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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

NM (A minor)'s Application [2014] NIQB 10

IN THE MATTER OF AN APPLICATION BY NM (A MINOR) FOR JUDICIAL REVIEW

HORNER J

INTRODUCTION

[1] The applicant, NM, a minor now aged 16, although 15 years at the time of the events under consideration, challenges the decision of the Board of Governors of a Belfast College ("the Board") to expel him from the College and the decision of the Expulsion of Pupils Appeal Tribunal ("EPAT"), an independent tribunal made up of members with educational experience and expertise to affirm the decision of the Board. It is claimed that both decisions are unlawful. Although NM is now at another school and does not want to be re-admitted to the College, he claims that an expulsion on his school record may disadvantage him in the future.

ORDER 53 APPLICATION

[2] The grounds of the Order 53 statement include allegations that:

(i) Against the Board of Governors of the College.

(a) The Board erred in expelling the applicant because it believed, wrongly, that he had been involved with illegal drugs.

(b) The decision was premature because they did not wait until the investigation of the PSNI was complete, especially as this established that the "rolly" in question constituted only tobacco.

(c) The Board did not follow the procedure for expulsion set out in its guidance.

(d) The Board did not give adequate reasons for the decisions.

(e) The Board breached the applicant's Convention rights by using CCTV when it did not comply with data principles 1, 3 and 6 of Schedule 1 of the Data Protection Act.

(ii) Against EPAT:

(f) It failed to take into account the fact that the substance the applicant was using was not illegal.

(g) There was a failure to follow the procedures for expulsion in the applicant's case.

(h) There was a failure to follow the data protection principles under the Data Protection Act.

(i) There was a failure by the EPAT to give adequate reasons for its decision.

[3] The incident occurred on 12 April 2013 at the College. The decision of the Board was given on 21 May 2013. The appeal and the decision of the EPAT was given on 28 August 2013. Proceedings for judicial review were instituted on 26 November 2013. Any delay, the court was informed, was due to difficulties in obtaining legal aid.

[4] I gave a short extemporaneous judgment. At the time I said I would provide a written one setting out my reasons more fully if either party wished to appeal my decision. The applicant has indicated that he wants a written decision as I understand he is appealing the refusal to grant leave.

THE BACKGROUND

[5] The applicant was a year 11 pupil at the College at the time of the events under consideration. He had a poor disciplinary record:

(i) There had been two previous suspensions before the incident at junior school. He had attacked one pupil and had also been fighting. In September 2012 he was suspended for putting his hands round the throat of a year eight pupil.

(ii) In February 2013 he was guilty of aggressive and threatening behaviour in the presence of a member of staff.

(iii) He had continued to bully a year 8 pupil from September 2012.

(iv) He had made Facebook posts ridiculing other members of his year group.

(v) He had used abusive language towards a member of the Classroom staff.

(vi) He had earned 39 demerits which included 12 for disruptive behaviour and 15 for homework.

[6] A number of modification strategies had been used by the College to improve his behaviour. These included daily programme reports, Head of Year and Head of Schools' Reports. Parental co-operation was not always noted and the applicant's parents did accept that they had taken their "eye off the ball". Each suspension of the applicant followed a meeting with the applicant's mother.

[7] On 12 April 2013 the applicant along with some others went to a room which he knew to be out of bounds to smoke cigarettes, an action which he knew was forbidden by the College's Rules. Earlier a CCTV camera had been installed in the room (there was a dispute as to whether or not this was on police advice or not). On 11 April 2013 illegal drugs had been used in the same room. The applicant was not involved. Those who had been involved confirmed to the College that cannabis had been used. On 12 April 2013 it subsequently turned out that there were no illegal drugs involved, but the College was able to confirm this only after the police's investigation had been completed and the substances seized at the time had been tested. At the time it would appear that the College may, understandably given what had happened the day before, believed that cannabis was again being abused in this room.

[8] A letter was sent on 15 April 2013 suspending the applicant from his school for five days until Friday 19 April. The explanation given was substance abuse. This was extended until 26 April and then 3 May. The applicant and his parents were invited to attend a meeting at College on 8 May. Those present at the meeting included the Chairman of the Board, Bishop McKeown, the Headmaster, Mr Lambon and the parents. The recommendation to the Board following the meeting was that the applicant should be expelled. The Board met on 20 May and accepted the recommendation. It took the decision to expel the applicant. They wrote to the applicant's parents on 21 May 2013. The letter stated:

> "The Board of Governors considered the substance abuse evidence as recorded in the video and documents relating to the incident on the 12th April 2013. The Board of Governors also considered N's record, as outlined by Mr Lambon at the consultative meeting on 8 May 2013 and in particular the record of violent behaviour.

> The Board of Governors also gave careful consideration to the written submission and oral representations by Mr and Mrs M.
>
> The Board of Governors, having examined all of the relevant evidence, is satisfied that the incident did involve a banned substance and also noted that other relevant evidence related to banned substances. The Board of Governors accepts the recommendation to expel N. In doing so, the Board of Governors took into account the major incident on 12 April 2013 and the pattern of behaviour set out in the consultation meeting on 8 May 2013. In coming to this conclusion, the Board of Governors is particularly conscious of their responsibilities for the welfare and safety of the other students."

[9] This decision was the subject of an appeal to EPAT. This is an independent tribunal which met at the end of August 2013. It received all the evidence relating to the incident including confirmation from the police that no illegal drugs had been involved. The three members of EPAT are entirely independent of the College. They are appointed for their educational expertise and experience as I have already pointed out. They also obtained the applicant's disciplinary record and the steps the College had taken to address his behavioural problems. The court before it reached its conclusion on the leave application, insisted upon seeing the notes made by members of EPAT to satisfy itself that they had access to all relevant information, including the critical information from the police that no illegal substances had been involved. It is also worth noting that at that meeting the applicant's parents insisted that the members of EPAT view the CCTV footage. This was to remove any doubts that the members of EPAT may have had that even if there were no illegal substances involved, the actions of those who participated still connoted involvement or familiarity with illegal substances. Presumably this is the issue referred to in the College's letter of 21 May 2013 as "other relevant evidence relating to banned substances".

[10] The clerk to EPAT wrote on 28 August 2013 setting out its decision. The letter said:

(i) That "it was reasonable and responsible for the school to investigate further". This relates to the CCTV coverage.

(ii) They further went on to state "consideration was given to all points raised by the parents and school. Further educational options were discussed. The meeting made clear that the totality of the pupil's behaviour was being considered." (emphasis added) It then went on

to set out in detail the applicant's record and the steps that had been taken by the school to try and achieve compliance with its rules.

(iii) Finally, the Tribunal stated:

> "Having considered all the information both verbal/visual and written the Tribunal concluded that Board of Governors [sic] had acted correctly."

[11] It is worth recording that the applicant since leaving the College obtained a placement in another school. At this school he was found to be abusing illegal substances. Rather than face disciplinary action, he was withdrawn from the school and has now started a new school. As I have made clear, he does not seek a return to the College.

LEGAL FRAMEWORK

[12] The statutory scheme relating to, inter alia, expulsions, was not opened to the court. Both the applicant's counsel and the respondents' counsel agreed that:

(i) The decision of EPAT (and the Board) were judicially reviewable;

(ii) The statutory scheme is similar to the one set out in R v The Head Teacher of St George's Catholic School and Others [2002] EWCA Civ 1822.

[13] In the leading judgment Simon Brown LJ in the St George's Catholic School case said at paragraph 43:

> "I for my part find it difficult to think of any case in which the decision reached upon another wise fairly conducted appeal by an independent tribunal following a full merits hearing should be impugnable by reference to unfairness at an earlier stage."

He went on to say that there was no requirement that any child should have "two fair hearings" and that the earlier hearing would only be relevant if it had infected the second stage.

[14] Keene LJ said at paragraphs [54] and [55] that:

(i) Normally the courts will expect the right of appeal to be exercised and if it is not will refuse relief.

(ii) That it was very difficult to envisage a situation where a fair hearing on appeal could be liable to be quashed because of a defect in the earlier hearing.

Therefore, I consider that it is essential so far as this challenge relates to procedural unfairness to concentrate on the decision of EPAT unless the hearing before EPAT is shown to be procedurally unfair and/or tainted by the earlier process.

[15] Brooke LJ said in R v Dunraven School [2000] ELR 156 at 198:

> "The general rule, when Parliament is entrusted in a decision-making process to a specialised body, it that the courts will be reluctant to interfere with the decisions made by that body. It is operating in a field with which it (and not the courts) is familiar, and this is particularly the case where sensitive relationships are concerned."

This was echoed by Coghlin J in The Matter of an Application by Kean (A Minor) for Judicial Review [1997] where he said:

> "For my own part, I remain extremely sceptical of any suggestion that the day to day exercise of his disciplinary powers for professional teachers should be subject to the unwieldy and time consuming supervision of the law."

I conclude from the above that when an independent tribunal which comprises members with specialist educationalist expertise and experience reaches a conclusion following a fair hearing, a court should grant it a wide measure of appreciation. It should only interfere when the tribunal has obviously erred.

[16] This is of course an application for leave. It is an application that is made late in the day. Coghlin J had said in the Kean case:

> "However, it is has been emphasised by a number of the Judges in this jurisdiction that applicants are not entitled to regard a three month as a period of grace of which they may take full advantage. On the contrary, applicants for judicial review are positively encouraged to act as promptly as the circumstances will allow in the knowledge that, in some cases, delay may be regarded as a serious obstacle to relief even if applications are lodged within the 3 month period."

He then went on to say:

> "It seems to me that the emphasis upon prompt application is of even greater importance in the context of disciplinary action within a school where it is very much in the interests of both pupils and staff that such matters should be resolved as efficiently and expediently as possible."

I agree entirely with these comments although there will be even greater force when the applicant remains a pupil of the institution against which he is seeking relief.

[17] The applicant is at another school. I was prepared, given that this was a leave hearing, to accept that an expulsion on his educational record could be a detriment to him in later life and that he would want it expunged, if possible. How this detriment might have a practical effect was not explored in any detail. That issue will only arise, if leave is granted.

[18] It is against the background as set out above that I must be satisfied that there is a prima facie case of unlawfulness disclosed by the applicant which has a reasonable prospect of success. I consider that there are good grounds for imposing a higher hurdle in an application involving a challenge to an expulsion from a school: eg see R v Commissioners of Customs and Excise [2004] EWHC 254 (Admin) at [8]. There has been delay. The applicant is at a new school. If leave is granted, then it is unlikely that any hearing will occur much before Easter. With the best will in the world more than a year is likely to pass before there is any judgment. It cannot be in the interests of the College, but more importantly in the interests of the applicant, to have this matter hanging in the air. It is surely in the best interests of all that the matter should have been long resolved. However, I have not heard arguments on this issue and therefore I have proceeded on the usual basis that there needs to be an arguable ground for judicial review which has a reasonable prospect of success before leave can be granted. I have not sought to require the applicant to overcome a higher hurdle.

THE DECISION

[19] In opening the application for leave, Mr Sands BL, for the applicant told the court that the central thrust of the claim for judicial review was the suggestion that this was a drugs or drugs related incident. The word drugs was used in the sense of an illegal substance. He claimed that this was a manifest error because no illegal substances were used nor were there any connotations of illegal substances. He claimed that this not only vitiated the Board's decision but also tainted the process of appeal.

[20] Although the challenge to the decision to expel the applicant was primarily made on the basis of the Board's error and unfairness and the fact that this tainted the appeal process, there were other subsidiary grounds put forward, although in

some cases they were the subject of only desultory submissions. The categories of complaint can be summarised as follows:

(a) Error and unfairness.

(b) Failure to give adequate reasons.

(c) Use of CCTV footage.

(d) Failure to follow policies.

[21] Before dealing with those issues seriatim, it is important to point out that the court has concentrated on the decision made by EPAT. For the reasons which I have pointed out, if the decision of EPAT is unimpeachable, then there is no judicial review. It is only if the earlier process has tainted the appeal that it would be important to consider the decision of the Board. In this case there is absolutely no evidence to suggest that the appeal process was infected by any error or unfairness of the hearing and decision of the Board. The court was able to satisfy itself by looking at the notes of EPAT that it had all the necessary information and was alert to the fact that what had occurred on 12 April 2012 involved tobacco and not an illegal substance. The fact that no drugs were involved and there were no drug related issues, was further re-enforced by the CCTV footage which was available. On the basis of the present papers I considered that if the application for judicial review had been against the Board alone, I would have granted it because, at the very least, there was an ambiguity about whether or not the Board proceeded on the basis that the applicant had been involved with illegal drugs on the College's premises. However, I was wholly satisfied from the evidence that the earlier hearing did not taint or affect the appeal issue. Accordingly, I conclude that the issue for the court at this stage of the leave hearing is whether or not the challenge to the decision of EPAT discloses an arguable case which had a reasonable prospect of success.

ERROR AND/OR UNFAIRNESS

[22] As I made clear, I consider that if the case was solely to challenge the decision of the Board, I would have granted judicial review. It is easy to understand how this error about what substance was involved might have arisen because on the previous day cannabis had been sold and used in the same room by other pupils. The applicant's complaint was that the Board had proceeded on the basis that on 12 April, like 11 April, this out of bounds room was being used for illegal drug use. Whatever the validity of the applicant's complaint against the Board, it is clear beyond peradventure that EPAT were in no doubt that only tobacco was involved in the incident which was the subject of its hearing. The notes of the member of EPAT and the letter which was subsequently written, make it clear that the tribunal knew it was dealing with tobacco only. I was informed by the counsel for the second named respondent, without contradiction from the applicant's counsel, that the

parents were able to insist on the use of the CCTV footage to make clear to EPAT that there were no other illegal substance connotations. Certainly EPAT did not proceed on the basis that it suspected the applicant was involved with illegal drugs. Each of the members knew, and the court was able to confirm this by considering their notes, that only tobacco was involved. The decision makes this clear. Furthermore, no ground was put forward as to how the decision of the Board could possibly have tainted the decision of EPAT. It is important to emphasise that even though tobacco is not an illegal substance, its use on the school premises is a clear breach of the College's rules and the College's clear policy is to prevent its use on its grounds. Accordingly, I conclude that there is no arguable case of unfairness and/or error with a reasonable prospect of success made out against EPAT on this central issue.

FAILURE TO GIVE REASONS

[23] This matter was not explored in anything but the most cursory of detail during the submissions made by the applicant's counsel. There is a duty to give reasons to engender transparency. As Gordon Anthony in his book on Judicial Review in Northern Ireland at 7.25 the author states:

> "Reasons which should be prepared by the decision-maker, itself, must therefore be adequate and intelligible, although much will, at the same time, depend:
>
> Upon the particulars circumstances and the statutory context in which the duty to give reasons arises … and in many cases very few sentences should suffice to give such explanation as (is) appropriate to the particular occasion."

[24] I have considered the letter of 28 August 2013 in its context. The reasons for the decision of EPAT are clear and transparent and should not have left the applicant or his parents in any doubt. Any fair reading of the letter discloses:

(a) The offence related to the applicant going to a room in the school which he knew to be out of bounds to buy a rolled up cigarette containing tobacco which he knew was prohibited by the College's policies.

(b) The offence came to light following an investigation into drug abuse which had taken place on 11 April, the day before. But it was not suggested that the applicant was involved in this incident.

(c) The totality of the applicant's behaviour was being considered and this was enumerated at length. In particular the applicant's response to a

wide range of measures put in place by the College and which were designed to address his misbehaviour was considered, and the applicant's failure to respond to those measures.

(d) Despite considering all the points put forward by the parents and noting that this was not a decision taken lightly, as evidenced by the fact that this was the first expulsion by the College for ten years, EPAT affirmed the decision of the Board to expel the applicant.

In short, I have no doubt that the reasons given by EPAT were intelligible and adequate. The applicant and his parents can have no doubt about the basis upon which EPAT reached its conclusion and how it came to affirm the decision that he should be expelled from the College. The applicant had a poor disciplinary record, he failed to address his wrongdoing despite extensive measures being put in place and this incident proved to be the final straw.

CCTV FOOTAGE

[25] In her affidavit the applicant's mother states that "she believed that CCTV coverage was a breach of N's right to privacy and was entirely disproportionate". She goes on to ask why the school could not have sent a teacher to have a look. She further complains that the College should have followed the BELB's policy as it is based on the Data Protection Act. These arguments were not the subject of any real amplification in the course of the submission by Mr Sands BL.

[26] On the basis that the applicant's Article 8 rights were engaged, the onus is on the College to:

(a) Objectively justify the interference.

(b) Demonstrate that the steps taken by the College were rational and connected with the objective and were not arbitrary.

(c) Satisfy the court that it constituted minimal interference – a fair balance being struck between the individual rights and the rights of the community.

[27] The use of covert surveillance was not disproportionate given that there had been illegal drugs used in that room the day before. I consider that a wide margin of appreciation should be given to schools in carrying out their pastoral functions. It is not for the courts to dictate how a school should look after the maintenance of discipline, especially when it has a duty to <u>all</u> the pupils in its care. This duty will ensure that none of its pupils ingest illegal drugs on its premises (and try to persuade them not to do so off its premises) and to make sure that they do not permit law-breaking on its premises.

[28] A teacher will only obtain a snapshot of what is happening unless he is hidden within the room. It is unrealistic to expect a teacher to provide surveillance for the out of bounds room throughout the day. Even if the College felt that it could afford to have a teacher so engaged with all his/her other duties, the College would still face the same complaint of invasion of the applicant's privacy. Furthermore, if the teacher enters a room at a particular time, he/she risks coming in too early or too late or of obtaining a false impression. It is noteworthy, and it is not disputed, that it was the parents who insisted that EPAT view the CCTV footage in order to remove any suggestion of involvement with illegal drugs. It is clear that EPAT had no problem with the use of CCTV and said that "it was reasonable and responsible of the school to investigate further". I considered that the College has acted proportionately in carrying out CCTV surveillance of the events in question given that illegal substances had been abused in this room on the day before. It was justified in doing so given what had happened before and the importance of keeping the school free of drugs. It was rational and legally connected with the objective, detecting and defeating illegal drug use. It constituted the minimum interference necessary to ensure that the College (and EPAT) obtained a fair and objective picture of what happened. In short, it was proportionate.

[29] The College was not bound by the BELB's policy on CCTV surveillance. Nowhere does the applicant begin to demonstrate a breach of the Data Protection Principles nor of the relevant statutory provisions of the Data Protection Act. These principles and statutory provisions were not opened to the court. They have since been considered in some detail by the court. The case presented on this issue has not overcome the hurdle necessary for leave to be granted.

FAILURE TO FOLLOW POLICIES

[30] There are three policies of the College which were drawn to the court's attention. The first is entitled "Drugs", the second is entitled "Substance Use and Abuse including Drugs Education" and the last is the "Scheme for the Suspension and Expulsion of Pupils". I should make it clear that policies such as these are not statutes or legal documents to be parsed in minute detail. They offer guidance to both pupils and their parents and to teachers as to what the College expects of its pupils, what standards it strives to achieve and what the consequences will be if its policies are ignored or flouted.

[31] As I have pointed out there is no doubt that the College does treat tobacco as being a drug and regards its use on school premises as serious: see definition of drugs and a drugs related incident in the policy entitled "Drugs" and see the definition of the term drugs in the sub-paragraph entitled "Rationale" in the Substance Use and Abuse including Drugs Education document. However it is clear that there is still a considerable difference between cannabis, an illegal substance, and tobacco, a legal substance. However, tobacco is harmful. It affects the health of those who smoke it, it can affect the health of those who are in the vicinity of those who smoke it and it can lead to long term addiction problems, especially amongst

young people. I should draw attention to the difference in the procedures to be adopted depending, whether a legally held substance or an illegal substance was involved as per the Substance Use and Abuse including Drugs Educational policy. However, in respect of tobacco the document says:

> "The school has a responsibility to promote healthy lifestyles and, in pursuit of this, teaches pupils about the hazards of smoking as part of the health education cross-curricular theme. The school must legally provide an environment which complements this teaching. It also has a legal duty to protect the health of staff and visitors to the school.
>
> **A pupil smoking offence is the most serious breach of the Code of Conduct and will be punished accordingly**." (Emphasis added).

Clearly the College takes a very dim view indeed of cigarette smoking.

[32] In the Scheme for the Suspension and Expulsion of Pupils policy document, it is clear that one of its fundamental policies is:

> "The expulsion of a pupil is the most serious disciplinary action that can be applied and in normal circumstances should be considered after all reasonable courses of action have been explored."

I note that this is the first expulsion from the College for a number of years. I have considered the regulations governing expulsions and am satisfied that the College complied with those. There are under paragraph 5 expulsions in two types of situations, namely:

> "(i) single major incident involving gross misconduct.
>
> (ii) as a last resort. That is:
>
> (a) where the school has taken all reasonable steps to avoid expelling a pupil.
>
> (b) where allowing the pupil to remain in school would be seriously detrimental to the education and welfare of the pupil or that of others in the school."

This case does not come under the first heading of gross misconduct. The "last resort" type situation is dealt with under paragraphs 5.4 and 5.5. I am satisfied in considering these provisions, which were not discussed in detail in court, that the College complied with the procedure set out in this policy document. The one point that was made on behalf of the applicant was that he had not received an Appendix 4 letter. In fact, my reading of the policy document is that there is no requirement to send a letter in any particular form. There is a pro forma document at Appendix 4 of the policy but that is a document which the College is advised to complete to assist the College in substantiating any expulsion: see paragraph 5.5. While, the pro forma document under Appendix 4 appears not to have been completed in that form, all the information was available that would have been included in the pro forma document. Indeed, EPAT's decision used this very information in helping to decide what course it should take on the appeal. There was no requirement to send this form to the applicant or his parents. Completion of the pro forma document is not a condition precedent to expulsion. There can be no doubt that immediately before the incident the applicant had been involved in serious misbehaviour for which he had been punished. The parents had been fully informed of the circumstances in respect of which his punishments arose. A whole host of measures had been put in place to bring about an improvement in his behaviour. The applicant had failed to respond satisfactorily to those measures. His misbehaviour continued and culminated in the subject accident on 12 April 2012. The applicant has not persuaded me that there is a case for judicial review on the basis that the College failed to follow its policies.

CONCLUSION

[33] The applicant had a fair hearing before an independent tribunal, EPAT, comprising experts in the educational field. Any complaint about unfairness or error arising from the decision of the Board, a decision made before it was known that the substance being used in the out of bounds room was tobacco, was eradicated by the applicant's appeal hearing. For the reasons given, I conclude that any leave for judicial review against the Board is pointless given the hearing which took place before EPAT. I do not consider that the Board's hearing or decision infected the appeal process. Nor have any grounds been put forward by the applicant or his counsel that would allow me to conclude the appeal process had been tainted. Further I do not consider any of the grounds in respect of which judicial review has been sought, have been made out against EPAT to the necessary standard. Accordingly, I refuse the applicant leave to seek judicial review.

[34] There can be no doubt that the continuance of proceedings is bound to be unsettling and upsetting to the applicant and will be unhelpful to him as he seeks to address his behavioural problems. Legal proceedings can serve only to distract him and undermine his prospect of receiving a grammar school education. In a case involving expulsion from a school in the Republic of Ireland, Hedigan J in Board of Management of the College v Secretary General of the Department of Education [2013] IECH 358 at paragraph [17] said:

> "He and his parents initially admitted the conduct with which we are dealing herein. He is not the first and certainly will not be the last to fall into error. Every one of us at some time or times in our lives falls in ways great or small. The measure of our lives however is not that we fall but that we rise again. We can only ever rise again when we confront and admit our fall and accept its consequences. Until we do that, we can never rise and get past our fall from grace. When we do, the path is always upwards and onwards. I hope the notice parties will reflect upon this in the trying times that lie immediately ahead."

On reflection, the applicant and his parents may consider these comments apposite to the applicant's present circumstances.