Trinity Term
[2010] UKSC 27
On appeal from: [2009] NICA 14

JUDGMENT

In the matter of an application by 'JR17' for Judicial Review (Northern Ireland)

before

Lord Phillips, President
Lord Rodger
Lady Hale
Lord Brown
Sir John Dyson SCJ

JUDGMENT GIVEN ON

23 June 2010

Heard on 19 and 20 April 2010

Appellant
Karen Quinlivan BL
Leona Askin BL
(Instructed by Madden & Finucane)

Respondent
Heather Gibson QC
Paul McLaughlin BL
(Instructed by Education & Library Board Solicitors)

Intervener (Northern Ireland Commissioner for Children and Young People)
Dr Tony McGleenan BL
(Written submissions)
(Instructed by John J Rice & Co Solicitors)

SIR JOHN DYSON SCJ

1. On 7 February 2007, the principal of a school in County Antrim suspended the appellant from school for 5 days. The appellant was a year 12 pupil. The suspension was renewed for 3 further 5 day periods until 13 March. Between 13 March and 20 April, the North Eastern Education and Library Board ("the Board") provided him with home tuition. He returned to the school in June to sit his GCSE examinations.

2. He issued these proceedings in April 2007 seeking judicial review of the principal's decision to suspend him. The case raises issues as to whether the principal had the power to suspend the appellant and, if he did, whether he exercised that power lawfully.

The facts

3. Much of the account that follows is derived from the affidavit sworn by the principal. At the end of January 2007, the appellant was absent from the school on work experience. On 31 January, the principal was approached by two female pupils at the school. He was told that one of them was terrified of the appellant. Like the Court of Appeal (Kerr LCJ, Higgins and Girvan LJJ), I shall refer to her as A. She made it clear that she did not want to make any formal complaint and did not wish the principal to tell the appellant that she had spoken to him about the appellant's behaviour towards her. Her complaint related to conduct both inside and outside the school. She said that it was causing her deep distress. The principal assured the two girls that he would help in whatever way he could. Later that day, the other girl came on her own to see the principal for a second time. She told him that A was suffering from deep distress, had extremely low self-esteem and was "thinking of ending it all". She gave the principal further details of the nature of the appellant's offending behaviour in the school. She said that it was of a "subtle and covert" nature. The principal regarded the report as being "sincere and genuine" and as "extremely serious".

4. The principal spoke to A's mother. She told him that she too was concerned about her daughter's state of mind and the possibility of suicide and that the appellant was the cause of the problem. She said that A was very vulnerable and needed to be monitored closely. The principal also spoke to Mrs O'Hare, the Child Protection Officer for the Board. Mrs O'Hare said that efforts should be made to comfort A and boost her self-esteem. He therefore arranged to make a classroom available to A and her friends during breaks and lunchtime periods.

5. During the following days, the principal had daily meetings with A and some of her friends and monitored her progress. He said that this served to confirm to him that the girls' concerns were "real and sincere". He also received confirmation from some of A's friends about the appellant's behaviour which they had witnessed.

6. On 1 February, the vice-principal attended a multi-disciplinary case conference that had been arranged by Social Services to consider the appellant. This conference was convened in view of the fact that allegations had been made against the appellant of criminal offences of a sexual and violent nature outside the school. It was not in any way related to the complaint that had been made by A. Indeed, it seems that those who attended the conference, who included the appellant's mother and grandmother and a representative of the police ("PSNI"), were not even aware of the complaint. The outcome of the conference was that the family were advised that, if they did not adhere to the Care Plan, consideration would be given to placing the appellant on the Child Protection Register.

7. On 2 February, the vice-principal informed the principal of what occurred at the conference and of the serious allegations that had been made against the appellant. Mrs O'Hare advised the principal that a risk assessment meeting should take place in the school.

8. This meeting took place on 6 February. Reference was made to the 4 alleged offences which had been the subject of discussion at the conference on 1 February. The minutes record the following:

> "<u>Issues Discussed</u>
>
> - Given the principle of 'innocent until proven guilty' how to assess any risk posed by [the appellant] to females in the school.
> - [The appellant's] Human Rights.
> - The balance of probability.
> - The concept of proportionality in any measures that may be undertaken.
> - The lack of any documented assessment of the alleged harm to [A].
> - The principle that Child Protection overrides rights of individuals.
> - The statutory duty on the Principal and Board of Governors to safeguard all the children in their school.

Action Plan

1. Social Services to carry out an assessment of the alleged incident with [A] and of any impact on her emotions.
2. [The appellant] to be suspended from school for 5 days, with the possibility of extension, whilst the above assessment takes place.

The suspension to be viewed as a precautionary measure, not a presumption of guilt.

3. PSNI to keep the other agencies informed of any developments in the justice system.
4. Following the Social Services assessment, NEELB to convene a formal multi-agency/multi disciplinary meeting to a) assess risk within the school and in transport to and from school b) plan the management of any perceived risk."

9. The principal says that it was agreed that, in order to protect A's identity and prevent any further deterioration in her mental health, the appellant should not be informed about her complaint. Two options were considered: (i) constant supervision of the appellant by a teacher or other member of staff and (ii) suspension of the appellant together with arrangements for his education off site. He says that he was not satisfied that sufficient teaching and staff resources were available to ensure constant monitoring and supervision of the appellant while he was on the school premises. Nor could he be satisfied that such an arrangement would ensure physical separation of the appellant from A. He was particularly influenced by the nature of the alleged conduct, namely "subtle and silent covert intimidation". Accordingly, it was decided that the appellant would be suspended as a "precautionary measure" (para 9 of the principal's affidavit).

10. Following the meeting of 6 February, the principal met Mr Freeman, the chairman of the Board. He explained to Mr Freeman that the suspension was precautionary in nature and that it was based on the need to protect the girl who had made the report.

11. On 7 February, the principal asked for the appellant to attend at his office. The principal explained that certain allegations had been made against him in relation to his behaviour, but that he could not go into them. He said that it had been decided that it was in the interests of everybody that he should be suspended. Following the meeting, the principal telephoned the appellant's mother and told her that the appellant would be suspended until a meeting could be arranged by Mrs O'Hare. On the same day, the principal wrote to the appellant's grandparents a letter in these terms:

"Following the Case Conference on Thursday 1 February 2007, at which you were present, a Risk Assessment meeting with representatives from the school, Social Services, NEELB Child Protection Officer, and the PSNI took place in school on Tuesday 6 February 2007. Based on the information presented at this meeting it was agreed that, in the circumstances, [the appellant] should not remain in school.

It must be emphasised that this is not an assumption of [the appellant's] guilt in these matters but instead a precautionary strategy which has been taken, I believe, in everyone's best interests, including [the appellant's].

A further meeting will be arranged by the NEELB as soon as possible in order to consider the matter further.

In the meantime, [the appellant] is suspended from school for five days, i.e. Thursday 8 February – Wednesday 14 February with a possible extension to follow.

Work will be made available for collection from the school office by an adult after 10.00 am on Thursday 8 February 2007 for [the appellant] to complete during this period of suspension.

Please contact me should you wish to discuss this matter or require any further information."

12. The principal had earlier drafted a letter of suspension whose opening paragraphs were:

"It has come to my attention that the PSNI is investigating a number of allegations outside of school of a serious nature which include sexual attacks on girls.

I have also had recent reports from girls who claim that he is deliberately intimidating them in school.

> Following a meeting with representatives from Social Services, NEELB Child Protection Officer and the PSNI, I have decided that [the appellant] should not at this time remain in school. ”

The wording of the draft letter was changed following advice that the principal received from Mrs O’Hare.

13. During the succeeding weeks, the principal received no information from the Board or Social Services about the progress of the assessment of A. On 14 February, he wrote another letter to the appellant’s grandparents saying that, “in order to allow for further investigation of the matter referred to in my last letter”, the suspension was to be extended for a further 5 days from 21 to 27 February. The letter stated that “this is not an assumption of [the appellant’s] guilt in the matters which we have discussed but instead a precautionary strategy”. On 23 February, he wrote a further letter to the grandparents in the same terms extending the suspension for a further 5 days from 28 February to 6 March. Finally, on 5 March he wrote another letter to the grandparents in the same terms extending the suspension for a yet further 5 days from 7 to 13 March.

14. Following the initial decision to suspend the appellant, the principal had contacted the Board’s Home Tuition Service and requested that a teacher be assigned to the appellant for tuition off-site. On 12 March, the principal wrote to the appellant’s parents informing them that home tuition had been arranged with effect from 14 March and that, consequently, the appellant would be marked on the school roll as “educated off site”.

15. In the period between 7 February and 14 March, the principal made arrangements for schoolwork to be prepared by the appellant’s teachers and left for collection at the school office. Work was made available in the subjects of Mathematics, English, Science, Religion, Business and Communication Systems, Music and History. Work was collected by or on behalf of the appellant in the first week only and it was not returned to the school for marking or guidance.

16. On 20 April, the principal wrote to the parents of all pupils within year 12 (including the appellant’s parents) saying that pupils could attend school to study for their examinations or stay at home if that was preferred. He says that he decided to include the appellant because, since the school timetable had been completed, additional staff resources were now available to monitor the appellant within the school. The appellant availed himself of facilities within the school on a number of occasions after 20 April, but he is shown on the School Registration Certificate as having been on study leave until late June.

17. On 4 May, a meeting was arranged at the school in order to discuss the situation with the appellant's mother and grandparents. It was noted that Social Services had not yet completed their assessment of A. It was agreed that a multi-agency risk assessment of the appellant may no longer be necessary and that, if the appellant availed himself of the school facilities, he would be escorted by a teacher to and from his allotted room; there would be close supervision of the year 12s at break -times; and the appellant would sit all of his examinations in a room on his own.

18. There is no evidence as to whether the Social Services assessment of A was ever completed. It would seem that the multi-risk assessment of the appellant was never carried out. Meanwhile, as I have said, the appellant had commenced these judicial review proceedings. The claim was dismissed by Weatherup J and his appeal dismissed by the Court of Appeal.

The statutory framework

Suspension and expulsion of pupils

19. The school is a "controlled school" to which the Education and Libraries (NI) Order 1986 SI 1986/594 (NI 3) as amended by SI 1993/2810 (NI 12) ("the 1986 Order") applies. Article 49 provides:

> "(1) Each board shall prepare a scheme specifying the procedure to be followed in relation to the suspension or expulsion of pupils from schools under its management.
>
> …….
>
> (4) A scheme prepared under paragraph (1)…shall provide that a pupil may be expelled from a school only by the expelling authority and shall include provision for such other matters as may be prescribed."

20. Article 134 provides that the Department of Education Northern Ireland ("the Department") may make regulations for the purpose of giving effect to the order.

21. Pursuant to article 134 of the 1986 Order, the Department made the Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995 (1995 NI 99) ("the Regulations") as amended by 1998 NI 255. Regulation 3 provides:

> " 3. Without prejudice to the generality of Article 49(4) of the 1986 Order a scheme prepared under Article 49(1), (2) or (3) of that Order shall include provision for the following other matters, that is to say –
>
> (a) a pupil may be suspended from school only by the principal;
> (b) an initial period of such suspension shall not exceed five school days in any one school term;
> (c) a pupil may be suspended from school for not more than forty five school days in any one school year;
> (d) where a pupil has been suspended from school, the principal shall immediately -
> i. give written notification of the reasons for the suspension and the period of the suspension to the parent of the pupil, to the board and to the Chairman of the Board of Governors….; and
> ii. invite the parent of the pupil to visit the school to discuss the suspension;
> (e) the principal shall not extend a period of suspension except with the prior approval of the Chairman of the Board of Governors and shall in every such case give written notification of the reasons for the extension and the period of extension to the parent of the pupil, to the board…"

22. The Board has prepared a scheme entitled "Procedures for the Suspension and Expulsion of Pupils in Controlled Schools" ("the Scheme"). It provides:

> "<u>Principles</u>
>
> 3.1 A pupil may be suspended only by the principal.
> 3.2 An initial period of suspension shall not exceed five school days in any one school term.
> 3.3 A pupil may be suspended from school for not more than forty-five school days in any one school year.
> 3.4 The principal shall not extend a period of suspension except with the prior approval of the Chairman of the Board of Governors and shall in every such case give written

notification of the reasons for the extension and the period of extension to the parent of the pupil and to the Board.

Steps to be followed prior to suspension

4.1 A school's disciplinary policy describes the standards of behaviour expected from pupils and outlines the procedures and sanction to be adopted when these guidelines are not adhered to.

4.2 The disciplinary policy will provide for the suspension of a pupil in certain circumstances. The option of suspending a pupil for a prescribed period should only be considered:

4.2.1 after a period of indiscipline – The school is required to maintain a written record of events and of the interventions of teachers, contacts with parents and any requests for external support from the Board's Educational Welfare and Educational Psychology services; and/or

4.2.2 after a serious incident of indiscipline – The school is required to have investigated and documented the incident. The investigation should include an opportunity for the pupil to be interviewed and his or her version of events given before the decision to suspend.

Instigating suspension

5.1 On taking the decision to suspend a pupil the principal must immediately notify the parents, in writing, of the suspension, its duration and the reasons for the suspension (for sample letter see Appendix 2). The letter notifying the parents of the suspension must be sent out on the day of the suspension. If the letter is sent home with the pupil this must be followed by a copy sent by 1st class post.

5.2 The letter must also invite the parents to visit the school to discuss the suspension. Should the parents accept this invitation the principal may consider it appropriate to invite other parties such as Educational Welfare, Educational Psychology or Social Services. The meeting should be chaired by the principal.

5.3 The school should keep full notes of the meeting….."

The Schools' Management powers

23. Article 9B(1) of the 1986 Order, inserted by 1989 NI 20, provides that it shall be the duty of a board to prepare a scheme or schemes of management for controlled schools under the management of the board. The Board prepared a scheme for management of the schools under its control ("the Management Scheme"). Article 26(1) of the Management Scheme provides that "in addition to his statutory functions and subject to the provisions of the Education Orders and regulations, orders and directions made thereunder ….and such directions as may, from time to time, be given to him by the Board of Governors, the Principal shall control the internal organisation, management and discipline of the school".

The background to the legislation

24. The background to the legislation is to be found in the "Report of the Working Party on the Management of Schools in Northern Ireland (1979)" otherwise known as the "Astin Report". The Astin Report was itself largely based on the report of the Committee of Enquiry appointed jointly by the Secretary of State for Education and Science and the Secretary of State for Wales entitled "A New Partnership for Our Schools (1977)" otherwise known as the "Taylor Report".

25. The Taylor Report noted that there was a lack of authoritative definition of the terms "exclusion", "expulsion" and "suspension" and that this had given rise to confusion in the minds of governors, teachers and parents (para 9.9). The report stated that suspension should not be used as a punishment (para 9.12). It said:

> "Suspension should be seen as providing a breathing space to allow rational consideration, discussion and accommodation between the parties concerned, or depending on the seriousness of the problem, a search for more fundamental solutions, including, in an extreme case, the possibility of education elsewhere."

26. The report also stated that it was unsatisfactory that there were wide differences from area to area in the procedures for suspension. There were "stringent and carefully defined suspension procedures for students at further education institutions" and "the corresponding procedures for school pupils should be prescribed more carefully" (para 9.15). At para 9.18, it made the following recommendations:

"1. the terms exclusion, suspension and expulsion, wherever they are used in statutory regulations or in local education authorities' regulations or instructions, should be authoritatively defined and differentiated in the way we have suggested;

2. every local education authority should be required to make and publish arrangements for the procedures to be followed in its area with regard to the suspension of pupils from attendance at school which satisfy the following general requirements:

i. when a pupil's behaviour over a period gives rise to a real possibility that he will have to be suspended from attendance if it continues, opportunity for consultation and discussion should be accorded to his parents;

ii. it should be clearly known by all concerned who has the power to decide that a pupil should be suspended from attendance or should remain suspended after a specified period;

iii. a time limit of not more than three days should be fixed for the duration of any suspension by the head teacher;

iv. provision should be made to avoid danger to the pupil concerned, or to others, as a result of his suspension;

v. when a decision is made to suspend a particular pupil the parents should be informed by a quick and reliable means, should be told how long the suspension is to last and should be given full particulars of the reason for it. A record should be made in a register kept specifically for the purpose within the school and available to the governing body.

vi. the governing body should be empowered to extend the suspension for a strictly limited period, specified by the local education

authority for all cases, during which the interested parties should be brought together to seek an acceptable solution;

vii. if no satisfactory solution is found within this period the case should be referred to the local education authority;

viii. there should be provision for appeal by the parents to the local education authority, to be heard within a specified period, against the continuation of a suspension beyond a specified period or against any other action proposed as an alternative to the child's resumption of attendance at the school. Parents should be told how, and to whom they should appeal, when the appeal will be heard and what procedure will be followed;

3. legislative steps be taken to ensure that:

i. no registered pupil is debarred from attendance at his school, except on medical grounds, otherwise than in compliance with the suspension procedures arranged by the local education authority;

ii. no registered pupil is expelled from a school except by the decision of the local education authority responsible for maintaining the school, who should inform the governing body."

27. The Astin report in its turn stated that there was an urgent need for clarification and greater precision in legislation concerning suspensions and expulsions of pupils from grant-aided schools (para 7.70). Suspension and expulsion, though regrettably necessary on occasions, should be steps of last resort (para 7.71). The recommendations of the Taylor Report were excellent and should be adopted for Northern Ireland: the key features included that a clear procedure should be laid down and made public (para 7.73). At para 7.74, the report recommended *inter alia* that the stated period for which a principal was empowered to suspend a pupil should be 5 days (not 3 days as recommended by the Taylor Report).

The issues

28. Four issues arise on this appeal. First, on what ground did the principal suspend the appellant? Secondly, did he have the power to suspend the appellant on that ground? Thirdly, if he did have the power to suspend the appellant, did he exercise that power lawfully? Fourthly, was there a breach of article 2 of the First Protocol of the European Convention on Human Rights ("the Convention")?

On what ground did the principal suspend the appellant: disciplinary or precautionary?

29. Both Weatherup J and the Court of Appeal held that the suspension in the present case was "precautionary" rather than "disciplinary". Weatherup J said, at para 43, that the school was not investigating a disciplinary offence, but was awaiting the assessment from Social Services. The Court of Appeal said, at para 22:

> "If an action such as exclusion is taken on disciplinary grounds, it surely takes place on the basis that disciplinary grounds exist *i.e.* that there is a reason associated with discipline for taking the action. If a pupil is excluded or suspended in order to investigate whether an offence has been committed, this cannot, in our opinion, be said to have occurred on disciplinary grounds—it is done in order to investigate whether disciplinary grounds exist."

30. In his affidavit, the principal makes it clear that he suspended the appellant as a "precautionary measure based upon child protection issues" (para 25). That view is reflected in all the suspension letters: "this is not an assumption of [the appellant's] guilt in these matters, but instead a precautionary strategy….in everyone's best interests".

31. The labels "disciplinary grounds" and "precautionary grounds" appear to derive from the House of Lords decision in *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363. In that case, the claimant pupil was excluded from school by the defendants following a fire at the school in respect of which he was investigated by the police and subsequently charged with arson. There was a power to exclude (permanently or temporarily) on "disciplinary grounds" under section 64 of the School Standards and Framework Act 1998, but the limit for temporary exclusion was 45 days in any one school year. The claimant had been suspended temporarily for more than 45 days in the school year

pending the outcome of the criminal process. It was, therefore, common ground that the exclusion was unlawful according to domestic law.

32. Lord Hoffmann said, at para 36, that the statutory code was well adapted to the use of exclusion as a punishment for a serious disciplinary offence, imposed in the interests of the education and welfare of the pupil and others in the school. It was far less suitable for dealing with a case like the case under appeal "in which the pupil was excluded on precautionary rather than penal grounds".

33. The dichotomy between disciplinary and precautionary grounds also appears in the speech of Baroness Hale. At para 74, she said:

> "Section 64 is concerned only with exclusion 'on disciplinary grounds'. The requirements all assume that it is imposed as a determinate sanction for a serious breach of discipline, rather than as an indeterminate precaution pending the resolution of what may or may not turn out to have been a serious breach of discipline."

34. In the context of the 1998 Act, therefore, the question was whether the suspension was "on disciplinary grounds" within the meaning of section 64. If it was not, it was convenient to describe it as being on "precautionary grounds". The relevant question in the present case is whether the grounds on which the appellant was suspended were within the scope of the Scheme. If they were not, then it is convenient to describe the suspension as having been made on precautionary grounds.

35. If paras 3 and 4 of the Scheme are read together, it is clear that a pupil may only be suspended under the Scheme on disciplinary grounds. Para 4 specifies the steps that are to be followed "prior to suspension". It provides that the option of suspending a pupil should *only* be considered if the conditions stated in paras 4.2.1 or 4.2.2 (as the case may be) are satisfied. These two paragraphs are concerned with indiscipline. The present case has (rightly) proceeded on the basis that bullying or intimidation by one pupil of another in school is "indiscipline" within the meaning of the Scheme. Thus, the assertion by the principal that he suspended the appellant on "precautionary grounds" necessarily implies the assertion that he did not suspend him on disciplinary grounds and that the Scheme did not apply to the case.

36. I cannot accept either the express or the implied assertion. In my opinion, it is clear from the evidence that the principal suspended the appellant *both* because he considered that there was a *prima facie* case that the appellant was guilty of the

misconduct which had been reported by A and her friends *and* because he wished to protect A (and others in the School) from the appellant. These reasons were not mutually exclusive. It is plain from the principal's affidavit that he was of the view that there was a *prima facie* case against the appellant. He said that he regarded the girls' reports as "both sincere and genuine" (para 3) and his daily meetings with A and some of her friends served to "confirm to me that the girls' concerns were real and sincere" (para 5). Para 12 of the affidavit is also important:

> "I also made an assessment as to the likelihood of the veracity of her complaints. In this regard, the new information which I received about allegations of assault on females in the community provided an important context to my overall assessment but was not the motivating factor behind the decision. I had previously refused to take action based upon unproven allegations of sexual assault by the [appellant] outside of school. I was also conscious of advice from the Department of Education that in circumstances where there was a conflict between the interests of children, the needs of the victim should be paramount."

37. This is a revealing paragraph. It is clear that the principal regarded the allegations of assaults on females outside the school as relevant to his decision. They could only be relevant if he considered that they provided further support for his belief that there was a *prima facie* case that A's complaint was true. Otherwise it is difficult to see how these allegations provided "an important context" to his overall assessment. It is also significant that he described A as "the victim". That could only have been on the footing that he believed the girls' account. It is clear that, as he says, the principal made an assessment as to the likelihood of the veracity of A's complaints and concluded, for the reasons that he gave, that they were likely to be true.

38. The Court of Appeal, at para 26, rejected the submission made on behalf of the appellant that, although the suspension was avowedly for the purpose of obtaining a Social Services' assessment of A, it proceeded on the assumption that the appellant was guilty. In my opinion, it is clear that the decision to suspend was closely linked to the principal's view that there was at least a *prima facie* case that the appellant was guilty of the conduct that had been alleged by the girls. On the evidence of the principal, it is inconceivable that he would have suspended the appellant if he had disbelieved the account of his behaviour given by the girls, but had nevertheless believed that A was distressed for some other reason by the presence of the appellant in the School. If he had not believed that there was at least a *prima facie* case that the appellant was guilty of the alleged indiscipline, he would not have suspended him.

39. In my opinion, the answer to the first question is that the appellant was suspended on disciplinary grounds within the scope of the Scheme. Whether the suspension complied with the Scheme is a separate question which I deal with below. The reasons for my opinion are: (i) despite his statements to the contrary (both at the time and in his affidavit), it is clear that the principal suspended the appellant because he considered that there was a *prima facie* case that the appellant had committed one or more acts of indiscipline; (ii) he did not suspend him as a holding or precautionary measure pending investigation of whether disciplinary grounds for suspension existed: he suspended him pending the Social Services assessment of A and there was no further investigation of whether disciplinary grounds existed; (iii) the principal had investigated the alleged incident or incidents of indiscipline before suspending the appellant (as required by para 4.2.2 of the Scheme), but the investigation was limited to speaking to A and the other girls and did not include an opportunity for the appellant to be interviewed; (iv) the suspensions of 5 days at a time were in accordance with para 3.2 of the Scheme; and (v) at para 11 of his affidavit, the principal states that he believes that his actions "were in accordance with the [Scheme]".

Was there power to suspend the appellant?

40. It is not in dispute that there was power to suspend the appellant under the Scheme on disciplinary grounds. That is the short answer to the second issue. I should add that it has (rightly) not been argued that there was power to suspend a pupil on disciplinary grounds *outside* the Scheme.

41. A question that was considered in the courts below was whether there is power to suspend a pupil on precautionary grounds or whether the Scheme is exhaustive of the power of a principal to suspend. The Court of Appeal were of the view that the general management powers available to school authorities must include a power to suspend as a "precautionary measure" in appropriate circumstances. In the case of *Re M's application* [2004] NICA 32 the Court of Appeal (Kerr LCJ, Nicholson and Campbell LJJ) spoke of the practical need for a power to suspend as a precautionary measure. At para 20, they said:

> "…we consider that it is entirely proper for a principal to suspend a pupil who may face the prospect of expulsion if the allegations made against him are substantiated for the purpose of having the case against the pupil explored. One need only instance a simple example to demonstrate the inevitability of that conclusion. If a pupil was alleged to have assaulted a teacher, it would be inconceivable that the principal should not be able to suspend the pupil pending a full investigation of the incident or a final decision as to what the ultimate punishment should be."

42. There is strong support for that view, which was replicated by the Court of Appeal in the present case, in the dicta of Lord Scott in the *Lord Grey School* case who said, at para 69:

> "It seems to me clear that the management powers of a head teacher enable him or her to keep a pupil temporarily away from the school for reasons that have nothing to do with discipline. An obvious example is that of a pupil who arrives at school one day suffering from some infectious disease. It may be necessary, in order to safeguard the health of the other pupils and the school staff, for the pupil to be sent home until he or she is no longer infectious. It is to be hoped that the pupil's parents or guardians would agree with this course. But if they did not, the head teacher…would, in my opinion, have power to impose it….It would, in my opinion, be lamentable if, by an application of sections 64-68 to situations to which they could never have been intended to apply, managers of schools found themselves placed in a statutory straightjacket and prevented from taking sensible decisions to deal with unusual situations. "

43. Thus it was that the Court of Appeal in the present case held that the principal was entitled to suspend the appellant under his general management powers. These had to be exercised reasonably and in accordance with the common law rules of procedural fairness.

44. In my opinion, it is important to bear in mind the background to the 1986 Order and the schemes that were made under it. As the Taylor and Astin Reports demonstrated, before the 1986 Order was made, the right to suspend and expel pupils was not subject to specific regulation. Control was effected by invoking the common law. This was unsatisfactory, because it gave rise to uncertainty. The recommendations of the reports included that there should be clearly defined suspension procedures. Parliament accepted these recommendations. It considered that it was unacceptable to leave the question of suspension and exclusion of pupils to be regulated by general management powers and the common law. The 1986 Order envisaged that each board would prepare a scheme specifying the procedure to be followed in relation to the suspension or expulsion of pupils from schools under their management. Article 49(4) states that a scheme "shall include provision for such other matters as may be prescribed".

45. It would have been open to the Board to prepare a scheme which allowed the suspension or expulsion of pupils on grounds other than disciplinary grounds. Such a scheme would have been required to specify the procedure to be followed in relation to suspension or expulsion on those other grounds. But the Board did not take that course. Its response to article 49 of the 1986 Order was to produce a

scheme which provided for suspension and expulsion of pupils on disciplinary grounds only.

46. I can see that it might well be convenient for a principal to have a power to suspend on precautionary grounds, for example, for the reasons given by the Court of Appeal in *M's* case and by Lord Scott in the *Lord Grey School* case. There is no evidence as to why the Board produced a scheme which limited the power to suspend and expel pupils in the way that it did. It may be that it did not contemplate that there would be circumstances in which it would be expedient to suspend or expel a pupil on precautionary grounds. On the other hand, it may be that, taking the view that a pupil should be suspended or expelled only as a last resort, the Board made a deliberate decision not to permit a principal to suspend or expel on precautionary grounds. Support for the view that suspension and expulsion should be seen as a step of last resort is to be found at para 7.71 of the Astin Report. Lord Bingham put the point crisply, at para 21, in the *Lord Grey School* case:

> "The immense damage done to vulnerable children by indefinite, unnecessary or improperly-motivated exclusions from state schools is well-known, and none could doubt the need for tight control of the exercise of this important power."

47. In the light of the background to article 49 of the 1986 Order and the problems that had been exposed by the Taylor and Astin reports which it was intended to address, I consider that schemes prepared under article 49(1) should be interpreted as defining exhaustively the circumstances in which a power to suspend or expel a pupil may be exercised. I would, therefore, hold that the Scheme defines exhaustively the circumstances in which a pupil may be suspended or expelled in a school under the control of the Board. If the Board wishes to give school principals the power to suspend or expel on precautionary grounds, then it should amend the Scheme to provide for this expressly and to regulate the exercise of the power.

Was the suspension lawful?

48. The principal has not disclosed the details of the alleged misbehaviour of the appellant that resulted in the decision to suspend. It is, therefore, not clear whether there was a single incident or a series of incidents of indiscipline which led to the decision. But either way, it is clear that he was of the view that this was a case of one or more serious incidents of indiscipline within the meaning of para 4.2.2 of the Scheme. The contrary has not been argued. Para 4.2.2 requires that after a serious incident of indiscipline, the school is required "to have investigated

and documented the incident". Crucially, it also provides that "the investigation should include an opportunity for the pupil to be interviewed and his or her version of events given *before* the decision to suspend" (emphasis added).

49. The principal communicated his decision to suspend the appellant at the meeting in his office on 7 February. He told the appellant that certain allegations had been made against him, but he could not give any details. Without more ado, he then told the appellant that he was being suspended. There can be no doubt that the appellant was not given an opportunity to give his version of events before he was suspended.

50. There was, therefore, a clear breach of para 4.2.2 of the Scheme. That breach fundamentally undermined the decision to suspend. The right accorded by para 4.2.2 to a pupil to put his or her version of events before a decision to suspend is made is fundamental. It reflects the fact that a person's right "to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it" is one of the fundamental rights accorded by the common law rules of natural justice: see per Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237, 279 F-G.

51. There was also a breach of para 5.1 of the Scheme in that the letter of 7 February did not give the reasons for the suspension. The letter stated that the decision was based on information presented at the meeting on the previous day and that there was no assumption of the appellant's guilt. It is true that the last sentence of the letter informed the grandparents that they should contact the principal if they wished to discuss the matter or required further information. But para 5.1 requires the principal to notify the parents of the reasons for the suspension "immediately" on taking the decision to suspend. Further, it is clear that, if the parents or grandparents had asked for more information, the principal would not have given them details of the allegations against A, because, on the advice of the Board, he had decided to respect A's confidence and not to do so.

52. As I have already said, the principal had drafted a letter which included the sentence: "I have also had recent reports from girls who claim that he is deliberately intimidating them in school". That might not have been sufficient to satisfy the requirements of para 5.1 even if it had been sent before the decision had been made to suspend, but it would at least have given the appellant some idea of the nature of the allegations that were being made. Unfortunately, on the advice of Mrs O'Hare this sentence was omitted from the letter that was sent.

53. The principal was undoubtedly faced with a very difficult situation on 1 February. Understandably, he was extremely concerned for the well-being of A.

He decided that he should respect her confidence. This decision was bound to put him in conflict with para 4.2.2 of the Scheme and probably para 5.1 as well. He decided to suspend the appellant without giving him an opportunity to give his version of events and without giving his parents/grandparents the reasons for his decision, and to suspend him until Social Services had completed their assessment of A. It is not clear what assessment Social Services was being required to undertake, still less how the outcome of the assessment would impact on the decision to suspend the appellant. Further, it is not clear what the principal would have done if (as proved to be the case) the assessment was not completed within the period available for suspensions (not more than 45 days in a school year).

54. One of the odd features of this case is that at para 11 of his affidavit the principal states that he believes that his actions "were in accordance with the Board's Scheme for the suspension and expulsion of pupils". Para 4.2.2 of the Scheme is uncompromising in its terms, reflecting the seriousness of a decision to suspend or expel a pupil on disciplinary grounds. Neither the principal nor the Board seems to have appreciated that the course that they followed would necessarily involve a breach of the Scheme.

55. There were alternative avenues that the principal should have explored. For example, he did not explore the possibility of investigating the allegations on the basis of evidence from A's friends alone. They claimed to have witnessed the alleged incident or incidents. If this proved impossible, he could have asked A and her mother whether they would object to his investigating the alleged incidents using the evidence of the girls as well as her evidence. He could have explained to them that he owed a duty to everybody at the school to decide whether the complaints that had been made by A and the other girls were true and that he was required by law to ask the appellant for his version of events before deciding what steps, if any, to take.

56. He says that at the meeting of 6 February, he considered whether it would be possible for a teacher or other member of staff to supervise the appellant and monitor his behaviour, but concluded that he was not satisfied that sufficient resources were available to ensure the physical separation of the appellant from A. The appellant and A were not in the same school years and the need to ensure their physical separation would only have arisen during breaks and lunch periods. There is nothing to indicate that the principal made an analysis of precisely what additional calls would be made on the school's resources if the appellant was to be monitored and supervised during the break and lunch periods. No evidence has been produced to show what additional calls would have been made on the school's resources and why the school's existing resources could not have met them. Furthermore, if the school had been unable to meet the additional calls from its existing resources, there is no evidence that consideration was given to the possibility of obtaining the necessary additional resources from the Board.

57. For the reasons that I have given, therefore, the suspension of the appellant was unlawful, since it was in breach of both paras 4.2.2 and 5.1 of the Scheme.

Was there a breach of article 2 of the First Protocol of the Convention?

58. It is submitted on behalf of the appellant that the conduct of the respondents amounted to a denial of his right to education in breach of article 2 of the First Protocol of the Convention. So far as material, article 2 provides:

> "No person shall be denied the right to education."

59. The extent of the right conferred by article 2 was considered by the House of Lords in the *Lord Grey School* case. At para 24, Lord Bingham said:

> "The Strasbourg jurisprudence, summarised above in paras 11-13, makes clear how article 2 should be interpreted. The underlying premise of the article was that all existing member states of the Council of Europe had, and all future member states would have, an established system of state education. It was intended to guarantee fair and non-discriminatory access to that system by those within the jurisdiction of the respective states. The fundamental importance of education in a modern democratic state was recognised to require no less. But the guarantee is, in comparison with most other Convention guarantees, a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the state. There is no Convention guarantee of compliance with domestic law. There is no Convention guarantee of education at or by a particular institution. There is no Convention objection to the expulsion of a pupil from an educational institution on disciplinary grounds, unless (in the ordinary way) there is no alternative source of state education open to the pupil (as in *Eren v Turkey* (Application No 60856/00) (unreported), 7 February 2006). The test, as always under the Convention, is a highly pragmatic one, to be applied to the specific facts of the case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils? In this case, attention must be focused on the school, as the only public authority the respondent sued, and (for reasons already given) on the period from 7 June 2001 to 20 January 2002."

60. The question, therefore, is whether between 7 February and 20 April the school denied the appellant effective access to such educational facilities as were provided by the state. Ms Quinlivan submits that the appellant suffered an unlawful restriction to his education and that in consequence there was a breach of article 2. She relies on the decision of the ECtHR in *Şahin v Turkey* (2005) 44 EHRR 99, para 154:

> "In order to ensure that the restrictions that are imposed do not curtail the right in question to such an extent as to impair its very essence and deprive it of its effectiveness, the Court must satisfy itself that they are foreseeable for those concerned and pursue a legitimate aim. However, unlike the position with respect to articles 8 to 11 of the Convention, it is not bound by an exhaustive list of 'legitimate aims' under article 2 of Protocol No 1… Furthermore, a limitation will only be compatible with article 2 of Protocol No 1 if there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

61. She submits that the suspension of the appellant from the school was a restriction on his right to education and that the principal's response to the allegations against him was disproportionate. He could and should have explored alternatives to suspension such as those mentioned at paras 55 and 56 above and there was no review of the proportionality of the suspension as the weeks went by. She also makes the point that the suspension came at a crucial time in the appellant's education, coming as it did in his GCSE year.

62. In my view, there was no "restriction" on the appellant's right to education under article 2 in this case. It follows that the statement at para 154 in *Sahin's* case has no application and no questions of proportionality arise. It is true that (as I have held) the appellant was suspended from the school in breach of domestic law. But it does not follow from this that there was any restriction on his right not to be denied "effective access to such educational facilities as the state provides" for pupils such as the appellant. In the *Lord Grey School* case, the pupil had been excluded from the school in breach of domestic law, but the House of Lords nevertheless held that the exclusion did not, in the circumstances of that case, amount to a breach of his article 2 right.

63. As Lord Bingham said in the *Lord Grey Case* at para 24, there is no Convention right to education of a particular kind or quality, other than that prevailing in the state. Thus, there is a breach of article 2 only if the person is denied effective access to such educational facilities as the state provides for such pupils.

64. Article 86 of the Education (Northern Ireland) Order 1998 (SI 1998/1759 (NI 13))provides:

> "(1) Each board shall make arrangements for the provision of suitable education at school or otherwise than at school for those children of compulsory school age who by reason of illness, expulsion or suspension from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.".

65. The state, therefore, provides educational facilities for pupils who are suspended from school and the appellant was not denied access to those facilities in this case. The fact that the standard or quality of the education provided may have been low is not material. What matters is that the appellant was given access to the alternative facilities provided for pupils who have been suspended. Work was made available by the school for the appellant immediately following his suspension in all the principal subjects: see para 15 above. From 14 March until 20 April, he received home tuition for 8 hours per week mainly in Mathematics and English. Understandably, the appellant's mother complains that this was inadequate. But there is no evidence that the arrangements made available and provided by the school were different from those that the state made available and provided to any pupil such as the appellant who, for whatever reason, was not able to attend school. I have little doubt that the facilities made available between 7 February and 13 March (which in the event were not accepted) were not as effective from an educational point of view as attendance in a classroom would have been. It may be that the same can be said in relation to the merits of home tuition of 8 hours per week. But for the reasons that I have given, there was no breach of article 2 of the First Protocol in this case.

Overall conclusion

66. I would, therefore, allow the appeal and declare that the appellant was unlawfully suspended from the school from 7 February until 20 April 2007. But I would also declare that there was no breach of article 2 of the First Protocol of the Convention.

LORD PHILLIPS

Introduction

67. I have had the benefit of reading the judgment of Sir John Dyson. I agree with his conclusions (i) that the appellant was unlawfully suspended from his school from 7 February until 20 April 2007, but (ii) that there was no breach of article 2 of the First Protocol of the Convention. As to the second conclusion, I share Sir John's reasoning and have nothing that I wish to add. As to the first conclusion, I have reached it by a somewhat different route, both from that of Sir John and from that of Lord Rodger and Lord Brown. I can summarise that route as follows:

i) The Board's scheme entitled "Procedures for the Suspension and Expulsion of Pupils in Controlled Schools" ("the Disciplinary Scheme") does not govern all circumstances in which the principal of a controlled school can lawfully deny a pupil access to the school.

ii) The circumstances in which the principal suspended the appellant fell within the scope of the Disciplinary Scheme.

iii) The principal's actions did not comply with the requirements of the Disciplinary Scheme and were, in consequence, unlawful.

The scope of the Disciplinary Scheme.

68. Article 49 of the Education and Libraries (Northern Ireland) Order 1986 provides:

> "(1) Each board shall prepare a scheme specifying the procedure to be followed in relation to the suspension or expulsion of pupils from the schools under its management"

69. The object and the scope of this provision can readily be deduced from the relevant recommendations of the Reports which, as is common ground, the

provision was designed to implement, namely the Taylor Report and the Astin Report.

70. Sir John has summarised the relevant provisions of these Reports in paragraphs 24 to 27 of his judgment. They deal with exclusion from a school, whether temporary or permanent, in a disciplinary context – that is by way of reaction to aberrant behaviour on the part of the pupil. The cause of such behaviour may or may not involve culpability on the part of the pupil. The Court has recently heard an appeal in which evidence was given of the large number of pupils who have been excluded from school because of behaviour caused by autism spectrum disorders. Sir John has quoted the statement at para 9.12 of the Taylor Report that suspension should not be used as a punishment but as providing a breathing space for rational consideration of the way ahead.

71. It follows that the scheme that Boards are required to prepare must deal with the procedure to be followed in relation to suspension or expulsion for disciplinary purposes. If there is to be a power for a principal temporarily to exclude a pupil from the school while investigating alleged misbehaviour, provision for this should properly be included in the Disciplinary Scheme.

72. The respondents have drawn a distinction between "disciplinary suspension" and "precautionary suspension". Disciplinary suspension they define as suspension by way of sanction for established misconduct. Precautionary suspension they define as suspension while investigations take place as to whether or not there has been misconduct. It is their submission that the Disciplinary Scheme regulates only the former type of suspension, not the latter. I do not agree. The scheme required by article 49 of the 1986 Order should cover the investigatory stage of the disciplinary process. If it makes no provision for temporary exclusion from school during this stage, then temporary exclusion is not permitted by the scheme.

73. The respondents found, for their distinction between disciplinary and precautionary suspension, on one decision of the Court of Appeal in Northern Ireland and one of the House of Lords. The former is the case of *Re M's Application* [2004] NICA 32, cited by Sir John at para 41 of his judgment. In an earlier passage in the same paragraph the Court said:

> "[20] We are satisfied that school principals must have the power, in appropriate cases, to suspend pupils before investigating the full circumstances of an alleged infringement of school rules or other misbehaviour. In those circumstances suspension is not a form of

> punishment but merely a means of allowing the proper investigation of the allegations."

74. There are two schools of thought as to whether a principal should have power to exclude a pupil from the school while carrying out investigations of alleged misconduct by the pupil, but if he is to have such a power it must be part of the relevant Disciplinary Scheme. I agree with all members of the Court that the 1986 Order requires a scheme that deals comprehensively and exclusively with all exclusions from school that fall properly within its scope.

75. The House of Lords decision relied upon by the respondents is the *Lord Grey School* case [2006] 2 AC 363. In that case their Lordships made *obiter* comments on the scope of section 64 of the School Standards and Framework Act 1998. That section provided that the power to exclude could only be taken "on disciplinary grounds" and the House questioned whether this could preclude exclusion of a pupil pending the result of a criminal trial. I do not find the observations of the House support the suggestion that the scheme required by article 49 is not concerned with the investigatory stage of disciplinary proceedings.

76. The passage that Sir John has quoted at para 42 from the speech of Lord Scott is, however, illuminating. I do not consider that article 49 has any bearing on the power of a principal to keep a pupil temporarily away from school for a reason that has "nothing to do with discipline". Such exclusion does not fall within the meaning of "suspension or expulsion" in article 49, which is dealing with the disciplinary context. Miss Gibson QC for the respondents has helpfully drawn attention to circumstances which have nothing to do with discipline that may justify, indeed require, a principal to exclude a child from school. One is where the lack of cleanliness of the pupil or the pupil's clothes so requires – section 34 of the Health and Personal Social Services (Northern Ireland) Order 1972 (SI 1972/1265 (NI 14)). Another is where the pupil is infectious or contagious, or is in quarantine – section 5 of the Public Health Act (Northern Ireland) 1967.

77. The Scheme of Management drawn up pursuant to article 3 of the Education (Northern Ireland) Order 1998 provides:

> "26. (1) In addition to his statutory functions and subject to the provisions of the Education Orders and regulations, orders and directions made thereunder and to the provisions of this scheme and a financial scheme under the Education Orders and such directions as may, from time to time, be given to him by the Board of Governors, the Principal shall control the internal organisation, management and discipline of the school."

This gives the principal the power, and indeed the obligation, to exclude a pupil in circumstances that do not fall within the Disciplinary Scheme where the proper management of the school so requires. Such circumstances are not likely to arise very often in practice.

The circumstances in which the principal suspended the appellant

78. It follows from the conclusions that I have set out above that it does not matter whether the appellant's suspension or exclusion was "disciplinary" or "precautionary". The critical question is whether it was part of a disciplinary process or whether it was for a reason that had nothing to do with discipline. If it formed part of the disciplinary process, it was only lawful if permitted by the Disciplinary Scheme. If it was not part of the disciplinary process, then different questions arise in order to determine whether the appellant's exclusion was pursuant to the proper exercise of the principal's general managerial powers.

79. There is a problem as to how one approaches the purpose of the appellant's suspension or exclusion. Is it to be judged on what the principal told the appellant, his mother and his grandparents, or is it to be judged from the principal's own viewpoint? This was not explored in argument and, at the end of the day I have concluded that it does not make any difference.

80. The information provided to the appellant, his mother and his grandparents is summarised at paragraphs 11 to 13 of Sir John's judgment. This makes it plain that the appellant's suspension was part of a disciplinary process. The appellant himself was told that he was being suspended because of allegations about his behaviour. The letter sent to the grandparents on 7 February referred to the Case Conference on 1 February when allegations of serious criminal offending had been made against the appellant. The reference to the fact that the suspension did not involve an assumption of guilt and that the matter would be considered further suggests that the suspension was in order to enable further consideration to be given to the allegations made. That impression would have been reinforced by the subsequent letters stating that the suspension was being extended for further periods of five days "in order to allow for further investigation" of the matter referred to in the letter of 7 February.

81. The fact that the original suspension was for five days and that subsequent extensions were for the same period was also suggestive of suspension under the Disciplinary Scheme. In these circumstances it is no cause for surprise that the grounds upon which the appellant sought relief in his judicial review proceedings included failure to comply with the Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995 and taking "into account irrelevant

considerations, in particular unproven allegations made about the Applicant in relation to his conduct outside school".

82. The principal's own understanding of the grounds on which he was suspending the appellant are less easy to analyse. These seem to have been a combination of concern for the welfare of the anonymous pupil who had complained of the appellant's treatment and a belief, at the least, that there was a prima facie case that the appellant had been guilty of serious misconduct. Significantly the principal himself believed that he was acting under the Disciplinary Scheme.

83. For these reasons I have reached the firm conclusion that the circumstances under which the principal suspended the appellant fell within the scope of the Disciplinary Scheme. I do not think that the principal was purporting to impose a disciplinary sanction. Rather his action was "precautionary" in that it was provisional suspension in order to give further consideration to the allegations of misconduct made against the appellant and the consequential risk posed by his behaviour.

Failure to comply with the Disciplinary Scheme

84. The Disciplinary Scheme made no provision for precautionary suspension. Whether this was as a matter of policy or oversight does not matter. The consequence was that it was not open to the principal to suspend the appellant as a precautionary measure, rather than as a disciplinary sanction after following the procedure required by the Disciplinary Scheme. The appellant's suspension was unlawful.

85. I would end by expressing my agreement with those who have sympathised with the predicament in which the principal found himself. Without the power of precautionary suspension his options were limited and he was not well advised as to how to proceed. But for the reasons that I have given I agree that the appellant's appeal must be allowed.

LORD RODGER

86. I agree with Sir John Dyson that the appeal should be allowed, but, like Lord Brown, I reach that conclusion on the basis that the Principal purported to

suspend the appellant as "a precautionary measure" and that, under the Management Scheme which applied to the school, he had no power to do so.

87. On 31 January 2007 two girls spoke to the Principal and made an allegation of misconduct by the appellant. While the Court has not been furnished with any details, it is accepted that the allegation was of some form of bullying, which was said to be of a "subtle and covert" nature. It is clear that, having heard the initial account given by the female pupil and her friend, and having heard a further account from her friend later the same day, the Principal was inclined to believe what they said. No doubt, even though it related to entirely separate matters, what he heard the next day after the multi-disciplinary case conference would have tended to reinforce his view. Indeed, as Sir John Dyson says, at para 38, on the Principal's evidence, it is inconceivable that he would have suspended the appellant if he had disbelieved the girls' account of his behaviour. If he had not believed that there was at least a prima facie case that the appellant had done what they said, he would not have suspended him.

88. But it does not follow, in my view, that, because the Principal proceeded on the basis that there was a prima facie case against the appellant, he suspended him on disciplinary, rather than precautionary, grounds. The fact that he accepted that there was a prima facie case against the appellant is entirely consistent with his proceeding on a precautionary basis. In short, the Principal would never have taken any precautionary steps to protect the girls by suspending the appellant if, on the available information, he had not been inclined to accept their account. That the suspension was, in fact, taken as a precautionary measure is confirmed not only by what the Principal says in his affidavit but by the minute of the risk assessment meeting which took place on 6 February. The meeting decided that Social Services were to carry out an assessment of the alleged incident with the girl and of any impact on her emotions. Also the appellant was to be suspended for 5 days, with the possibility of extension, while the assessment took place. The minute included the words (in bold): "The suspension to be viewed as a precautionary measure, not a presumption of guilt." This approach was reflected in the (otherwise misleading) letter from the Principal to the appellant's grandparents on 7 February. I therefore see no basis for second-guessing Weatherup J or the Court of Appeal, both of whom decided that the suspension was precautionary.

89. The girl who alleged that she was being bullied said that she did not want to make a formal complaint and did not wish the Principal to tell the appellant that she had spoken to him about his conduct towards her. Everything that the Principal then did seems to have proceeded on the basis that he could not reveal the identity of the girl, and hence the detail of her allegations, to the appellant. Even in his affidavit of 7 June 2007, he said "I do not now wish to say or do anything which may betray the confidence of this pupil or which may assist in identifying her." Pupils who are bullied will often worry in case the bully finds out that they have

reported his conduct. So they may well ask that what they have said should be kept confidential. The Northern Ireland Department of Education policy recognises this, but adds that pupils should be told that if teachers "are concerned about your safety, or someone else's, they may need to share this with others, but they will always tell you first": *Pastoral Care in Schools: Promoting Positive Behaviour* (2001), para 110. Here, the Principal took a serious view of what the girls had told him. He clearly thought that the matter could not be passed over without further investigation and without appropriate steps being taken if the allegation proved to be true. But the Principal could never have properly concluded that the allegation was indeed true and taken action to deal with the situation without informing the appellant of the allegation against him and giving him an opportunity to give his version of events. So this was a situation where, as envisaged in the policy paper, the girl's complaint could not be kept confidential. As it was, the school was already taking steps, in conjunction with the girl's parents, to support and protect her. If more steps were required because the complaint had been revealed to the appellant, doubtless the Principal would have taken them.

90. In fact, the Principal took no steps to investigate the allegation himself. Instead, on 6 February, the risk assessment meeting decided that Social Services were to carry out an assessment of the alleged incident with the girl and of any impact on her. It does not appear that any approach to the appellant was envisaged. So this assessment was unlikely to be conclusive and certainly could never have resulted in any action against the appellant. But, in the meantime, the appellant was to be suspended, initially for 5 days, while the assessment took place. The following day, the Principal proceeded to suspend the appellant for 5 days without giving him any real account of the basis for the suspension – even though, it appears, the appellant had an idea about who might have complained. In fact, as we know, suspension succeeded suspension until 20 April and the appellant was not actually allowed to return to school until the beginning of May - by which time Social Services had still not completed their assessment of the girl. Indeed, the evidence does not show whether that assessment was ever completed. The upshot is that, on the basis of an allegation of bullying, not involving physical violence, the appellant was suspended for many weeks. This was, in all probability, a more severe consequence than would have been imposed on him even supposing that the incident had been investigated promptly, misconduct on his part had been established and he had been punished for it under the school's current discipline policy.

91. No doubt, all these steps were taken in a difficult situation and with the best of intentions. But, at least with the benefit of hindsight, it is clear that the course adopted was misguided. The Principal's insistence on concealing the allegation from the appellant made it impossible for the school to carry out a proper investigation of the alleged misconduct. Perhaps for that reason, instead of the school investigating and dealing with the incident within its disciplinary system, it

outsourced the investigation of the girl's account to Social Services, which never produced a report. Given the insistence on confidentiality, it is in any event unclear what practical steps were envisaged as following from that investigation. In the meantime, the same insistence on confidentiality appears to explain why the appellant's grandparents were given a false and misleading reason for his suspension in the Principal's letter of 7 February.

92. As Sir John Dyson has demonstrated, the Management Scheme which applied to the school actually makes no provision for precautionary suspension. In other words, the only use of suspension which it contemplates is as a severe "sanction" (para 4.1), only short of expulsion, after a period of indiscipline (para 4.2.1) or after a serious incident of indiscipline (para 4.2.2). In the latter case suspension can only be considered after the school has investigated and documented the incident, the investigation being one which "should include an opportunity for the pupil to be interviewed and his or her version of events given before the decision to suspend." Here, plainly, that stage was never reached.

93. The Court was not told why the Management Scheme does not include any provision for the use of suspension as a precautionary measure. The simple fact is, however, that it does not. Moreover, since the concern behind framing specific rules on suspension was to remove doubts about how it should be used, in respectful disagreement with the courts below, I see no room for implying into the general management powers of the Principal a power to suspend a pupil on a precautionary basis. Whether the Scheme should be amended to include such a power in appropriate circumstances is a matter of policy for the Northern Ireland Executive and not for this Court.

94. In that situation in February 2007 the Principal had no power to suspend the appellant, as he did.

95. For these reasons, and in agreement with Lord Brown, I too would allow the appeal and declare that the appellant was unlawfully suspended from the school from 7 February until 20 April 2007.

96. For the reasons which Sir John Dyson gives, I would also declare that there was no breach of article 2 of the First Protocol to the Convention.

LADY HALE

97. It is remarkable how quickly children pick up a basic sense of justice and fairness. How often do we hear them complain – rightly and wrongly - that "it's not fair"! Some of the injustices in their lives are not within the control of the adults around them but many of them are. Where adults are in control of children's lives they have a moral duty to be fair and sometimes this is also a legal duty. If children are faced with a world which is arbitrary and unfair they may see little point in obeying the rules or being just and fair in their own dealings with others when they grow up.

98. Because we can all empathise with the Principal in his dilemma, we must also empathise with the appellant in the situation he faced. Aged 15, he is coming up to his GCSE examinations. He is away from school on work experience for a few days and due to return on Tuesday 6 February 2007. On Wednesday 7 February he is summoned to the Principal's office, told that allegations have been made against him and that he is being suspended as a result. At first this does not sink in properly. He is also handed a letter to take home to his grandparents, with whom he lives. He opens this, which spells out that he is suspended for five school days (a whole week) with a possible extension to follow. He is angry and upset ("it's not fair"). He returns to the Principal's office and asks why he is being suspended. He is told that there is nothing more the Principal can tell him. The letter to his grandparents is misleading. It implies that the reason for his suspension is the information about allegations outside school, which was "shared" at the case conference on 1 February. It says nothing about the real reason, which was the allegations made by A and her friends. The suspension is extended for four further weeks. Once "home" tuition is arranged, from 14 March, there are no further formal extensions. But the reality is that he is not free to come back to school and was not in fact allowed back in until the beginning of May.

99. This is unjust in two ways. He has been away from school for nearly three months at a critical time. His tutor's reports indicate that he attended and co-operated very well with the eight hours' tuition he was offered each week but he was clearly a pupil who needed help to improve basic skills. This looks like a more severe punishment than would have been warranted had the allegations against him been proved. More seriously, he was not given any opportunity of explaining his side of the story in a way which would have made any difference. The Principal left others to take the matter forward and made no further attempt to establish the truth or to negotiate a solution which would enable both the pupils concerned to continue their education in the school.

100. There can be no doubt that what the school did was not in accordance with the Board's scheme, prepared under article 49 of the Education and Libraries

(Northern Ireland) Order 1986, and thus unlawful. I agree with Lord Phillips that it is not helpful or necessary to decide whether the Principal's action was "disciplinary" or "precautionary". Precautionary is not a term of art. It is quite clear that what was done was done in a disciplinary context – that is, because the appellant had been accused of indiscipline – and not for any other reason. The scheme is undoubtedly intended to be exhaustive of the grounds upon which a pupil can be suspended in a disciplinary context and the procedures which must be followed before he is. It requires the indiscipline to be established and it requires the pupil to be given an opportunity of defending himself. It also requires that his parents are told the right reason. None of that happened: hence the unlawfulness.

101. Whether such schemes should provide for suspension while allegations of indiscipline are being investigated – either by the school or (as in *A v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363) by the police or some other body - is, as Lord Rodger points out, a policy question and, I would venture to suggest, not an easy one. Suspension is bound to have an adverse effect upon a pupil's education, as well as on his self-esteem and on his reputation with others. It may well expose him to risks while he is not at school. It is rightly regarded as a last resort. If a scheme were to provide for suspension during investigations, as Lord Brown points out, it would still have to require that the pupil be told the reasons for it and given an opportunity to argue against it. The Principal's dilemma would remain.

102. Whether there is power to send a pupil home, or to require him not to come in, for reasons that "have nothing to do with discipline" is not a question that arises on the facts of this case. There are arguments either way. On the face of it, article 49 covers all involuntary exclusions from school for whatever reason. Yet "common sense" might suggest that there should be some flexibility, for example if a pupil insists on attending school when clearly too ill to do so. Improper dress, on the other hand, looks like a disciplinary matter. And the answer to a dirty child might be quietly and tactfully to insist that he has a wash. Usually, these situations can be dealt with by agreement rather than by coercion. The scheme could address itself to such matters if it were thought appropriate to do so. So I would prefer not to express a concluded view on the point.

103. As to article 2 of the First Protocol to the European Convention on Human Rights, the test is that laid down by Lord Bingham of Cornhill in the *Lord Grey School* case at para 24: "have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the state provides for such pupils?" This is a question of fact and degree. Left to myself, I might have thought that three months out of school in the run-up to important public examinations was indeed to deny him effective access to the educational facilities which the state provides for year 12 pupils. He should not have been relegated to eight hours' tuition a week for six weeks. But I appreciate that others think and have thought

that it may be enough to be "effective". The appellant has achieved his major objective of establishing that he should not have been suspended in the way that he was. Had this been recognised at an early stage, he might also have achieved his objective of being allowed back into school. The only purpose of finding a violation of his Convention rights would be to pursue a claim for damages, which could only succeed if the court were satisfied that an award were necessary to afford him just satisfaction: see Human Rights Act 1998, s 8(3). Miss Quinlivan rightly did not place this at the forefront of her submissions. I see no point, therefore, in pressing my doubts to a dissent but, as a declaration is a discretionary matter, I would prefer to make no declaration at all on this issue, the appellant having achieved just satisfaction from his declaration on the first.

104. Finally, we should not forget the complainant either. The Principal believed her friend and her mother about how upset she was and rightly took steps to help her. But we shall never know precisely why she was so upset and whether she had good reason to be. What lessons has she learned? It is good that the school was prepared to take her seriously and give her support. It is not good that an anonymous report of complaints which could not be disclosed was seen to lead to sanctions against the alleged perpetrator. In legal proceedings, children have to be reassured that they will be listened to and their complaints taken seriously. They may also be given help and support to improve their lot. But if adverse consequences are to be visited upon parents or others as a result of their complaints, they cannot be given a guarantee of confidentiality. Those elementary principles of fairness are as applicable in the school disciplinary context as they are in legal proceedings. In the words of Eleanor Roosevelt on the screen at the end of our courtroom, "Justice cannot be for one side alone, but must be for both".

105. For these reasons, and in agreement with the other members of the court, I would allow the appeal and declare that the appellant was unlawfully suspended from school from 7 February until 20 April 2007. I would refrain from making the second declaration.

LORD BROWN

106. I have had the advantage of reading in draft the judgment of Sir John Dyson and, like him, would allow the appeal and declare (1) that the appellant was unlawfully suspended from 7 February until 20 April 2007 but (2) that there was no breach here of article 2 of the First Protocol of the Convention.

107. I add a few short paragraphs only because I confess to very considerable sympathy for the Principal in this case and because I prefer to found my own

judgment on the proposition that there is simply no power under the Board's Scheme to suspend a pupil as a "precautionary measure" rather than on the basis that the appellant was in fact suspended here on disciplinary grounds and unlawfully so because his suspension was in breach of paragraphs 4.2.2 and 5.1 of the Scheme.

108. I am sympathetic to the Principal both on the facts and because, quite understandably, he thought he was entitled as a matter of law to suspend the appellant on precautionary rather than disciplinary grounds. So far as the facts are concerned it appears that the Principal was so concerned at A's distress and state of mind (he thought she posed a real risk of suicide) that he felt unable to betray her confidence in making the complaint. As to whether there exists a power of precautionary suspension, the Northern Ireland Court of Appeal had already decided in *Re M's application* [2004] NICA 32 that such a power existed and strong support for such a view was to be found in the judgments of the House of Lords in *A v Head Teacher and Governors of Lord Grey School* [2006] 2AC 363. True, the House of Lords was there concerned with sections 64-68 of the School Standards and Framework Act 1998 and not with any Scheme made under Northern Ireland's (1986) Order and (1995) Regulations but it is difficult to see why these essentially similar provisions should be construed and applied differently.

109. At first blush the case for having a power of precautionary suspension appears strong to the point of irresistibility. On reflection, however, even if such a power be regarded as desirable, I am not convinced that it is necessary, still less that such a power must inevitably exist (as the Court concluded in *Re M's application*). As Sir John's judgment makes clear, there are strong policy reasons for treating all school exclusion (suspension as well as expulsion) as a remedy of last resort and for subjecting this power to the most rigorous controls. Even in the case of an alleged assault on a teacher (the example given in *Re M's application*) segregation within the school or other measures short of suspension are available to deal with the situation pending full investigation.

110. Sir John also explains (para 45) that if after all it *is* thought necessary or desirable to have a power of precautionary suspension, then the Board can amend their Scheme to provide for it. The power would obviously need to be carefully regulated. This very case, indeed, illustrates the problems of a power of precautionary suspension not subject to clear controls: essentially it assumes the right to suspend a pupil for an unlimited period (subject only to the nebulous constraint of reasonableness) provided only that the suspension is not characterised as disciplinary and steps are taken (as here they were, following the Court of Appeal's judgment) to ensure that the pupil's school records do not indicate a disciplinary breach. The power would inevitably need to be subject to time limits (presumably of such length as to allow for a sufficient investigation of the

disciplinary breach alleged) and that investigation would inevitably require the pupil to be notified of the nature of his alleged breach of discipline and given a proper opportunity to respond.

111. It is surely inconceivable that a Principal would be permitted to pretend (as here he did by his letter to the appellant's grandparents of 7 February 2007) to be suspending the appellant because of various alleged offences outside school under investigation by the PSNI when in fact he was suspending him because of A's complaint (about which he felt unable to notify the appellant and whose account of the matter, therefore, he would necessarily never learn). All this, I readily accept, was undertaken by the Principal in the best of good faith. In hindsight, however, it can be seen that even had a power of precautionary suspension existed, it could never properly have been exercised in this way.

112. The importance of this case, however, I repeat, is not that it illustrates a power being improperly exercised but rather that it establishes that no such power exists.

113. As to the article 2 question, there is really nothing I want to add to Sir John's analysis. The appellant's suspension from school, unlawful though it was under domestic law, does not translate into a denial of the right to education. As Lord Hoffmann made clear in the *Lord Grey School* case (para 61), the breach of such a public law duty, not giving rise to a private right of action, cannot be promoted to a breach of duty under section 6 of the Human Rights Act 1998 remediable by a claim for damages.