with the trustees and managers of any school which is likely to be affected by the proposal.
- (d) The EA ‘shall submit the proposal to the Department together with its views thereon.’
- (e) The EA publishes the proposal for public consultation over a period of 2 months, with responses to be submitted to the Department.
- (f) Decision by the Department on the proposal or modification of it.
- (g) If approved by the Department, CCMS must implement it.”

[13] Section 1 of the Rural Needs Act (Northern Ireland) 2016 (‘the Rural Needs Act’) states:

- “(1) A public authority must have due regard to rural needs when—
- (a) developing, adopting, implementing or revising policies, strategies and plans, and
- (b) designing and delivering public services.

(2) For the purposes of this Act, “public authority” means anybody or person listed in the Schedule.”

[14] The public authorities identified in the Schedule include CCMS, EA and DE.

[15] Section 75 of the Northern Ireland Act 1998 requires public authorities to have regard to the need to promote equality of opportunity, and the statutory guidance published by the Equality Commission sets out a two stage process. Firstly, a screening process is required then, if there is a major potential impact to equality of opportunity and good relations, a full impact assessment should be carried out.

Relevant Policies

[16] DE, the notice party to this application, has adopted a Sustainable Schools Policy (‘the SSP’) which has the aim of improving the quality of the educational experience for pupils and ensuring the sustainability of schools. Six criteria are identified, namely:

- (i) Quality educational experience;
- (ii) Stable enrolment trends;
- (iii) Sound financial position;
- (iv) Strong leadership and management;
- (v) Accessibility; and
- (vi) Strong links with the community.

[17] The SSP states that the common goal of a high quality education experience should not imply a strictly uniform application of the criteria.

[18] In relation to the second criterion, the SSP states that an enrolment number of 105 should be regarded as the basis for a new or replacement primary school. However, it recognises that individual schools need to be looked at in the context of local circumstances. In rural areas, schools are often at the heart of communities and provide a vital local service.

[19] The EA has published a policy document entitled “Providing Pathways – Strategic Area Plan for School Provision 2017-2020.” This references the SSP and sets out how the goals of achieving sustainability and quality are to be achieved throughout Northern Ireland. This, in turn, led to the publication of the “Action Plan for Primary, Post-Primary and Special Schools April 2019-March 2021.”

[20] This latter document made specific reference to the school and stated that the key issue was to “address school provisions where sustainability is an issue” and the action plan called for the “managing authority to consult on options for future provision...by March 2021.”

[21] DENI issued its “Guidance on the Publication of a Development Proposal”, circular 2017/09, on 7 July 2017 and in amended form on 14 September 2018. It provides advice and guidance on the DP procedure, including, at paragraph 6.1 the need to provide sufficient evidence to support a Case for Change, demonstrating how that will deliver the policy behind the SSP and Area Plan. The information furnished must be “robust and verifiable.”

The Case for Change

[22] The CCMS commenced consultation with the Board of Governors of the school, as well as staff and parents, on 8 February 2022. Of the 45 responses received, all were opposed to the idea of the school closing. Concerns were expressed about the impact on the rural community, the lack of alternative provision, the transport implications and the self-fulfilling prophecy of consulting on a school closure. Respondents also commented that new properties were being built in the town which would have a positive effect on pupil numbers.

[23] The CCMS Education Provision Committee (‘EPC’) met on 17 August 2022. The minutes of this meeting indicate that it was attended by six members, including Ms Patricia Carville. A proposal to proceed to DP to discontinue the school was unanimously carried, on the basis that the school was no longer viable and “needed to close.”

[24] The Case for Change was issued on 10 October 2022 proposing that the school be discontinued with effect from 31 August 2023, or as soon as possible thereafter. In issuing the proposal, CCMS confirmed:

- (i) Consultation had taken place;
- (ii) Equality screening had been carried out;
- (iii) The statutory requirements of the Rural Needs Act had been considered.

[25] The information provided included the enrolment figures for the school which had ranged from fewer than 30 in 2018/19 and 2019/20 to 42 in 2022/23. It is stated that:

“The school’s enrolment has remained below the sustainability minimum over the last 10 years.”

[26] An analysis of the population projections and birth rates has been carried out which is said to suggest that there are not sufficient pupils to cater for a sustainable school in the village.

[27] Insofar as the other sustainability criteria are concerned, it was acknowledged that the quality of the educational experience was very good, albeit that pupils were taught in composite classes. The school was operating at a surplus of over 15% and the leadership regarded as highly effective. The school is accessible to the pupils in the local area whilst the nearest alternative maintained primary school is almost six miles away. It also was observed to work closely in shared education projects with the local controlled school.

[28] The CCMS rejected alternative options, including shared facilities, amalgamation, integration and federation, on the basis that none of these would provide a sustainable solution.

[29] The Case for Change conclusions were as follows:

- (i) The proposed discontinuance supports an area planning solution and addresses the issue of sustainability;
- (ii) The proposal meets the educational needs of pupils in that they will no longer be taught in composite classes and will benefit from increased peer interaction and specialist teaching, including SEN provision;
- (iii) Transport will be provided for affected pupils who meet the eligibility criteria.

[30] CCMS produced a document in August 2022 entitled 'Equality and Human Rights Screening Template' which seeks to address, inter alia, the obligations imposed by section 75 of the Northern Ireland Act and section 1 of the Rural Needs Act. In relation to the latter, it is asserted that the proposal would enable pupils in the rural area to have access to a broad and balanced curriculum with larger number of peer interactions and fewer composite classes. Against this, it is recognised that transfer to a different school will impact upon pupils and that transport challenges may limit extra-curricular activity. Any issues arising, it is said, could be mitigated by the provision of pastoral support.

The EA Response

[31] On 19 October 2022 the EA commenced a process of consultation with those schools which may be affected by the proposal. Four responses were received, three did not support the proposal and one neither agreed nor disagreed.

[32] A significant body of responses was received from others including political representatives, church leaders, district councils and the wider community. Of

these, none supported the proposal and 96 disagreed with it. Detailed submissions were received from the Board of Governors of the school and from Ms Stewart, the Chair of the Board.

[33] Following this period of consultation, EA contacted CCMS on 1 December 2022 asking if CCMS wished to make any amendment to the Case for Change in light of the responses received. No such amendments were made.

[34] A fresh Rural Needs Impact Assessment was produced on 10 January 2023 which again concluded that the proposal had the potential to strengthen rural provision in the area and was in line with the SSP.

[35] The proposal was discussed by the EA's Strategic Planning and Policy Committee ('SPPC') on 31 January 2023. The minutes of this meeting reveal that one of the attendees was Ms Patricia Carville. There is no record of any declaration of interest being made by any of the members of the committee.

[36] In relation to the school, it is noted that representatives were invited to deliver a presentation, following which members had an opportunity to ask questions. The minutes set out the submissions made in opposition to the proposal, which included the financial sustainability of the school, its academic performance, the views of all those consulted and the potential impact on pupils.

[37] The matter was placed to a vote, seconded by Ms Carville, and the proposal carried by eight votes to seven.

[38] It was ultimately resolved as follows:

"The EA supports the CCMS in taking forward DP no 694 to discontinue St Mary's Primary School, Fivemiletown with effect from 31 August 2023, or as soon as possible thereafter.

In consideration of the above, and the Case for Change, the EA is proposing to publish DP no 694 in the week beginning 6 February 2023."

[39] DP no 694 was duly published on 8 February 2023.

[40] Further representations were made by the Board of Governors post the DP publication and there was engagement with CCMS on the question of alternative options including integration, federation and amalgamation. Included in this was a formal request that the DP be withdrawn to permit further consideration of the issues.

[41] However, with no resolution having been reached, these judicial review proceedings were issued on 24 April 2023.

[42] A further meeting of the EPC took place on 3 May 2023 at which the unanimous decision was made to continue with the DP process. The committee also decided not to accept the Board's request that a deputation be permitted to present to the EPC. Ms Carville was present at that meeting.

[43] On 16 June 2023 a formal complaint was made by the Chair of the Board of Governors to the EA in relation to the alleged conflict of interest of Patricia Carville and her failure to declare her interest as a member of the CCMS EPC at the meeting of EA SPPC on 31 January 2023. The point was made that she had seconded the proposal to support the discontinuance of the school and the motion was carried by just one vote. A further complaint was made, in similar terms, to CCMS.

[44] On 16 August 2023 Bishop Donal McKeown, as Chair of CCMS, responded to the complaint in the following terms:

"We agree that dual membership should have been declared at each meeting of the EA and CCMS committees which Ms Carville attended. We further consider that it is inappropriate to hold dual membership of both committees. To that extent your complaint is partially upheld. We understand that CCMS now intends to reconvene the Education Provision Committee to consider the impacted decision again."

[45] On 25 August 2023 Sara Long, the Chief Executive of the EA, responded to the complaint as follows:

"Arrangements are being put in place so that the development proposal regarding the closure of St Mary's Primary School, Fivemiletown can be placed before the SPPC on 5 September 2023. It is not conceded that there was a conflict of interest but, in light of the complaint that has been raised and in the interests of transparency and good administrative practice, the Education Authority is proposing to put it before the SPPC so that the committee can consider DP 694 afresh."

[46] The Governors were offered the opportunity to attend the SPPC meeting on 5 September with a deputation, which was accepted.

[47] On 29 August the Chair of the Board emailed CCMS as the school was unaware when the EPC was intending to reconsider the matter. It was pointed out

that the enrolment figure for 2023/24 was 52, and increase of ten from 2022/23. This increase had led to the employment of a third teacher.

[48] On 31 August 2023 it was revealed in correspondence from Bishop McKeown that the EPC had, in fact, met again on 24 August. That letter states:

“CCMS does not accept that the integrity of the development proposal process in relation to St Mary’s Primary School, Fivemiletown is contaminated by any actual or perceived conflict of interest...However, in the interests of sound administrative practice and in addressing any concern of an actual or perceived conflict of interest, the papers from the May 2023 EPC were presented to members for reconsideration at a meeting on 24 August 2023. Mrs Carville was not in attendance...The committee unanimously agreed that the development proposal should not be withdrawn.”

[49] Bishop McKeown also points out that the EPC decided not to meet with the school representatives on the basis that the DP “is currently with the Department of Education for decision.”

[50] The minutes of the meeting of 24 August reference the reconsideration of the 3 May decision, describing it as a “goodwill gesture to address any potential perception of bias.” It is noted that the EPC members agreed the consultation stages had allowed for detailed submissions, that full consideration of these had been carried out and that they agreed, unanimously, that the DP should continue. The EPC did consider the enrolment numbers, including the projection provided by the school of 55 pupils in 2025/26. It would appear that they did not have the actual enrolment figure for 2023/24 but, in any event, a statement is made that “numbers remain significantly below the threshold.”

[51] The SPPC met again on 5 September. At this meeting it was noted that Ms Carville had resigned her membership with effect from 21 August 2023. The deputation from the school made a presentation, emphasising how the school met the criteria in SSP.

[52] The SPPC agreed the following comments in relation to DP 694:

“Following considerable discussion and deliberation of the Development Proposal, including the issues and concerns raised by the school and its community, EA supports the CCMS in taking forward DP no 694 to discontinue St Mary’s Primary School, Fivemiletown with effect from 31 August 2023, or as soon as possible thereafter, given it is line with the Strategic Area Plan.”

Standing

[53] The first proposed respondent made the case that the applicant lacks standing in that he does not have a sufficient interest in the matter to which the application relates as required by Order 53 rule 3(5) of the Rules of the Court of Judicature (Northern Ireland) 1980.

[54] The basis for this contention is that the applicant is now in P7 and will complete his primary education in June 2024. Reliance is placed upon a first instance decision from England & Wales, *R v Head Teacher of Fairfield Primary School ex p. W* [1997] Lexis Citation 3395. In that case the applicant sought to challenge the failure by a head teacher to take disciplinary action against another pupil involved in an alleged assault. The judicial review application was listed for hearing on the last day of school, with both pupils due to start different secondary schools after the summer vacation. Scott Baker J determined that the dispute had ceased to be of any practical significance and therefore it was inappropriate to hear the application.

[55] The issue of standing in *ex p. W* had been dealt with when leave was granted and was not therefore part of the ratio of Scott Baker J's decision.

[56] In *Re D* [2003] NICA 14, the Court of Appeal stated:

“If the applicant had the necessary standing at the outset, it is difficult to suppose that the court should have dismissed the application on the ground that the basis for it had gone by the time of the hearing. Similarly, although the appeal was confined to the issue of the validity of the decision not to prosecute, the applicant was by then the respondent to the appeal and it would be hard to say that he should not have attempted to uphold the judge's decision. An issue might arise in another case whether a person in his position would have the necessary standing if he were the appellant.

It appears accordingly that the court should look at the question of the applicant's standing by reference to the time when the proceedings were commenced, and if satisfied that he had sufficient standing then it should be slow to hold that he did not possess it at a later stage in the litigation.” [paras 16 & 17]

[57] In this case, no issue is taken that the applicant had the requisite standing when proceedings were issued in April 2023. It is now said that he has lost standing by reason of the events which have occurred since that date, and the increasing likelihood that the discontinuance of the school will not occur before June 2024.

[58] The most recent committee meetings of both the EPC and SPPC reaffirmed that the DP seeks the closure of the school by 31 August 2023 or so soon thereafter as is possible. I therefore see no basis to contend that this applicant does not have the requisite sufficient interest to bring this challenge. I also take into account the significant public interest which is and has been generated by the subject decisions.

[59] I therefore reject the claim that leave ought to be refused in this case on the basis of a want of standing.

The Test for Leave

[60] As recently confirmed by the Court of Appeal in *Re Ni Chuinneagain's Application* [2022] NICA 56 an applicant must satisfy the court at the leave stage that there is an arguable case with realistic prospects of success, and which is not subject to a discretionary bar such as delay.

The Grounds for Judicial Review

[61] Whilst there are a number of different decisions under challenge, the grounds resolve to three thematic issues:

- (i) Procedural Unfairness;
 - (ii) Illegality; and
 - (iii) Bias.
- (i) *Procedural Unfairness*

[62] The allegations of procedural unfairness focus on the consultation process which has been carried out. The requirements for a fair consultation were considered by the Supreme Court in *R (Moseley) v Haringey LBC* [2014] UKSC 56, which adopted the Sedley criteria (which had their origins in a school closure case, *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168):

“First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”

[63] Lord Reed also emphasised that enough must be said about realistic but rejected alternatives on the basis that this enables consultees to make an informed response on the reasons for the preferred choice.

[64] In *R (Help Refugees) v SSHD* [2018] EWCA Civ 2098 Hickinbottom LJ summarised the relevant principles:

“(i) Irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted (*R (Moseley) v Haringey London Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947 per Lord Wilson JSC).

(ii) The public body doing the consulting must put a consultee into a position properly to consider and respond to the consultation request, without which the consultation process would be defeated. Consultees must be told enough – and in sufficiently clear terms – to enable them to make an intelligent response (*R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 per Lord Woolf MR, and *Royal Brompton and Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [9] per Arden LJ). Therefore, a consultation will be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal (*Coughlan* at [108]); or where the consultation paper is materially misleading (*R v Secretary of State for Transport ex parte Richmond upon Thames London Borough Council (No 2)* [1995] Env LR 390 at page 405 per Latham J) or so confused that it does not reasonably allow a proper and effective response.

(iii) As I have indicated (see paragraph 87 above), the content of the duty – what the duty requires of the consultation – is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose. Citing the judgment of the Privy Council in *The Mayor and Corporation of Port Louis v The Attorney General of Mauritius* [1965] AC 1111 at page 1124 (“the nature and the object of consultation must be related to the circumstances which call for it”), Lord Reed JSC in *Moseley* said (at [36]):

‘[Statutory duties of consultation] vary greatly depending on the particular provision in

question, the particular context, and the purpose for which the consultation is to be carried out.”

Lord Wilson (at [23]) also referred to the requirements being linked particularly to the purpose of the consultation.

(iv) A consultation may be unlawful if it fails to achieve the purpose for which the duty to consult was imposed (Moseley at [37]-[43] per Lord Reed).

(v) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, “clear unfairness must be shown” (Royal Brompton at [13]); or, as Sullivan LJ said in *R (Baird) v Environment Agency* [2011] EWHC 939 (Admin) at [51], a conclusion by the court that:

‘... a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong.’

(vi) The product of the consultation must be conscientiously taken into account before finalising any decision (Coughlan at [108]).”

[65] The applicant is critical in the instant case of the lack of information provided about the alternatives which were open for consideration. Instead, it is contended, these are rejected on the basis of a “lack of evidence” to support them. This is said to be a breach of the duty of fair consultation and also of the terms of the Departmental Guidance which requires “robust and verifiable” information in relation to rejected alternative options.

[66] The applicant also says that the evaluation process has been infected by a predetermined decision to close the school, which itself relied on enrolment numbers to the exclusion of other relevant considerations and criteria.

[67] The alternative options are, however, set out in the consultation document and are subject to consideration. In February 2023 in an exchange of emails, CCMS maintained that it was prepared to consider other options in relation to the school's future as part of the consultation process.

[68] There can be no doubt that enrolment numbers played a significant part in the overall assessment of the sustainability of the school. However, the evidence does not suggest that other factors were excluded from the reasoning. CCMS was fully apprised of the educational achievements of the school, its place within the community, its financial status and its successful leadership. Ultimately, weighing up these factors is a matter for the decision maker and not for the courts. I am conscious that to impugn such a decision on the basis of a lack of fair consultation requires evidence that something has gone "clearly and radically wrong." I am not satisfied that the applicant has established an arguable case that the consultation process which led to the Case for Change and the DP falls into this category. Equally, the evidence indicates that both CCMS and EA conscientiously took into account the responses generated through the consultation. They are, of course, not bound by such responses even if, as in this case, they were overwhelmingly against the proposal.

[69] A separate challenge is brought in relation to the refusal by CCMS to permit the school representatives to attend the meeting of 24 August, ostensibly on the basis that the matter was with DENI for decision. The problem with that analysis is that the matter at hand on 24 August was not whether or not to close the school, which is properly a matter for DENI, but whether to withdraw the proposal, which was a matter for CCMS.

[70] Context is always important in the field of procedural fairness. On 16 August Bishop McKeown, on behalf of CCMS, had said unequivocally that Ms Carville ought to have declared her dual membership and, moreover, such dual membership ought not to be held. The only basis for this decision must be to avoid the kind of conflict of interest which could arise in the decision making process. The communication on that date makes it clear that the EPC intends to consider its decision again.

[71] Despite this finding, the EPC on 24 August records that no conflict of interest was accepted, and that the reconsideration was taking place as a "goodwill gesture."

[72] Just over two weeks later, on 31 August, Bishop McKeown states that the school's request for a meeting with the appropriate decision makers be directed to DENI on the basis that the DP was currently with it for a determination. This statement is very difficult to reconcile with the 16 August assertion that the EPC is to reconsider its decision not to withdraw the proposal.

[73] I have concluded that it is at least arguable that CCMS has failed to recognise what was concluded and communicated in the letter of 16 August. This lack of

understanding, evident in the minutes of 24 August and the subsequent letter of 31 August, makes it arguable that CCMS did not consider the request from the school to be heard in advance of the reconvened EPC meeting within the correct legal framework.

Illegality

[74] The applicant alleges that article 142(3) of the 1989 Order, which imposes a duty on the CCMS to consult with trustees, Boards of Governors and principals “about the exercise...of its functions” means that there was a specific and freestanding obligation to consult in advance of the meeting of 24 August. The proposed respondent says this is a misinterpretation of the statutory duty which requires only general consultation from time to time, not specific consultation each and every time that the CCMS considers the exercise of one of its functions.

[75] It is important to read article 142(3) in the overall context of the obligations imposed on CCMS by article 142. Article 142(1)(b) requires it to promote and co-ordinate the planning and effective provision of Catholic maintained schools “in consultation with the trustees of Catholic maintained schools.”

[76] In light of the factual matrix referred to above, I am also satisfied that the applicant has made out an arguable case that article 142 imposed a duty on CCMS to consult in advance of the reconvened EPC meeting of 24 August. The form and content of such consultation may vary but it is arguable, in light of the erroneous statement of 31 August, that it ought to have extended to accepting a deputation from the school to make representations to the committee.

[77] The applicant also seeks to argue that the proposed respondents have behaved unlawfully by failing to comply with their statutory duties under section 75 of the Northern Ireland Act and section 1 of the Rural Needs Act.

[78] In *Re O Murchu’s Application* [2023] NICA 28, the Court of Appeal confirmed, in agreement with Colton J, that where an issue exists about the failure to comply with a section 75 duty, there is an adequate and effective alternative remedy created by statute, namely a complaint to the Equality Commission. Colton J described this as a “well-established legal precedent in this jurisdiction.”

[79] In *Re SK’s Application* [2017] NIQB 9, leave was granted on the section 75 ground in a school closure case but ultimately Deeny J concluded that there was no basis to find that it was one of the “exceptional cases” where a breach of the statutory obligation was amenable to judicial review.

[80] I see no basis to depart from this principle on the facts of the instant case since it gives rise to nothing which could be described as exceptional. If there is a basis for a complaint of breach of section 75, Parliament has established a scheme to address this under Schedule 9 of the Northern Ireland Act. Given that this represents an

effective and adequate alternative remedy to proceedings by way of judicial review, I refuse leave on this ground.

[81] The issue raised relating to the rural needs assessment arises from an understandable, but erroneous, reading of the papers. The applicant says that the January 2023 assessment post-dated the Case for Change and could not therefore have been taken into account in the consideration of that proposal. However, as the position has been explained by counsel for the proposed respondents, the January 2023 assessment was a reformulation of the assessment carried out in August 2022 and to which due regard was had prior to publication.

[82] The applicant also seeks to impugn the content of the rural needs assessment. It is argued that there is a failure to identify the impact of the proposal and instead the document simply recites the SSP.

[83] The obligation to “have regard to” in section 1 of the Rural Needs Act only imposes an obligation on the public authority to consider the relevant issues, not to give them any particular weight or still less to give them determinative weight. Provided the authority has had regard to the matters, the balancing of weight could only be impugned on the basis of *Wednesbury* unreasonableness.

[84] I am not satisfied on the evidence that an arguable case has been made out that the CCMS failed to comply with the “have regard” duty in section 1 of the Rural Needs Act and leave on this ground is refused.

[85] In their skeleton argument, counsel for the applicant also advanced a discrete ground of misdirection of policy by reference to the issue of the school having a budget surplus. The Case for Change does refer to the guidance given to maintained schools not to accumulate a surplus of 5% of the delegated budget or £75,000, whichever is the lesser. It was also mentioned at the SPPC meeting on 31 January 2023 and the minutes record that “concern was also expressed in relation to the accumulation of a school surplus.”

[86] However, there is no evidence that the existence of this surplus played any material role in the decisions which were taken. When the minutes of the relevant meetings are read as a whole there is no suggestion that any participant formed the view that the school ought to be discontinued by reason of the accumulation of a surplus.

[87] This point was not pursued with any vigour at the leave hearing. I find no arguable basis for the contention that either of the proposed respondents misdirected themselves or committed any error of law in relation to the budget surplus. Leave is therefore refused on this ground.

Bias

[88] The applicant says that the first and second decisions, namely the Case for Change document and DP no. 694 are both affected by the actual or apparent bias of Ms Carville who sat on both the EPC and SPPC. Reliance is placed on the CCMS conclusion of 16 August 2023 to the effect that such dual memberships of committees are inappropriate and a declaration of interest ought to have been made at each. Had such a declaration been made, it is argued, she would not have been able to participate in the discussions or voting at the committees and this would have had an impact on the outcome of the EA SPPC decision.

[89] The proposed respondents say that any issue in relation to bias was cured by the meetings which took place in August and September 2023 which were not attended by Ms Carville and where decisions were made to proceed with the DP, and to continue to support it.

[90] Ms Carville ought to have declared, at each committee, that she was a member of the other. I am satisfied that it is at least arguable that her failure to do so created a perception of bias from the perspective of the reasonable and fair minded observer. Such apparent bias may have infected the decision of the SPPC to comment favourably on the DP on 31 January 2023.

[91] However, I am not satisfied that the entire process could be said to be similarly affected. The Case for Change document was unaffected by any issue of bias since it was adopted by the EPC in October 2022 following a consultation exercise and prior to any involvement of the EA in the process.

[92] Furthermore, Ms Carville resigned from the SPPC in August and on 5 September, it received a delegation from the school before reconsidering its decision in light of all the evidence provided. No case of actual or apparent bias can be made in respect of this decision and I am satisfied that any issue arising from the meeting of 31 January has been cured by this later process.

Conclusion

[93] For the reasons outlined, leave is granted limited to the issues of procedural fairness and legality arising out of the CCMS decision making process in August 2023 around the withdrawal of the DP (decision (v)).

[94] I am not satisfied that any arguable case with a realistic prospect of success has been made out in respect of decisions (i), (ii), (iii), (iv) and (vi). It will be apparent therefore that only the CCMS will be a respondent to the substantive application.

[95] I will hear counsel in respect of directions towards the substantive hearing of the application.