Judgment Approved by the court for handing down

Neutral Citation Number: [2024] EWHC 2267 (ADMIN)

Case No: AC-2023-LON-002904

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 September 2024

Before :

Jason Coppel KC
(sitting as a Deputy High Court Judge)

- -

Between :

THE KING
(on the application of
(1) LM
(2) AM

Claimants

- and -

AN ACADEMY TRUST

Defendant

- -
- -

Jim Hirschmann and Rosa Thomas (instructed by Tees Law) for the Claimants
Hannah Slarks (instructed by Browne Jacobson LLP) for the Defendant

Hearing date: 18 July 2024

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Approved Judgment

This judgment was handed down remotely at 14:00pm on 2nd September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Jason Coppel KC:

Background

1. In this judicial review claim, the Claimants seek to quash a decision of the Governors Disciplinary Committee of the Defendant ("the School") of 3 July 2023 to uphold the decision of the School's Headteacher ("the Headteacher") dated 2 November 2022 to permanently exclude their child, TM, from the School with effect from 3 November 2022. The Governors Disciplinary Committee had been reconstituted in order to reconsider the Headteacher's decision to exclude TM after an initial decision of the Committee dated 25 November 2022 had been quashed on review by an Independent Review Panel ("IRP").

2. As set out in a letter dated 2 November 2022, the Headteacher had concluded that TM had committed "*acts of sexual violence and harassment towards other students on and off the school premises*". TM had "*touched another male student's genitals inside and outside his clothing*" and on more than one occasion and to more than one student he had "*asked to see students' penises or for them to feel his*". There had been "*occasions where he has touched a female student inappropriately without her consent around her torso outside her clothes*". TM had also "*threatened her if she did not hug him" and "made sexually explicit remarks about female students*". In the Headteacher's view, these were "*significant and persistent breaches of the school's rules*" which required TM's exclusion, and his return to school would put other students at risk. A managed move to another school had been considered but had been ruled out.

3. A disciplinary committee of the Governing Body of the School ("the GDC") considered TM's exclusion at a meeting on 21 November 2022. The Claimants and TM were present and were represented by a barrister, who was permitted to question the Headteacher at length. The GDC upheld TM's exclusion. It decided that the decision to exclude TM was lawful. In its view, there had been "*persistent breaches and a serious breach of the school's behaviour policy regarding sexual abuse, harassment, or assault*". Having reviewed witness statements and CCTV evidence, "*the panel were convinced on the balance of probabilities, that the behaviour attributed to [TM] by his peers occurred*". Such behaviour would cause serious harm to other pupils at the School if TM were readmitted, not least because TM "*is in complete denial of his actions*". The GDC rejected a complaint by the Claimants that the Headteacher had not compiled a formal risk assessment, on the basis that the Headteacher's approach had been one of continuous risk assessment, and action in response to that assessment, whilst investigating allegations against TM. The GDC also decided that the Headteacher's decision had been reasonable and procedurally correct, rejecting detailed criticisms advanced by the Claimant's barrister. In its view, the Headteacher had considered all relevant evidence before making his decision to exclude TM and any further information which could have been gathered would not have changed the decision.

4. The Claimants exercised their right to seek a review of the GDC's decision by an IRP. The IRP met on 24 January 2023 in person and again on 11 May 2023 by remote hearing. The Claimants and TM again attended the meetings and both the Claimants and the School were legally represented. By majority decision, the IRP quashed the

GDC's decision that TM should be permanently excluded and directed that the Governing Body reconsider TM's reinstatement.

5. The criticisms of the GDC which were made by the IRP fell into two categories (see §9.6 of the IRP's decision): failures to consider relevant matters and procedural failings. The particular criticisms made by the IRP can be summarised as follows:

   i) The GDC had failed to provide sufficiently detailed reasons as to enable all parties to understand why it had come to its conclusion (§8.2).

   ii) The GDC should have been far more robust in testing more thoroughly why alternative provision – that is, a managed move of TM to another school - was not explored and/or why a multi-agency approach (as recommended by the guidance *Keeping Children Safe in Education* ("KCSIE"), §§465 & 540), was not at least considered. Reasons should have been recorded in the GDC minutes as to why agencies other than the police, social services and the school counsellor had not been involved (§8.3).

   iii) The GDC acted unreasonably in not recording, in its minutes or in its decision, the extent to which it had tested (a) the qualifications and capacity of the Headteacher to investigate this complex case single-handedly and (b) the School's effectiveness in meeting the standards set by KCSIE (§8.4).

   iv) It was of great concern to the IRP that there was no risk assessment process underway in June 2022 when (different) allegations had been made against TM, and indeed from November 2020, when TM had disclosed to a music teacher that he had sampled music from a pornographic website (§8.5).

   v) The GDC did not test how the School managed cases which were being processed by the criminal justice system and failed to ask to see the review recommended in §524 of KCSIE or evidence of the support offered by the School which was required by §526 of KCSIE (§8.6). (It is in fact unclear what the IRP was referring to by this finding and it did not feature in the complaints made by the Claimants in this judicial review claim).

   vi) The number of roles taken on by the Headteacher in investigating and deciding upon TM's exclusion "*did compromise the impartiality of the investigation*" and witness statements taken from pupils had been written by the Headteacher or by another teacher with the assistance of the Headteacher's Personal Assistant ("PA") (§8.7). The GDC should have queried how authentic each statement was. The IRP stated further, in §8.12, that "*[f]or the person who will make the final decision (DfE PEX para 1) to permanently exclude to have written the statements on behalf of each witness is not good practice*". Given the weight attributed to the witness evidence it was "*unjust and represents a flaw*" that the taking of the statements was not overseen by a person other than the Headteacher and each witness allowed to write their own version.

   vii) It was "*unreasonable for the Headteacher to do everything himself*" and "*unreasonable for the GDC not to test this in a more robust manner and weigh this appropriately in their final deliberations*" (§8.8).

viii) It was not good practice to have a majority of parent governors on the panel and for the potential conflict of interest which this raised not to have been addressed at the start of the meeting (§8.9).

ix) It was "*a flaw*" for the GDC's decision to have been signed only by the clerk to the Governing Body who had not been present at the GDC's meeting (§8.10).

x) The Claimants had been denied information relating to TM's exclusion until the last minute before the GDC's meeting, including access to relevant CCTV footage. There was "*an over cautious approach to release of information which has the potential to deny justice and as such, could be a flaw*" (§8.11).

6. The IRP summarised: "*A majority of the Panel believed the GDC did fail to consider many relevant matters in this case (8.2–8.8) and together with the procedural flaws (8.9–8.13), they were of such magnitude and so all-encompassing that they went to the heart of the matter and justice was not done*" (§9.6).

7. A reconstituted disciplinary committee of the Governing Body ("**the RGDC**"), consisting of three different governors, met to reconsider TM's exclusion on 26 June 2023. It considered the evidence which had been before the GDC, the IRP's decision, relevant statutory guidance and fresh written representations from the Claimants. It did not hear any oral evidence or submissions. On 3 July 2023, it decided unanimously that the decision to exclude TM was "*lawful, rational and fair*" and that he should not be reinstated.

8. The RGDC considered that the Headteacher had been entitled to find on the balance of probabilities that incidents had occurred of TM "*touching the genitals of male pupils, asking to see other pupils' penises or to feel his penis and the inappropriate touching of female pupils which was unwanted or conducted under the threat of violence*". In its view, there was credible evidence that, on balance, TM had engaged in unwanted touching of male and female pupils. The Headteacher was "*entitled to view TM's behaviour as serious and persistent breaches of [the School's] behaviour policy and that TM 's behaviour was sufficiently serious to require permanent exclusion in order to protect other pupils from ongoing risk*". The RGDC accepted that "*attempts to arrange a managed move had been unsuccessful and that a managed move was not likely to be feasible in the circumstances*".

9. The RGDC considered the criticisms of the IRP and of the Claimants as to the gathering of evidence by the Headteacher. It acknowledged that "*in some areas the collection of evidence could have been better*" but it "*did not feel that these issues detracted from the evidence to the extent that it was unreasonable to rely upon it*". The RGDC also accepted that there had been "*a shortcoming in codifying the support and protective actions for [TM] and other pupils into a formal written risk assessment*" but this would not have altered the support offered to TM or affected the fact that, by October 2022, serious incidents had already occurred.

10. Finally, the RGDC considered the procedural criticisms of the IRP and the Claimants, including as to possible conflict of interest in a decision being made by parent governors. Its view was that "*any issues which might have given rise to potential or*

perceived unfairness at the GDC meeting and in respect of the subsequent GDC decision have been addressed in their reconsideration meeting".

11. A new school for TM had been identified prior to the RGDC's decision and I understand he has settled well there. These proceedings were issued on 2 October 2023. The Claimants claim a quashing order in respect of the RGDC's decision and also mandatory orders, including an order to readmit TM to the School. Permission for judicial review was initially refused on the papers by Rory Dunlop KC on 8 November 2023, but was granted by Tom Little KC on 19 March 2024 following an oral permission hearing. I understand that even if I were to find the decision of the RGDC to be unlawful, TM may not now wish to move back to the School. But the proceedings are nevertheless important to him and his parents, as a means whereby he may be able to "clear his name" of the allegations which were found proven against him, and to have his exclusion from the School expunged from his record.

The legal framework

12. Section 51A(1) of the Education Act 2002 (the "**Act**"), as modified by reg. 21(2) of the School Discipline (Pupil Exclusions) (England) Regulations 2012 (SI 2012/1033, the "**Regulations**"), provides that:

"The principal of an Academy in England may exclude a pupil from the school for a fixed period or permanently."

13. Under reg. 23(3) of the Regulations, where the principal decides to exclude a pupil permanently:

"The principal must, without delay –

(a) inform the relevant person, the proprietor and the local authority … of the period of the exclusion and the reasons for it; and

(b) give the relevant person [who is the parent of a pupil under 18] notice in writing stating the following matters –

(i) the period of the exclusion and the reasons for it;

(ii) that the relevant person may make representations about the decision to the proprietor and that, where the pupil is not the relevant person, the pupil may also be involved in the process of making representations, and an explanation as to how the pupil may be involved;

(iii) the means by which representations may be made;

(iv) where and to whom representations should be sent; and

(v) where a meeting of the proprietor is to consider the exclusion, that the relevant person may attend and be represented at the meeting (at their own expense), and may be accompanied by a friend."

14. Where the proprietor is informed under reg. 23(3)(a) of the permanent exclusion of a pupil and in certain other circumstances, "*the proprietor must decide whether or not the pupil should be reinstated*" (reg. 24(2)). In taking that decision, the proprietor must "*(a) consider the interests and circumstances of the excluded pupil, including the circumstances in which the pupil was excluded, and have regard to the interests of other pupils and persons working at the Academy (including persons working at the Academy voluntarily); (b) consider any representations about the exclusion made to the proprietor by or on behalf of the relevant person or the principal; (c) take reasonable steps to arrange a meeting at which the exclusion is to be considered for a time and date when persons including the principal and the relevant person can attend and make representations about the exclusion*" (reg. 24(3)).

15. The decision by the principal and the mandatory review by the proprietor in the case of an Academy are separate stages but are regarded as part of a single process: see *R (DR) v Headteacher of St George's Catholic School and others* [2002] EWCA Civ 1822, §37; *R v Governors of Dunraven School, ex parte B* [2000] ELR 156, 182.

16. Regulation 24(6) provides that if the proprietor of the Academy decides not to reinstate the pupil it must without delay inform the relevant person that they may apply for the proprietor's decision to be reviewed by a review panel (that is, an IRP). Regulation 25 sets out the procedure for the review. Like the proprietor, the IRP must also consider "*the interests and circumstances of the excluded pupil, including the circumstances in which the pupil was excluded, and have regard to the interests of other pupils and persons working at the Academy (including persons working at the Academy voluntarily)*". Pursuant to s. 51A(4) of the Act, as modified by the Regulations, an IRP may "*(a) uphold the decision of the proprietor, (b) recommend that the proprietor reconsiders the matter, or (c) if it considers that the decision of the proprietor was flawed when considered in the light of the principles applicable on an application for judicial review, quash the decision of the proprietor and direct the proprietor to reconsider the matter*". The IRP has no power to reinstate a pupil, because it is performing a review rather than substituting its own decision for that of a governing body (*R (A Parent) v Borough of XYZ* [2022] EWHC 1146 (Admin), §33). The IRP's decision is binding on the relevant person, the principal and the proprietor (reg. 25(6)).

17. Regulation 26 sets out the procedure for reconsideration of a decision not to reinstate a permanently excluded pupil following a review:

> *"(1) Where the review panel-*
>
> *(a) recommends that the proprietor reconsiders a decision not to reinstate a pupil who has been permanently excluded; or*
>
> *(b) quashes the proprietor's decision and directs the proprietor to reconsider the matter,*
>
> *the proprietor, within 10 school days after notification under paragraph 19 of Schedule 1 of the review panel's decision, must reconsider the exclusion.*

(2) When the proprietor has reconsidered its decision it must inform the relevant person, the principal and the local authority (and, if applicable, the home local authority) of its reconsidered decision and the reasons for it without delay…".

18. The standard of proof to be applied by the principal, the proprietor and the review panel is the balance of probabilities (reg. 28).

19. The principal, the proprietor and the review panel must all "*have regard to any guidance given from time to time by the Secretary of State*" (reg. 27). This guidance includes, notably, "*Suspension and Permanent Exclusion from maintained schools, academies and pupil referral units in England, including pupil movement*" (September 2022, "the Exclusions Guidance"). This provides, in relation to the headteacher's decision to exclude (§11):

"*A decision to exclude a pupil permanently should only be taken:*

- in response to a serious breach or persistent breaches of the school's behaviour policy; and

- where allowing the pupil to remain in school would seriously harm the education or welfare of the pupil or others in the school."

20. In relation to the decision of a governing body on whether a pupil should be reinstated, the Exclusions Guidance states (§122):

"In reaching a decision on whether a pupil should be reinstated, the governing board should consider whether the decision to suspend or permanently exclude the pupil was lawful, reasonable, and procedurally fair. This should consider the welfare and safeguarding of the pupil and their peers, the headteacher's legal duties, and any evidence that was presented to the governing board in relation to the decision to exclude."

21. As to the decision of the review panel, the Exclusions Guidance states, *inter alia*:

"225. When considering the governing board's decision in light of the principles applicable in an application for judicial review, the panel should apply the following tests:

• Illegality – did the governing board act outside the scope of its legal powers in deciding that the pupil should not be reinstated?

• Irrationality – did the governing board rely on irrelevant points, fail to take account of all relevant points, or make a decision so unreasonable that no governing board acting reasonably in such circumstances could have made it?

• Procedural impropriety – was the governing board's consideration so procedurally unfair or flawed that justice was clearly not done?

226. Procedural impropriety means not simply a breach of minor points of procedure but something more substantive that has a significant impact on the quality of the decision-making process. This will be a judgement for the panel to make, but the following are examples of issues that could give rise to procedural impropriety: bias;

failing to notify parents of their right to make representations; the governing board making a decision without having given parents an opportunity to make representations; failing to give reasons for a decision; or being a judge in your own case (for example, if the headteacher who took the decision to exclude were also to vote on whether the pupil should be reinstated).

227. Where the criteria for quashing a decision not to reinstate has not been met, the panel should consider whether it would be appropriate to recommend that a governing board reconsiders its decision not to reinstate the pupil. This should not be the default option but should be used where evidence of procedural flaws has been identified that do not meet the criteria for quashing the decision, but which the panel believes justify a reconsideration of the governing board's decision. This could include when new evidence presented at the review hearing was not available to the governing board at the time of its decision."

22. Where a governing body is required to reconsider, following the decision of a review panel decision, then according to the Exclusions Guidance (*inter alia*):

"241. It is important that the governing board conscientiously reconsiders whether the pupil should be reinstated, whether the panel has directed or merely recommended it to do so. Whilst the governing board may still reach the same conclusion as it first did, it may face challenge in the courts if it refuses to reinstate the pupil, without strong justification...

246. The reconsideration provides an opportunity for the governing board to look afresh at the question of reinstating the pupil, in light of the findings of the IRP. There is no requirement to seek further representations from other parties or to invite them to the reconsideration meeting. The governing board is not prevented from taking into account other matters that it considers relevant. It should, however, take care to ensure that any additional information does not make the decision unlawful. This could be the case, for example, where new evidence is presented, or information is considered that is irrelevant to the decision at hand...

250. ... The governing board's decision should demonstrate how they have addressed the concerns raised by the IRP."

23. In *A Parent*, Lang J observed (§87):

"In my view, the form of reconsideration that the School Exclusion Guidance envisages ... is for a governing body panel to review the material presented at the original hearing, and to consider whether or not its previous findings and decision should be changed or upheld. There is a residual discretion to consider new information, if relevant."

24. The claim consists of a number of different allegations of irrationality on the part of the RGDC. Such allegations spanned both aspects of the well-established test of irrationality: (a) irrationality in the classic, Wednesbury sense, which connotes a decision which is "*so unreasonable that no reasonable authority could ever have come to it*", and (b) irrationality produced by a demonstrable flaw in the reasoning underlying a decision, such as where reliance is placed on an irrelevant consideration, or there is a failure to consider a relevant matter, or there is no evidence to support an

important step in the reasoning (see §55 of *A Parent*, citing *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, §98).

Ground 1: the RGDC's findings of fact were irrational and unclear

25. Pursuant to §1 of the Order of Tom Little KC granting permission, the Claimants' pleaded case is to be taken from their Skeleton Argument for the oral permission hearing ("the OPH Skeleton Argument"). Ground 1 makes the composite allegation that the findings of fact made by the RGDC were irrational and unclear, but advances three distinct sub-grounds.

26. The allegation of illegality by the RGDC due to lack of clarity in its findings of fact is founded on a dictum of the Court of Appeal in *Re K (Children)* [2022] EWCA Civ 468 [2022] 1 WLR 3713, §85:

> *"There is, in our view, a real danger in reducing bespoke, detailed and subtle findings made by a judge to one or two word headline labels, in place of the original detail. The case analysis uses the labels of rape, bullying, manipulation and physical abuse, each of which emits a neon light in an erroneous and unjustified manner."*

27. The Claimants allege that the RGDC failed to particularise its findings of fact, falling foul of the danger articulated in *Re K*. However, the dictum in *Re K* is a flimsy basis for a public law challenge. The Court of Appeal was, in §85, criticising a case analysis which had been compiled by CAFCASS and which included a summary of the findings of fact made in the first instance family law judgment which was under appeal. The summary was, in the Court's view, an inadequate reflection of what the judge had actually decided, which was significant because CAFCASS's case analysis had supported a recommendation which was considered at a subsequent family law hearing, and may have influenced the outcome of that hearing. The Court of Appeal made its criticism expressly notwithstanding that the case analysis was not the subject of the appeal. CAFCASS was not a decision-maker, and the Court of Appeal was not analysing any decision made by it, or the reasoning underpinning such a decision. The Court's dictum was no doubt intended to stand as guidance for the compilation of other similar reports in the future, but it was plainly not intended to be applicable in the very different context of public law decision-making and cannot easily be read across to that context, where there are already well-established standards of adequacy of reasons and rationality.

28. Any attack upon the factual findings made by the RGDC must also recognise the nature of the function of the Governing Body which is considering a permanent exclusion decision of a headteacher. A Governing Body should "*ensure that exclusion (including the facts on which it is founded) is properly reconsidered in a manner which ensures that the pupil is being fairly treated*", it must "*establish to [its] own satisfaction what the primary facts were*" but in doing so it is "*entitled to start from the headteacher's findings*" (per Sedley LJ in *R v Dunraven School ex parte B*, at 182). In other words, as Ms Slarks, for the School, put it, the RGDC did not have to start with "a blank sheet of paper" and it is clear from the terms of its decision that it did not do so. It started with the Headteacher's reasons for excluding TM, which were set out in his exclusion decision and in a report of the Headteacher to the Governing Body prior to its first consideration of TM's exclusion. As is apparent from the extracts from the RGDC's decision which I have set out in §8 above, it

considered whether and to what extent it was able to agree with the Headteacher's findings, based on all of the evidence before it. Its approach was, in my judgment, correct in principle and in line with previous authority and with the Exclusions Guidance.

29. The allegation of lack of particularity in fact-finding is then used by the Claimants as a springboard for three distinct challenges, in what are, in terms, three claims of irrationality (see §§13-15 of the OPH Skeleton Argument). First, it is submitted that the RGDC irrationally failed to consider the doubtful credibility of "Pupil B" who had been the complainant against TM in respect of the most serious allegation of unwanted touching, which had allegedly occurred in the changing rooms of a public swimming baths, as well as other allegations of unwanted touching on School premises. It is simply not correct that the RGDC failed to consider the credibility of Pupil B, which had been at the forefront of the Claimants' submissions throughout. It did consider this issue, and that consideration is recorded both in the minutes of its deliberations and in its decision. It is apparent from the record of its deliberations that the RGDC regarded Pupil B's account as "*a clear account which went beyond the bounds of the allegation in swimming changing rooms alone and disclosed wider concerns*" but that it then looked for, and found, other evidence which confirmed that account. The RGDC considered CCTV footage of the alleged assault on Pupil B on School premises and compared it to Pupil B's account of that alleged assault. It did not accept part of Pupil B's account, namely an allegation that TM had attempted to pull down his trousers in a School corridor out of sight of CCTV. In its decision, the RGDC noted that it had carefully considered the reliability and weight that could be attributed to the evidence against TM, that it had found there to be credible evidence in support of many of the allegations against him and that it "*could not find that a number of pupils had colluded or lied to give accounts of a number of incidents*". I therefore reject the claim that there was a failure to consider the credibility of Pupil B, and still less that there was an irrational failure to do so.

30. The second irrationality allegation (§14 of the OPH Skeleton) is that the RGDC failed to particularise findings which are apparent from the minutes of deliberations that the CCTV footage which it had viewed, which was alleged to show inappropriate behaviour directed by TM to Pupil B on School premises showed behaviour that was of a type that "*you still might expect to see on occasion*" and which was not "*enough to exclude a pupil ... although would be grounds to speak to him*". Insofar as the public law challenge of "*failure to particularise*" is based on the dictum from *Re K*, I reject it. There is no claim that the RGDC failed to give adequate reasons in relation to this aspect of its decision and nor can it plausibly be said to have acted irrationally. It arrived at a view of the behaviour shown by the CCTV footage, which was carried forward into its decision, where it featured as one aspect of TM's conduct which, in the round, had justified exclusion.

31. The third irrationality allegation (§15 of the OPH Skeleton) is concerned with the allegations of unwanted touching and other harassment of female pupils. It is said, firstly, that the RGDC failed to explain which allegations of unwanted physical contact were proven. In fact, the RGDC took as its starting point the findings of the Headteacher, as it was entitled to do, and decided that the Headteacher had been entitled to find that the incidents of alleged inappropriate touching of female pupils had occurred. The incidents in question were summarised in the Headteacher's

exclusion decision (see §2 above) and also in his report to the GDC, where the Headteacher noted as "*contributing factors*" to the exclusion decision that, based on accounts of four different pupils, TM "*has touched female students without their consent leaving them and other students feeling uncomfortable. These include reaching inside a girl's blazer from the front and tickling her armpits and giving her an enforced hug*", and that he had "*on one occasion [threatened] to hit a girl with his crutch if she would not hug him*". Having reviewed the evidence which had been before the Headteacher, the GDC and the IRP, the RGDC concluded that the Headteacher had been entitled to find on the balance of probabilities that (amongst other matters) TM had engaged in "*the inappropriate touching of female pupils which was unwanted or conducted under the threat of violence*". The RGDC made clear where it did not accept allegations which the Headteacher had found proven; in this area, it accepted his findings and there is no room for reasonable doubt as to which findings these were.

32. The actual allegation of irrationality under this head is that the RGDC acted irrationally "*by not inviting TM's view or engaging seriously with the lack of an account from TM*". I do not accept that there was any failure to invite TM's views on these or indeed other allegations against him. As I have noted, the Claimants were present and legally represented at the GDC and IRP hearings. Whilst TM's own contribution to these hearings was limited (he answered a number of questions at the IRP hearing), that was down to the Claimants' choice to take up the great majority of their time with other forms of evidence or submission, including lengthy cross-examination of the Headteacher at the GDC hearing. The Claimants also had the opportunity to make written submissions, to the GDC, the IRP and the RGDC.

33. Finally, under Ground One, an additional point was made at the hearing before me that it was irrational for the RGDC to rely upon certain incidents as justifying exclusion which did not themselves reach the necessary threshold of seriousness such as to justify exclusion in and of themselves. I would not have permitted an amendment to the Claim in order to add this allegation, not least because the approach of the RGDC was far from irrational. It agreed with the Headteacher that there had been a serious breach of the School's behaviour policy, namely the assault on Pupil B in the swimming pool changing cubicle, and also persistent breaches of its behaviour policy, in the sexual harassment of other pupils. According to the Exclusions Guidance, either a serious breach or persistent breaches could be sufficient to justify exclusion. Here, there had been found to be both, and the RGDC was fully entitled to agree with the Headteacher that, taken together, the allegations against TM which were found to be proven were sufficient to justify his exclusion.

Ground 2: The RGDC acted irrationally and contrary to statutory guidance in deciding that it could decide whether to uphold the Headteacher's decision without obtaining a risk assessment

34. It is argued under Ground 2 that the RGDC acted irrationally and contrary to statutory guidance by not itself obtaining a risk assessment before proceeding to uphold the Headteacher's decision to exclude TM. Mr Hirschmann, for the Claimants, confirmed that their case was indeed that the RGDC should have obtained a risk assessment itself rather than, as the School had understood it, that the RGDC should have rejected the Headteacher's decision to exclude TM because he had not obtained a risk assessment. The RGDC had noted and criticised the failure of the School to prepare a

formal risk assessment but did not regard that failing as undermining the decision of the Headteacher to exclude TM.

35. The School relied upon §79 of *A Parent*, where Lang J rejected an allegation that a reconsideration decision by a Governing Body which upheld an exclusion was irrational because there had been a failure by the Headteacher to obtain a risk assessment. She stated:

"I consider that the Panel was rationally entitled to conclude that the absence of a formal risk assessment did not render the exclusion unlawful. The Keep Children Safe Guidance advised that, in cases of sexual violence, there should be an immediate risk assessment, and in cases of sexual harassment, the need for a risk assessment should be considered on a case-by-case basis. It was lawful for a decision maker not to follow guidance if there was a good reason for not doing so. (1) The Headteacher had a good reason for not obtaining a further risk assessment from Social Care, as his efforts to obtain one from the two local authorities had been frustrated. (2) Although the IRP indicated that the Headteacher could have recorded a risk assessment himself, there was no requirement in the School Exclusion Guidance for the Headteacher to undertake and record a risk assessment before permanently excluding a pupil. (3) The Panel was satisfied that the Headteacher had in fact assessed the risks, and that his professional judgment was reasonable in all the circumstances. Therefore, they concluded that his otherwise lawful decision to exclude was not rendered unlawful by reason of the failure to write down his assessment of risk". (with numeration added)

Her Ladyship added (§96) that: "*if [the Headteacher] had recorded his assessment in writing, it would most likely have confirmed his view as to the existence of the risk*".

36. Miss Slarks submitted, and I accept, that all but the first of these reasons is equally applicable in the present case. The requirement for a risk assessment in a case of alleged sexual violence is set out in the KCSIE Guidance and is not a pre-condition for exclusion under the Exclusions Guidance. The Headteacher in the present case had assessed the risk posed by TM to other pupils of the School – pursuant to a "dynamic risk assessment" - and had explained his thinking to the GDC. He had stated as follows in his report to the GDC:

"I have considered whether it would be possible for TM to remain in school with a risk assessment and control measures that would: prevent him assaulting students again; protecting them from harassment (sexual or other intimidation) and enable them to feel safe in the school environment. I have concluded that this is not possible in these circumstances for several reasons: the range nature of the assaults, the extent over time and number of victims, the complete denial by TM (supported by his family) of any of the incidents having occurred. I therefore concluded that it would not be appropriate for TM to remain in the school; the victims need to be and feel safe, be heard and be respected."

37. Further, like the Governing Body in *A Parent*, the RGDC took the view during its deliberations that a "*formal written risk assessment would not have provided anything new or different than was done in any event*". So, whilst the RGDC was critical of the School's failure to compile a formal risk assessment, it had ample reasons, which

cannot be criticised as irrational, for deciding that this did not undermine the Headteacher's decision.

38. The allegation in the present case is not the same as in *A Parent*, in that the Claimants maintain that the RGDC should itself have obtained a risk assessment rather than reinstating TM on account of the Headteacher's failure to compile a formal risk assessment. However, this way of putting the case does not avoid the difficulties posed by the ruling in *A Parent*, as it may still be said that the RGDC was not mandated by the Exclusions Guidance to obtain a risk assessment, there had been risk assessment by the Headteacher, and a formal risk assessment was not expected to add anything to what the Headteacher had thought at the time. In fact, the Claimants' formulation raises additional difficulties. The RGDC was not legally obliged to obtain any fresh evidence (although it was permitted to do so if it considered that to be desirable). There would have been practical difficulties in the RGDC commissioning a risk assessment in July 2023 regarding the risk posed by TM to other pupils of the School when TM had been absent from School since November 2022. It was not made clear by the Claimants who would have compiled this risk assessment – it could not be the Headteacher or presumably anyone else within the School, as any member of staff subordinate to the Headteacher might have their impartiality called into question. A third party would have to be instructed as to the relevant facts, but the crucial aspect of the factual matrix was what if any misconduct had been committed by TM, which the Claimants suggest that the RGDC should not have proceeded to consider.

39. The Claimants' Skeleton Argument adds a miscellany of other allegations to Ground 2, all of which are in substance allegations of irrationality by the RGDC which are associated with the absence of a formal risk assessment. First, it is argued that the RGDC irrationally failed to recognise that the School had failed to act appropriately in June 2022, where other allegations of misconduct had been made against TM, which he said were false. However, the risk assessment which the Claimants argue should have been compiled in June 2022 was in respect of the risk to TM from false allegations. That is not the type of risk assessment envisaged by the KCSIE Guidance and is of little relevance to the important question which arose in October 2022 as to the risk posed by TM to others.

40. Second, it is alleged that the RGDC lacked the specialist evidence which it needed to allow it to consider the risk which TM posed to other pupils at the School. That is not correct: the RGDC had the specialist evidence of the Headteacher as to the risk posed by TM. The Claimants disagree with the Headteacher's assessment, but the RGDC considered it and in my judgment was entitled to rely upon it in circumstances where it had accepted the significant majority of the Headteacher's factual findings, including the most serious of them.

41. Third, it is alleged that the RGDC did not properly consider whether TM could safely be educated at an alternative school. However, it was no part of the decision of the Headteacher that TM could not safely be educated at any school, and it did not fall to the RGDC to reach a conclusion on that question. The Headteacher had sought to agree a managed move to another school in the same locality but none of the schools which he approached would agree to accept TM. When the Claimants found another school for TM, the Headteacher cooperated with the admissions process at that school and TM was admitted, and continues to be educated, there.

Ground 3: The RGDC acted unreasonably by not seeking further evidence in relation to the authenticity of the pupil's statements and how independently they had been obtained.

42. As set out in §5(vi) above, the IRP had criticised the process followed by the Headteacher in taking statements from witnesses to TM's conduct. Interviews had been held with pupils by the Headteacher or the School's safeguarding lead and those interviews were typed up into formal statements by the Headteacher's PA. The statements were then sent to the pupils for correction and approval. Some of the statements were returned only after the Headteacher had taken the decision to exclude TM, although it is not suggested that there were any corrections made to the statements after the decision which undermined it.

43. The Claimants submit that the IRP's criticisms were such that the RGDC was required to obtain further evidence on this issue from the Headteacher and from the pupils whose statements were relied upon. Since the RGDC would usually be entitled to proceed by reviewing the existing evidence, the Claimants' case must be that the RGDC acted irrationally by failing to obtain new evidence on the issue of the veracity of the pupils' witness statements. What it in fact did was to acknowledge certain shortcomings in the way in which evidence had been gathered and then find that these issues did not detract from the evidence to the extent that it was unreasonable to rely upon it.

44. In my judgment, that was a rational approach and I reject the Claimants' challenge to it for two reasons in particular. First, the conclusion of the IRP regarding the compilation of witness statements was that the GDC should have queried their authenticity. It is apparent from its deliberations that the RGDC did precisely that, finding that different pupil voices were apparent from the statements, that the pupils had made handwritten amendments to the typed-up statements and that the statements appeared balanced.

45. Second, it is apparent from its decision that the RGDC did not accept many of the criticisms which had been made by the IRP. For example, it noted that the Headteacher was not the only member of staff involved in the compilation of statements and found that "*his active role in the investigation did not have a significant detrimental effect on the evidence obtained*". The RGDC was not required to accept all of the findings of the IRP, but only to give conscientious reconsideration to whether TM should be reinstated in the light of those findings. In my judgment, it fulfilled that obligation in its approach to the witness statements relied upon by the School. It was at one stage floated by Mr Hirschmann that the RGDC was required to accept and give full effect to the findings of the IRP, save unless the School had successfully brought judicial review proceedings to challenge the IRP's decision. No authority was cited for that proposition, and I reject it as inconsistent with the well-established approach that a Governing Body give conscientious consideration to the findings of an IRP. A Governing Body must of course embark upon a reconsideration if that is what is directed by an IRP, save unless it successfully judicially reviews that direction. But having embarked upon a reconsideration, the standard is conscientious consideration which is not constrained by having to abide by every finding made by an IRP which has not been subject to judicial review challenge.

Ground 4: The RGDC acted irrationally in concluding that permanent exclusion was a last resort in the absence of evidence that alternatives had been properly explored.

46. Ground 4 is founded upon the finding of the IRP (§8.3 of its decision) that the GDC "*should have been far more robust in testing more thoroughly why alternative provision was not explored*", where "alternative provision" refers to a managed move of TM to another school. The IRP recorded the Claimants' submission that the Headteacher had "sabotaged" any opportunity to explore an alternative placement.

47. In fact, alternative provision, in the form of a managed move to another school had been explored by the Headteacher. He informed the GDC that he did not consider that a managed move would be suitable as TM was maintaining his denial of, and was not learning from, his conduct. But that he had approached other local schools (of which there were five) and each had told him that they would not accept TM. There were no records giving more detail of whom the Headteacher had approached, what he had said to them and what they had said in response. Having reconsidered the matter, the RGDC "*accepted that attempts to arrange a managed move had been unsuccessful and that a managed move was not likely to be feasible in the circumstances*". In enquiring with other schools about a managed move, the Headteacher had been entitled to share his reasonably held concerns about TM's behaviour (which the RGDC did not characterise as "sabotage").

48. The argument under Ground 4 is that it was irrational of the RGDC to conclude that TM's exclusion was a last resort, as required by the School's behaviour policy and the Exclusions Guidance, and so justified, without further evidence of the detail of the Headteacher's exploration of alternatives. This must be an allegation of irrationality in the classic sense but falls far short of the high hurdle which must be surpassed to establish that allegation. It seems to me to be far from irrational for the RGDC to accept the Headteacher's account of events, notwithstanding the absence of supporting documentary evidence. In my judgment, the RGDC was not required to reject the Headteacher's account as untrue (or unproven) in the absence of such evidence, in particular when it had found the Headteacher's findings to be essentially credible and reliable and regarded his account of the managed move enquiries, and the reported reaction of the other schools, as inherently plausible.

Ground 5: The RGDC acted procedurally improperly by not allowing the Claimants (nor TM) to make oral representations before the RGDC.

49. Whilst a Governing Body would not ordinarily be required to obtain fresh evidence or submissions for the purposes of a reconsideration following an IRP decision, this may be necessary if fairness to the excluded pupil requires it. I am unable to accept the submission that fairness required that TM be permitted to address the RGDC.

50. The Claimants had been permitted to present written statements and submissions to the GDC and the IRP and also to make written submissions to the RGDC. As I have already noted, TM had attended the GDC meeting and could have given evidence there but the Claimants, who were advised by Counsel, decided to make their case by cross-examining the Headteacher at length and then making submissions through Counsel. TM did in fact give evidence to the IRP hearing. The RGDC had all of these materials before it, as well as the minutes and decisions of the GDC and the IRP. The Claimants' written submissions to the RGDC did not suggest, correctly in

my judgment, that the RGDC was acting improperly or unlawfully by not hearing oral evidence from TM, nor identify any particular issue on which the evidence was lacking.

51. The Exclusions Guidance states (§105) that "*the pupil should be enabled to make a representation on their own behalf [to a Governing Body meeting] if they wish to do so*". TM was indeed enabled to make a representation to the GDC, which he attended, with Counsel. That he did not do so was down to a strategic decision taken by the Claimants. There was no unfairness.

52. The Claimants do not identify any particular issue on which TM was required to be heard, due to not having had an opportunity to speak on the issue previously. Rather, they identify a single alleged misunderstanding by the RGDC and proceed from that premise to a conclusion that the RGDC was required to hear from TM on some or all issues in order to avoid misunderstanding TM's position.

53. The finding criticised is this: "*The panel noted that TM denied any wrongdoing whatsoever and characterised his actions as never amounting to more than 'banter'*". In fact, TM did continue to deny the allegation of assault on Pupil B at the swimming pool and the Claimants' Counsel had characterised his conduct towards Pupil B which had been captured on CCTV as "*genuine banter and messing around*" when making submissions to the IRP. There was no misunderstanding.

54. In any event, I would not accept the logic of the Claimants' submission. Absent an important issue on which TM had not been enabled to be heard, it is difficult to see how an error made by the RGDC in its reasoning could serve to establish, *ex post facto*, that fairness required that TM be given the opportunity to make oral representations. The requirements of procedural fairness should be apparent before the decision in question is taken.

Ground 6: Taken together the forgoing establishes that it was not possible for the RGDC, on a paper-based review of the materials, to uphold the Headteacher's decision to permanently exclude TM.

55. Ground 6 is a composite allegation that, having regard to all of the other grounds of claim, it was irrational in the classic, *Wednesbury* sense for the RGDC to uphold the Headteacher's decision to exclude TM following its review of the case papers. Since I have rejected each of the foregoing grounds of claim, I must also reject the overall claim of irrationality. I accept the submission of the School that this overall claim adds nothing in circumstances where Grounds 1 to 5 have failed. True it is that the IRP made extensive and serious criticisms of the decision of the GDC. But I have found no legal flaw in the reconsideration of that decision by the RGDC. It was in principle open to the RGDC to effect a conscientious reconsideration of the Headteacher's decision and in my judgment it did so, and so remedied any shortcomings in the consideration originally given by the GDC. I cannot agree that no reasonable RGDC would have reached the decision to uphold TM's exclusion.

Conclusion

56. For the reasons set out above, the claim is dismissed.