

Suspension and Expulsion Procedures for children and young people in Northern Ireland.

(A) Which legislation governs the law in respect of school suspensions and expulsions in Northern Ireland?

There are now 6 principal pieces of domestic legislation which govern the law relating to suspension and expulsion of pupils in Northern Ireland:

- **Education and Libraries (NI) Order 1993**
- **Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995, as amended by**
- **Schools (Suspension and Expulsion of Pupils) (Amendment) Regulations (Northern Ireland) 1998**
- **Schools (Expulsion of Pupils) (Appeals Tribunal) Regulations (Northern Ireland) 1994, as amended by**
- **Schools (Expulsion of Pupils) (Appeals Tribunal) (Amendment) Regulations (Northern Ireland) 1998**

The Education (Northern Ireland) Order 2006

The Education (Northern Ireland) Order 2006 may be described as 'enabling' legislation as it introduces new provisions that shall soon revise current procedures in relation to suspensions and expulsions and the relevant appeals processes in Northern Ireland. For further details in relation to the procedural changes proposed, please see the more detailed commentary below entitled **New provisions under the Education (Northern Ireland) Order 2006**.

In order for these new provisions to take effect a commencement order must first be passed through either Westminster or the Northern Ireland Assembly and this has not occurred to date.

(B) There is a Statutory Requirement that every school must have a written Scheme giving its procedures for suspensions and expulsions:

1) Catholic Maintained Schools

The legal position for Catholic Maintained schools is set out in the '***Scheme for the Suspension and Expulsion of Pupils***', (CCMS)1 [1] , following the provision made under Article 146 of the Education Reform (Northern Ireland) Order 1989:

"The Council for Catholic Maintained Schools shall prepare a scheme specifying the procedures to be followed in relation to the suspension or expulsion of pupils from Catholic maintained schools"

This scheme is drafted in accordance with the law contained within the legislation highlighted at (A), above. The principal and Board of Governors of all Catholic maintained schools are bound by the principles and procedures laid out in the scheme.

2) Board Controlled and other Grant-aided Schools

A similar scheme has been adopted relating to the suspension and expulsion of pupils from Board Controlled Schools in accordance with Article 49 of the Education and Libraries (Northern Ireland) Order 1986, as substituted by Article 39 of the Education and Libraries (Northern Ireland) Order 1993.

Under this legislation, the Board is required to make arrangements to enable the parent of a pupil at a grant-aided school, or if the pupil has attained the age of 18 years, the pupil him/herself, to appeal against the decision of an expelling authority to expel the pupil from school.

The 'expelling authority' may, in respect of a pupil at a Board controlled school be the Board responsible for the management of the school; or in the case of a pupil at a grant-aided school, may be the Board of Governors of the school.

Any appeal will be considered by a tribunal, which is constituted in accordance with the Schools (Expulsion of Pupils) (Appeal Tribunals) Regulations (Northern Ireland) 1994. All procedures, other than those already specified in these Regulations, are determined by the Board under their scheme, entitled 'Scheme for the Suspension and Expulsion of Pupils from Board Controlled Schools'.

3) Private Schools

Private schools provide an exception to the rule. They are not bound by any statutory obligation to have a written scheme detailing disciplinary procedures at the school. Neither are they required to comply with the above-mentioned legislation, relating to suspension and expulsion of pupils from schools.

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The main reason why private schools are distinguished from other schools is that the relationship between independent schools and the parents of pupils attending these institutions is considered to be **contractual**.² [2]

The legality of this association was confirmed in the case of **R v Fernhill Manor School, ex parte A**, as follows:

“the relationships between the private schools and those who attend them are founded on the contract which is made between the school and those who are paying for the teaching and education of the pupils of the school. That contract is a completely private contract and is not underpinned by statute”.³ [3]

The schools disciplinary code forms part of the contractual agreement entered into by the parents, when they agree for themselves as parents and on behalf of their children as pupils, to be bound by the rules of the school. Effectively, the school's powers to exclude a pupil shall be determined by the terms of the agreed contract. For this reason, it is important that parent's request written copies of a schools disciplinary code and any other school policy documents, for careful consideration, before they enroll their child at a school. The information provided to parents should clearly state the grounds, which shall warrant suspension and exclusion from school and the procedures, which will be followed in such circumstances. If a school did not follow set procedures, the parents may be justified in suing the school for breach of their contractual obligations.

It is noted that the legislation in respect of suspensions and exclusions from school does not apply to independent schools.⁴ [4]

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Neither shall parents be in a position to judicially review decisions to exclude their children from school, as private schools are not recognised public bodies.

For the same reason, parents shall be unable to initiate proceedings directly against private schools under the Human Rights Act 1998, where breaches of a child's human rights are alleged.

The State may however, be challenged under the Human Rights Act 1998, for its failure to protect a child's rights as provided under the European Convention of Human Rights, during the course of his/her education at an independent school.

This obligation by the State was clearly established in the cases of Campbell & Cosans v United Kingdom⁵ [5] and Y v United Kingdom⁶ [6], which dealt specifically with the administration of corporal punishment in private

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schools. In the former case, the European Court of Human Rights held that the right to education (Article 2, Protocol 1, ECHR) had been breached by the State, as the school would not allow the child to attend until his parent's accepted that corporal punishment would be meted out. In *X v UK*, the European Commission confirmed that the caning of a child, resulting in bruising and swelling to the buttocks, substantiated a breach of Article 3, ECHR, as it amounted to degrading treatment.

So great was the influence of the European Court of Human Rights decision in the case of *Campbell & Cosans v UK*, that our domestic law was changed in 1987 to abolish corporal punishment in all grant-aided schools *and* in respect of any pupils who receive publicly funded grants to attend a private school.⁷ [7]

On this premise, it is possible that we will see future challenges against the State, relating to decisions to suspend or expel pupils and the disciplinary procedures followed by private schools, as well as our controlled, grant-aided and maintained schools, grounded on Convention rights.

(C) What are the current procedures under our domestic legislation?

This section provides a general overview of the principles and procedures, which must be followed by all Catholic maintained, voluntary, grant-aided and Board controlled schools, when suspending or excluding a pupil from school and is drawn from the *Schools (Suspension and Expulsion of Pupils) (Amendment) Regulations (Northern Ireland) 1995, as amended by the 1998 Regulations*.

It is designed as a checklist for principals and Boards of Governors of schools, to ensure compliance with our domestic law. It is also hoped that it may serve as useful guidance for pupils, their parents and guardians, should they have any difficulties in understanding suspension and expulsion procedures currently followed in Northern Ireland schools:

The Suspension Procedure

· *A pupil may be suspended from school only by the principal.*

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- The first period of suspension cannot be more than *5 days*, but the principal can then extend this period by obtaining prior approval for an extension from the Chairman of the Board of Governors.
- A pupil may not be suspended from school for any more than *45 days* in one school year⁸ [8]. *A principal/Board of Governors cannot refuse to accept a pupil back into school after the expiry of 45 days even where the school's expulsion procedure is underway.*⁹ [9]
- Once a suspension is given, a Principal must immediately write to the pupil's parents/guardian, the relevant Education and Library Board, the Chairman of the board of Governors and in the case of CCMS schools, the local diocesan office and provide reasons for the suspension. The principal must invite the parents to the school to discuss the suspension. *This notice must be in writing.*
- If the principal decides to extend the period of suspension, written notice and reasons for the extension must be sent out again to parents/guardian and all of the above interested parties.
- A school must provide suitable education for a pupil while he/she is suspended from school. For example, a school should arrange for periodic collection of school notes/ home works at the school office and the pupil would

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then be responsible for completing any schoolwork in their own time. If a pupil is out of school for a lengthy period of time, home tuition may be sought through the appropriate Education and Library Board.

· *There is no right of appeal for either a pupil or their parents/guardian against a decision to suspend, provided under current domestic legislation.*

The Expulsion Procedure

· *A pupil cannot be expelled from school unless they have first served at least one period of suspension from school.*

· Before an expulsion can take place there must be *consultation* about the proposed expulsion between the parents/guardian of the pupil, the principal, the Chairperson of the Board of Governors, the Chief Executive of the Education and Library Board (or another officer of the Board duly authorised by him) and in the case of a Catholic maintained school, the Director of CCMS (or another officer duly authorised by him).

· A pupil may still be expelled if the parents/guardian do not attend this consultation meeting. They need only be notified of the date of the meeting and invited to attend.

· The consultation must include discussion about the *'future provision of suitable education for the pupil concerned'*, however no decisions are required to be made at this consultation.

· Procedures for Suspensions and Expulsions in *Board Controlled Schools*:

- Under the expulsion procedure in a *Board controlled school* the principal is required by the '*Scheme for the Suspension and Expulsion of Pupils from Board Controlled Schools*' to prepare a written summary including any history of serious misconduct by the pupil and the details and outcome of the consultation meeting.
- The written summary must be sent with all relevant evidence and supporting documentation together with the principal's recommendations to the *Suspensions and Expulsions Panel* of the appropriate Education and Library Board.
- The *Suspensions and Expulsions Panel* and then the Board's *Committee on the Suspension and Expulsion of Pupils* shall review the principal's written summary.
- Consideration will also be given to any views expressed by the principal, parents, the principal educational psychologist, the chief education and welfare officer, any other relevant board officer and principal's from previous schools.
- Meetings may be set up to consult upon suitable future educational provision and the wishes of the pupil shall be taken into account.
- *The Committee on the Suspension and Expulsion of Pupils shall consider any advices received from the Suspensions and Expulsions Panel before making a final decision in respect of the expulsion.*
- Where a pupil is to be expelled, the Committee shall immediately provide written notification of its decision to the school and parents/guardian of the pupil concerned, including notification of their right to appeal the decision, the time limits prescribed and details of where to lodge an appeal.
- The Committee may also give a *direction that the pupil be re-admitted to school* and it is the duty of the Board and the Board of Governors of the school that such a direction is complied with.

· More commonly, in the case of *Catholic maintained schools, voluntary schools and grant-maintained (including integrated and Irish medium) schools*, the Board of Governors makes the final decision in expelling a pupil from school.

· Procedures for Suspensions and Expulsions in *Catholic Maintained Schools*:

- Procedures to be followed in all Catholic maintained schools are detailed in the CCMS '*Scheme for the Suspension and Expulsion of Pupils*'.

- A warning is given by CCMS to all Catholic maintained schools, at paragraph 6.2 of the Scheme¹⁰ [10] , as follows:

“Schools that do not follow the procedures in “The Scheme” are acting illegally and it should be remembered that decisions relating to Suspensions and Expulsions are subject to an Appeals Procedure, which may be initiated by the parent/guardian of an expelled pupil. It is therefore imperative that these procedures be strictly adhered to at all times”.

- The Scheme also highlights considerations, which should be given *prior* to the implementation of the suspension and expulsion procedure. It is recommended as ‘good practice’ to consider fully the circumstances which led to a pupil’s behaviour and also whether an alternative to suspension or expulsion may be an effective response. Such considerations are listed to include:

Age and state of health of the pupil

Educational disability

10[10] CCMS ‘Scheme for the Suspension and Expulsion of Pupils’, pg 4, para. 6.2 (Suspension-Normal Circumstances)

Tension in family relationships

Parental, peer or other pressures on child

Socio-economic deprivation

Severity of behaviour

Whether pupil acted alone or as part of a group

Whether support and advice has been sought from external agencies

NOTE: This list of considerations should be particularly helpful, together with the suspension descriptors provided in Appendix 4 to the CCMS Scheme¹¹ [11] to principals and Boards of Governors when identifying the types of behaviour to be considered as warranting formal disciplinary action.

- The CCMS Scheme further identifies two reasons for expulsion, which may involve:

A “*single major incident*” involving gross misconduct; or

As a “*last resort*”, which would include:

· “Where the school has taken all reasonable steps to avoid expelling a pupil” or

· “Where allowing the pupil to remain in the school would be seriously detrimental to the education and welfare of the pupil, or that of others in the school”.¹² [12]

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In Catholic maintained schools the decision to expel a pupil cannot be made unless:

The consultation meeting referred to above has taken place and the future educational provision of the child is considered on foot of this consultation.

The parents/guardian of the pupil have been offered the opportunity to make representations (orally and in writing) to the Board of Governors in respect of the circumstances surrounding a potential expulsion. The principal shall convene a meeting with the Board of Governors in attendance, to allow such representations to be made. The Board of Governors shall also consider the future educational provision for the child.¹³ [13]

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The Board of Governors is satisfied that the pupil has failed to meet the minimum standards of behaviour held by the school and that expulsion is only appropriate sanction.14 [14]

- Record Keeping: The CCMS Scheme places emphasis on the need for all staff to keep detailed records of events leading to the suspension or expulsion of a pupil. It is noted that such records shall “ *provide valuable evidence in the event of an expulsion being subject to review by an Appeals Tribunal*”. 15 [15]

It is recommended that school records should include the following details:

A log of incidents

Witness statements (which must be signed by the author, dated and witnessed by a teacher at the time)

A record of any difficulties experienced by the pupil

Details of the schools response, strategies adopted to manage behaviour and the outcomes reached

Any referrals made to Support Services or relevant external agencies

Any advice or guidance offered to and agreed to by the principal in an attempt to moderate a pupil’s behaviour

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Details of any previous suspensions and/or alternative sanctions

NOTE: A model pro-forma of a pupil record is contained in the Scheme at Appendix 13.16 [16]

- *It is stated very clearly that principals may not enter into any agreement or direct parents/guardians to withdraw their children voluntarily from a school.17 [17]*

The implications of such actions are that a pupil shall remain on the school's register for an indeterminate period while the parents attempt to secure an alternative suitable placement. The statutory duty to provide access to the Northern Ireland Curriculum remains with the school, rather than the appropriate Education and Library Board and the pupil shall not be in a position to access home tuition or "education otherwise than at school"(EOTAS). If an expulsion procedure is not completed, this may leave a school at risk of breaching its statutory duty. Also, the prospect of remaining in educational 'limbo' for a significant period of time will inevitably disadvantage the pupil concerned.

- The Board of Governors are required to make every effort to have an expelled pupil placed in another CCMS School, subject to the wishes of the parents/guardian.18 [18]

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Once a decision concerning an expulsion has been made, *all* principals must write to the pupil's parents/guardian immediately and tell them about their right of appeal against the decision, the time limit set by the Education and Library Board for lodging an appeal and where the appeal should be lodged.

(D) Making an Appeal to the Expulsion of Pupils Appeal Tribunal

(1) The Legislation

Under Article 49(6) of the Education and Libraries (Northern Ireland) Order 1986, as substituted by Article 39 of the Education and Libraries (Northern Ireland) Order 1993, the parent of a pupil or the pupil him/her self, provided the pupil has attained the age of 18, may appeal to a tribunal against a decision to expel the pupil from a grant-aided school.

Article 49(10) of the 1986 Order as substituted by Article 39 of the 1993 Order empowered the Department of Education to make Regulations for the constitution and procedure of the appeal tribunals.

The Department of Education formalised procedures with the introduction of the Schools (Expulsion of Pupils) (Appeal Tribunals) Regulations (Northern Ireland) 1994, which came into operation on the 17th February 1994. These were subsequently amended by the Schools (Expulsion of Pupils) (Appeal Tribunals) (Amendment) Regulations (Northern Ireland) 1998, commencing operation on the 1st September 1998. With the introduction of this legislation, parents were permitted the right to request an independent tribunal to examine their child's case.

(2) The Appeal Procedure

- An appeal must be made by the parents/guardian of the pupil, unless the pupil is 18 years of age
- A parent or pupil who wishes to appeal the decision must give notice in writing to the relevant Education and Library Board setting out the grounds on which the appeal is made.
- 2 or more appeal tribunals may sit at the same time
- The person appealing has the right to make written representations to the tribunal and to appear and make oral representations at the hearing.
- The appellant is entitled to bring a representative or a friend to the appeal to make oral representations on their behalf.
- Representatives of the Board of Governors of a school (normally the Principal and Chairperson of the Board of Governors) will be expected to attend an appeal.

· The Board of Governors will be required to produce written documentation to the tribunal, detailing the expulsion procedure followed, including any correspondence between the pupil's home and school, showing details of serious misconduct and all steps taken by the school to moderate behaviour and to remedy the situation.¹⁹ [19]

· At the hearing of the Appeal, the Expulsions Appeal Tribunal must consider all of the circumstances of the case and in particular:

- a) Any representations made by the pupil, parent, expelling authority and the Education and Library Board
- b) Whether a school's procedures for expulsion were properly followed
- c) The interests of other pupils and teachers at the school

· The decision of the tribunal is sent in writing to the pupil/parents and the expelling authority as soon as possible after the hearing has taken place.

(E)Challenging a Decision to suspend a pupil from school

Although there is no statutory right of appeal against a decision to suspend a pupil provided under the Schools (Suspension and Expulsion of Pupils) Regulations (Northern Ireland) 1995, as amended by the Schools (Suspension and Expulsion of Pupils) (Amendment) Regulations (Northern Ireland) 1998, parents have been successful in challenging suspensions by way of a judicial review application to the High Court (which must be made as soon as possible after the decision is made or in any event not later than 3 months after the decision is made).

1) Judicial Review:

In **Re Kean's Application** [20], a pupil successfully challenged a decision to suspend on the grounds that the procedures employed by the principal were *unfair*. This was a Northern Ireland High Court decision and Mr Justice Coghlin heard the matter.

The facts of the case were that the principal had imposed an immediate suspension for what he had considered to be a serious breach of discipline. The pupil had put her foot through a glass door, thereby causing damage to school property. The pupil was not given an opportunity to respond to witness statements and the principal had not invited her parents to the school in order to discuss the suspension. Both of these omissions constituted breaches of procedure, as published in the school's Disciplinary Policy.

Although this application for judicial review was successful, the judge stressed that the decision rested on the specific circumstances of the case. It has since been queried whether a suspension is a public law issue, over which the Court has proper jurisdiction. [21]

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Coghlin J did acknowledge in his judgment that day-to-day disciplinary powers by a professional teacher/principal should not **“ be subject to the unwieldy and time-consuming supervision of the law”**

It has subsequently however been reaffirmed by the High Court and the Court of Appeal that a decision to suspend a pupil is subject to challenge by way of judicial review.

In **Re M (A Minor) Application, 2004 [22]**, the procedures followed in a five day suspension of a primary school child were held to be unfair by Girvan J on the basis that there had been time available to involve and consult the parents of the child who was too young to protect his own interests or to know how to consider or challenge the evidence against him. It was also held that the applicant child was the proper applicant being the party having the legal grievance. The Court of Appeal in the same case (CA 21/09/04) subsequently reaffirmed that punishment could only properly be imposed when M's guilt was established and the process to establish guilt in this case, in view of the child's age at the time should have involved his parents. For that reason it was held that the declaration of Judge Girvan was correct and it was ordered that all records of the suspension, in documents maintained by either the Board or the school, should be deleted.

(F) What are the Potential Implications on our existing Suspension and Expulsion Procedures with the Introduction of the Human Rights Act 1998?

Does the Right to Education provided under Article 2, Protocol 1, have a direct impact on suspensions and expulsions from school?

Article 2, Protocol 1 ECHR:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education is in conformity with their own religious and philosophical convictions”

It has already been established in **Yanasik v Turkey [23]** that suspensions and expulsions *per se* do not breach Article 2, Protocol 1.

In this case, the applicant complained to the European Commission about being expelled from a college because he had participated in a Muslim fundamentalist movement. The Commission found as follows:

“It would not be contrary to Article 2, Protocol 1 for pupils to be suspended or expelled, provided that the national regulations did not prevent them from enrolling in another establishment to pursue their studies”

However, where a pupil is below statutory school-leaving age and is excluded from school, whether it be through the regulated suspension and expulsion procedure, or an illegal exclusion (where a child is taken off the schools register without compliance with domestic legislation and appropriate notice is not given to the Education and Library Board), the child is entitled to receive an effective education elsewhere.

In the Northern Ireland case of **Re L (a Minor) Application [2005] NIQB 48**, a suspension was successfully challenged by judicial review on procedural grounds and a declaration of illegality was obtained on the basis that the applicant's suspension ran to 46 days where the statutory maximum is a period of 45 days. A further challenge was mounted by the Applicant in relation to a blanket policy operational by the Board in relation to the provision of home tuition during the child's prolonged period of absence from school. The policy was that a child of primary school age would not receive more than 5 hours weekly tuition from the Board and accordingly, did not take account of the child's individual needs. The applicant was a child with moderate learning difficulties and ADHD. It was argued on the applicant's behalf that the policy amounted to a breach of his right to education under Article 2, Protocol 1. This matter was not formally adjudicated upon as the Board had increased the provision to allow 15 hours per week by the time the matter was listed before the court. However, there was an indication given in the judgment that the Board should have considered whether provision would be suitable, given the special educational needs of the individual child.

Under current legislation, there is no statutory obligation upon Education and Library Boards to provide alternative educational provision where children are *voluntarily withdrawn* from school by their parents. This may occur for a range of different reasons, for example, where a child is a victim of bullying and the parent's are dissatisfied with the school's management of bullying behaviour; where there is disagreement over special needs provision made by a school to a child who has a statement of special educational needs; where a school insists on/or refuses to refer a child for assessment under the Code of Practice for Special Educational Needs; or where

there are restrictions on subject options available for state examinations. In such circumstances, the onus to provide an alternative school placement is transferred from the educational authorities to the parents of the pupil. The lack of support services available in such cases is of concern, as whilst any child is out of school, their educational progress usually remains static, at best.

If a child is suspended, expelled or unable to attend school due to illness or for any other reason during the course of their AS or A-Level studies, exceptional provision should be requested from the Board as it may be provided under Article 86(2) of the Education (Northern Ireland) Order 1998. This legislation places a discretionary duty on the Board and each Board currently operates its own policy in relation to education provision in such circumstances. It is advisable for parents and young people to check the policy operating within their Board area. In some circumstances where a child is excluded from school during the course of their As or A-Level's (i.e. when they have already completed compulsory schooling), the duty may therefore fall to the parents to find alternative suitable schooling for the child. The Board should consider each case on its individual merit before reaching its decision.

If any exclusion prevents a child from receiving a continuing education elsewhere, this should be treated with great caution. The Department of Education and the relevant Education and Library Board may be at risk of breaching their statutory duties and indeed, their obligations under the Human Rights Act 1998. Effective monitoring strategies must be put in place by CCMS and the Education & Library Boards Inspectorate to ensure that all principals and Boards of Governors act in compliance with the law relating to suspensions and expulsions. The Department of Education may also need to introduce regulations and appropriate sanctions to ensure that school managers are acting with procedural propriety.

It is clear from the European Court of Human Rights interpretation of Article 2, Protocol 1, that education must be practical and effective and that an individual must have the benefit of drawing profit from the education received. [24] This means that a pupil is entitled to receive accreditation or certification for any courses completed or examinations sat. For example, if no suitable alternative educational provision is available either at another school, a Pupil Referral Unit or through EOTAS; if home tuition provided by an Education and Library Board is insufficient in the number of hours received; or the Northern Ireland Curriculum cannot reasonably be accessed by an excluded child, it is perceived there may be a breach of Article 2, Protocol 1.

The current leading judgment in England in relation to Article 2, Protocol 1 and school exclusion is in the case of **Ali v Head Teacher and the Governors of Lord Grey School [2004] EWCA, [2006] UKHL 14**. This case examines the duty upon school Principals and Boards of Governors to protect a child's right to education under Article 2, Protocol 1. The facts of the case may be simplified as follows:

Child A was suspended from school following an allegation of arson at the school. The parents were not informed of the right to appeal to the Board of Governors. During the initial period of suspension, work was sent home. After 45 days a reintegration meeting was set up which A's parents did not attend. A was taken off the school roll. By the time he was admitted to another school, A had missed 11 months of schooling. A argued that the school's actions were unlawful and breached Protocol One, Article 2 ECHR.

In the Court of Appeal, it was held that during the initial period of suspension, there was no breach of Article 2, Protocol 1 as appropriate work had been sent home by the school. The school had a duty to readmit after 45 days and there was no lawful ground to delete the child's name from the school roll. Therefore, during the subsequent period of time during which the child remained out of school after 45 days had elapsed, A's rights under Article 2, Protocol 1 were breached and he was entitled to damages for this breach.

This decision was overturned by the House of Lords. Counsel for the school criticised the decision of the Court of Appeal that there had been a breach of Article 2, Protocol one, on the following grounds:

- **The Convention did not confer a right to be educated at a particular school.**
- **It conferred a right not to be denied access to the general level of educational provision available in the member state. He argued that in the circumstances of the case this right had not been breached by the school.**

The facts of the case were laid out in the judgement as follows:

- When asked by the school on 25th May 2001 to collect work from the school, the parents failed to do so. The school had provided work up until 14th May 2001 and the child had been allowed to sit his SATS tests between the 8th and 14th May at the school.
- Ali's case first came before the LEA access panel on 19th June 2001. They recommended educational provision by the PRU.

- When tuition was offered by the Pupil Support Unit (LEA) to the child in early July 2001, up until the end of term on 20th July, the parents declined this offer.
- The school wrote to the parents asking them to attend a meeting at the school on 13th July 2001. One of the other two boys was admitted back into school following a meeting on this date. Ali's parents did not respond to the school nor did they attend for the meeting.
- On 13th July the head teacher wrote to the parents informing them that Ali had been removed from the school roll and a referral had been made to the LEA School Access Panel so that educational provision could be made.
- The parents did not reply to this letter.
- The family did not contact the LEA until mid-October 2001. At a meeting on 18th October, the father was unsure whether he wanted Ali to return to school.
- On 6th November, Ali's father wrote to the school seeking reinstatement.
- The school responded that it had allocated Ali's place to another pupil the year group was now over-subscribed and it could not take Ali back.
- On 21st January 2002 Ali was placed in another school.

In the Judgement of Lord Bingham of Cornhill, he refers to Strasbourg jurisprudence, which makes it clear how Article 2, Protocol 1 should be interpreted:

- It was intended to guarantee fair and non-discriminatory access to the education system existing within a member state.
- There is no right to education of a particular kind or quality, other than that prevailing on the state.
- There is no Convention guarantee of compliance with domestic law (relating to education).
- 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 there is no alternative source of state education open to the pupil. (Turkey v Yanasik; and Eren v Turkey, Application No 60856/00 (unreported) 7th February 2006).

In this case, the judgement focused on whether there had been a breach of Article 2, Protocol 1, by the school (as the only public authority that Ali sued), during the period between 7th June 2001 and 20th January 2002.

The question was whether between those dates the school denied the respondent effective access to such educational facilities existing within the state. The facts of the case led the Court to conclude that it did not. The appeal by the school was allowed and Ali's claim was dismissed.

Ali has now submitted a case to European Court Of Human Rights and is challenging the decision of the House of Lords.

May parents assert their religious and philosophical convictions under Article 2, Protocol 1 in relation to the nature of punishment imposed by a school?

Suspensions and expulsions from school should never breach any other right afforded under the European Convention of Human Rights.

There have been *two* cases before the European Commission, where the parent's have presented their religious and philosophical convictions as a direct challenge against a school's decision to suspend their child:

Firstly, in the case of [Campbell and Cosans v UK \[25\]](#), the applicant's son had been suspended from a private school indefinitely, because the applicant parents refused to accept the headmaster's decision to administer corporal punishment against their child as a form of school discipline. The consequence was that the child remained out of school for almost a full year. The Commission stated as follows:

“His return to school could have been secured only if his parents had acted contrary to their convictions; a condition of access to an educational establishment which conflicts with another right enshrined in Protocol 1...”

It is clear from this case that the school's refusal to allow the child admission to school breached the parent's right to respect for their philosophical convictions on corporal punishment and also violated the child's right to education under Article 2, Protocol 1.

The Commission also attempted to define 'parent's philosophical convictions' in the course of their deliberations. The Court distinguished between mere parental preferences and parent's deeply held views in

respect of their child's schooling. They held that convictions are views that attain a certain level of cogency, seriousness, cohesion and importance.

In the case of **Valsamis v Greece [26]** the Commission considered a complaint against a decision to suspend a pupil for her failure to attend at a school parade. The parent's challenged the suspension on the grounds of their religious beliefs. The applicant parent's were Jehovah Witnesses and pacifists and objected to the parade on the basis that it was normally attended by the national military. The Commission concurred that the parent's were entitled to respect for their religious convictions under Article 2, Protocol 1. The Commission also considered that there were potential breaches of the child's additional convention rights to respect for private and family life, freedom of religion and freedom of expression. [27] However, on the **evidence** produced, the Commission disagreed with the applicant's about the military nature of the parade and it was held that there was no violation of Article 2, Protocol 1. It is significant to note that 8 members of the Commission dissented from the judgment, indicating that there had been an interference with the child's right to freedom of religion, enshrined in Article 9 of the European Convention.

School uniform policies and the child's right to religious freedom under Article 9 (ECHR)

In the case of **Shabina Begum v Head Teacher and Governors of Denbigh High School [2006] UKHL 15**, Shabina claimed that by refusing her access to her school while wearing a jilbab, the school had unlawfully excluded her, that her right to religious freedom under Article 9 ECHR had been breached, and that her right not to be denied education under Article 2, Protocol 1 ECHR had also been violated. The House of Lords overturned the decision of the Court of Appeal and found that there had been no such breach of Shabina's rights under the Convention.

The facts of the case may be summarised as follows:

- Shabina, a 15 year old girl of strict Bangladeshi Muslim origin, was a pupil of Denbigh High School in Luton.
- The school is a mixed community school for children between 11 and 16 years. 79% of the pupils are Muslim. The head teacher is Muslim and there are Muslims were represented on the PTA and governing body of the school.
- She started at the school in Autumn 2000 and wore a shalwar kameeze an acceptable alternative to the school uniform of shirt, tie, jumper and skirt. She was also permitted to wear a hijab or headscarf.
- On returning to school in autumn 2002, Shabina asked to be allowed to wear a jilbab – an ankle length straight dress with long sleeves – rather than the shalwar kameeze, which left the legs below the knees and the arms exposed.
- She claimed that the jilbab was the correct dress for a Muslim girl to wear when she had reached puberty. The case was based on very strong religious beliefs.
- The Head Teacher would not permit her to enter the school wearing a jilbab and asked her to return home and change.
- The head teacher and governors of the school were of the view that the jilbab was inappropriate and that Shabina should abide by the school uniform policy.
- The uniform policy had been designed after consultation with parents, pupils, staff and local mosques. The shalwar kameeze was adopted by the school as it was the garment worn by many faiths on the Indian sub continent. As well as Muslim pupils, there were also Hindus and Sikhs and the school wished to be inclusive and attend to the needs of the diverse school community.
- The only offers of compromise came from Shabina who offered to wear a jilbab in the school colours and to wear a school shirt and tie underneath. No compromise was reached and the school refused an offer of mediation.
- Shabina received no education for two years and missed the first year of her GCSE course before being offered a place in a new school where she was permitted to wear the jilbab.

High Court Decision

The judge in the High Court held that on the evidence Shabina had not been excluded. The school earnestly wished her to attend and placed no obstacle or impediment in her way. It had merely insisted that she abide by the school uniform policy as she had done for the previous two years. Her claim was dismissed.

Court of Appeal Decision

The Court of Appeal did not accept the High Court decision and held that the school had undoubtedly excluded Shabina from school. They had sent her away for disciplinary reasons as she had failed to comply with the school uniform policy and she was unable to return to the school for the same reason.

The appropriate action would have been for the school to permanently exclude her and to allow the matter to be raised before the school governors and the Independent Appeal Panel.

The Court of Appeal accepted that Shabina genuinely believed that her religion prohibited her from displaying as much of her body as would be on show if she were wearing the shalwar kameeze. It was accepted that the shalwar kameeze was appropriate dress for the majority of Muslim school girls (the South Asian liberal view), but that a jilbab constituted proper Islamic dress for adult Muslim women and that Shabina was therefore correct in her view.

Shabina's right to manifest her religious beliefs was being limited and it was a matter for the school to justify the limitation on her freedom created by the uniform code and by the way in which it was being enforced.

In this case, the limitations were to be prescribed in law and *'necessary in a democratic society in the interests of public safety, for the protection of public morals or for the protection of the rights and freedom of others'*. (Article 9 (2) ECHR)

The governors were entitled by law to set a school uniform policy for the school. The policy was published clearly and in writing and was made available to all pupils in the school.

The Court stated that the school should have considered Shabina's request to wear the jilbab in the following way:

- *Had the claimant established that she had a right, which qualified for protection under Article 9 ECHR? – The right to freedom in public to manifest religion or belief*
- *Subject to the justification that is set out under Article 9 (2) ECHR, has that convention right been violated?*
- *Was the interference with her Convention right prescribed by law?*
- *Did the interference have a legitimate aim?*
- *What factors must be considered to determine whether the interference was necessary in a democratic society for the purpose of achieving that aim?*
- *Was the interference justified under Article 9(2) ECHR?*

The Court held that the school governors had not approached the matter in the correct way. Shabina had a right to manifest her religious belief in public under Article 9 ECHR. This right is recognised under English Law by the incorporation of the Human Rights Act 1998. The onus therefore lay on the school to justify its interference with that right. Instead it started from the premise that the school uniform policy had to be obeyed and if she did not like it then she could go to a different school. The school did not attribute to the claimant's religious beliefs the weight they deserved.

The following declarations were made by the Court of Appeal:

- **Shabina was unlawfully excluded from school**
- **She was unlawfully denied her right to manifest her religion**
- **She was unlawfully denied her access to suitable and appropriate education.**

The Court of Appeal held that Shabina had been denied her right to Education under Article 2, Protocol 1 because she had been unlawfully excluded due to an unlawful violation of her Article 9 rights.

House of Lords Decision

Right to Education

The HOL's held that Article 2, Protocol confers no right to be educated in a particular school. The right to education is only infringed if the claimant is unable to obtain education from the system as a whole.

In the circumstances of this case, the HOL's considered that Shabina's right to education was not infringed as she was free to apply to other schools in the area that would have allowed her to wear the jilbab, or in the case of the local girls school, would have rendered the need to wear the jilbab as redundant. (No male pupils).

Right to Religious Freedom

Lord Bingham of Cornhill referred to the judgement in **R (Williamson) v Secretary of State for Education and Employment** (2005) 2 AC 246, in which it was decided that Article 9 ECHR protects both the right to hold a

belief, which is absolute, and the right to manifest a belief, which is qualified. The qualification must be justified within Article 9(2) and a limitation or interference must be prescribed by law; and necessary in a democratic society for a permissible purpose.

It must be directed to a legitimate purpose and must be proportionate in scope and effect.

Following this principle, the HOL's had to consider whether Shabina's freedom to manifest her belief by her dress was the subject of interference and, if so, whether such interference was justified.

Lord Bingham, Lord Hoffman and Lord Scott found that the school's refusal to allow Shabina to wear the jilbab at school did not interfere with her Article 9 right to manifest her religion, and even if it did, the school's decision was objectively justifiable.

Lord Nicholls and Lady Hale found that there had been an interference with Shabina's Article 9 right, but that this interference was justified.

The reasoning of the Lords was that Shabina and her family were aware of the school uniform policy at Denbigh High School and that there were other schools in the area at which Shabina would have been permitted to wear the jilbab. There was no evidence to suggest that Shabina was refused admission to these schools and as such her right to manifest her religion was not denied.

The Lords also took the view that the school had taken immense pains before reaching a decision to deny Shabina's request to wear the jilbab. The school had sought independent advice from Mosques in Luton and London. Following this consultative procedure, the school concluded that the uniform conformed to the requirements of mainstream Muslim opinion. The alternative uniform dress codes already in place at Denbigh High School were thought to be inclusive and representative of the school and wider community in an unthreatening and non-competitive way.

School authorities have statutory authority to lay down uniform rules and in the circumstances it was proportionate to insist upon implementing them.

Commentary

The House of Lords found against Shabina on the basis that she could have attended another school in the locality and worn the jilbab at that school. The case has attracted a great deal of commentary for this reason. Practically speaking, in many areas, the number of school which can offer availability to pupils in Year 9, after the school year has started, is limited. Would the Courts be required to consider evidence in relation to school admissions applications and refusal of school places in such cases What would have happened if in Shabina's case there were no alternative schools in the area where she could have worn the jilbab? In such circumstances would the child have been denied her rights under the Convention under Article 2, Protocol1?

(G) What of the child's Procedural Right's to Appeal?

The law relating to suspension and exclusion procedures currently does not allow **children** [28] any participatory rights in the consultation and decision making process. Nor are they provided the right to make their own representations/or to be separately represented at an Expulsions Appeal Tribunal hearing. This may present difficulties for a child who wishes to challenge an expulsion but is not supported by his/her parents in such action.

There is currently no statutory right of appeal against a suspension afforded to either the pupil or their parents/guardian, even though the law allows for a child to be suspended for up to 45 days in any school year.

· Does Article 6 of the European Convention apply to suspensions and expulsions?

Article 6, ECHR: Right to a Fair Trial

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"

Issues about schooling are central to a child's best interests and if we compare the system for separate representation in public law proceedings under the Children (NI) Order 1995 and in Youth Court proceedings under our criminal law, we will see that our current education legislation does little to ensure that children's voices are heard.

Article 6 of the European Convention guarantees the right to a fair trial; however this is only applicable in the determination of 'civil rights and obligations'. There has been some debate as to whether the right to education enshrined in Article 2, Protocol 1 constitutes a 'civil right'. A conclusion was reached in the case of **R v Head teacher of Alperton Community School et al [29]**, where it was held that the right to education is not deemed to be a 'civil' or private right. Accordingly, the procedural protections afforded under Article 6 do not apply in education cases.

However, the European Convention has been described as a 'living document', the reason being that its provisions are adaptable and may be interpreted afresh by the Court's over the passing of time. It may be that procedural rights in education law disputes shall attract further scrutiny by the Court's in the future and that the protections afforded under Article 6 of the Convention become applicable to parent's and children seeking to secure their rights under Article 2, Protocol 1.

Application of the Child's right to Participation, contained in the United Nations Convention on the Rights of a Child:

Article 12 of the United Nations Convention on the Rights of a Child provides:

“ that State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”

In the article entitled **“Access to Justice for Parents and Teachers over Schooling Decisions the Role and Reform of Educational Tribunals” [32]** , Neville Harris argues that the principal of participation enshrined in Article 12 of the United Nations Convention should be incorporated in both Special Educational Needs and exclusion procedures.

Although UN Convention rights are not incorporated into our domestic law, the principals of the UN Convention should be used as a 'model of good practice' and should always be referred to in the development and implementation of policies and procedures concerning children's rights. Furthermore, the articles contained in the United Nations Convention on the Rights of a Child are increasingly being used as an interpretative tool by European and domestic courts.

Although there is no statutory right for young people to attend or be represented in consultative meetings and tribunal hearings, the CCMS 'Scheme for the Suspension and Expulsion of Pupils' does give reference to some form of child participation. At Para 15.3 of the Scheme, it states that:

“ The parent/guardian (and the child if present) has also the right to make oral or written representations at consultative or Board of Governors meetings”

However, the opportunity for children and young people to make a meaningful contribution to such meetings, as required under Article 12 of the UNCRC, and which could be ensured with the benefit of advice and support from a separate representative, as and where appropriate, is not provided under the CCMS guidance. Indeed, parents are expressly denied the right to be accompanied or represented at such meetings within paragraph 15.4 of the same document:

“Since the consultative meeting is for consultation and not adversarial, a parent/guardian does not have the right to be accompanied or represented by another person..... Where an appeal against an expulsion takes place, then a parent/guardian has the right to be represented at such proceedings”.

It may be assumed that if a child decides to attend a consultative meeting to make their own representations, that their parents shall accompany them to the meeting. However, if a child's parents are not agreeable to attend, it is only fitting that the child should be entitled to have a responsible adult in attendance with them. This person should also be allowed, within the context of Article 12 of the UNCRC and in the interests of natural justice to make representations to the meeting, where necessary, on the child's behalf.

It may further be argued that if a child's participation in consultative and Board of Governors meetings is considered of some probative value, then they should continue to be involved in proceedings, which lead to an appeal.

It is important to note that if the law were to be changed to facilitate separate legal representation for children in education appeal tribunals that there would be implications for the Legal Services Commission in relation to

considering children and young people's access to funding for professional legal advice and representation under legal aid on a case by case basis. Current policy is that there is no legal aid available for representation in education appeal tribunal proceedings. General advice is currently available to parents, subject to means testing, under the Green Form Scheme.

Commentary on suspensions and expulsions procedures by the United Nations Committee on the Rights of the Child

In its second report to the United Nations Committee, in 1999, the UK Government addressed the issue of children's participation in exclusion procedures. The government acknowledged that it might be appropriate for older children to address an exclusions appeal panel about his/her exclusion from school. Allowing a child the right to have their voice heard is also conducive to the principals of natural justice, under our common law.

In the concluding observations of the Committee on the Rights of the Child in relation to the report submitted by the UK Government and dated 4th October 2002, the Committee recorded in paragraph 45 of it's report as follows:

'The Committee is concerned at the still high rate of temporary and permanent exclusions affecting mainly children from specific groups (ethnic minorities inter alia black children, Irish and Roma Travellers, children with disabilities, asylum seekers etc.), the sharp differences in outcomes for children according to their socio-economic background and to other factors such as gender, disability, ethnic origin or care status'

The Committee made a number of recommendations that were particularly relevant to suspension and expulsion procedures and requested that the UK Government ensure the following:

- * legislation throughout the state party reflects article 12 and respects children's rights to express their views and have them given due weight in all matters concerning their education, including school discipline;
- * shall take appropriate measures to reduce temporary or permanent exclusions;
- * children throughout the State party have the right to be heard before exclusion and have the right to appeal against temporary and permanent exclusion; and
- * children who are excluded do continue to have access to full time education;
- * undertake all necessary measures to remove the inequalities in educational achievement and in exclusion rates between children from different groups and to guarantee all children an appropriate quality education.

The next round of examination of the UK Government by the UN Committee is due to take place later this year (2008). The Children's Law Centre is working jointly with Save the Children (Northern Ireland) to produce an alternative NGO report for consideration by the UN Committee, entitled 'The State of Children's Rights in Northern Ireland', which focuses on the Governments progress in meeting the recommendations of the UN Committee since the last examination.

(H) New provisions under the Education (Northern Ireland) Order 2006.

As previously indicated at the beginning of this document, The Education (Northern Ireland) Order 2006 may be described as 'enabling' legislation as it introduces new provisions that shall soon revise current procedures in relation to suspensions and expulsions and the relevant appeals processes in Northern Ireland. There is currently no indication in relation to when such changes shall take effect.

The provisions that may effect change in this area are Articles 30 to 33 of the Order and the key changes proposed may be summarised as follows:

Article 30 provides for the introduction of a new suspension and expulsion scheme -

(1) The Department of Education is required to issue a new uniform scheme specifying procedures for suspension and expulsion of pupils registered in all grant aided-schools;

(2)The Education and Library Board shall be the authorised expelling authority rather than the Board of Governors of a school;

(3) A pupil may only be suspended from school by a person or body specified under the scheme;

(4) The Board of Governors of the school shall be required by law to comply with the scheme;

(5) The Department shall review the scheme within five years of its introduction and shall consult widely before making or revising a scheme under Article 30;

Article 31 provides for a new expulsion appeal tribunal to be established -

(6) The Department of Education shall by regulations provide for the constitution and procedure of a new appeals tribunal to hear and determine expulsion appeals relating to pupils from all grant-aided schools. The Order provides that representations may be made to the tribunal by or on behalf of the education and library board, the school Board of Governors and the relevant pupil.

Article 32 provides for the introduction of a mechanism of appeal against suspension -

(7) The Department of Education may by regulations provide for appeals against decisions to suspend a pupil from a grant aided school. This is a discretionary duty under the Order.

(8) Such regulations may include details of the persons entitled to appeal, who shall hear the appeal, time-limits for lodging an appeal; the procedures under which the tribunal shall operate, the matters to which the tribunal shall have regard in determining an appeal, and any other matters as the Department deems appropriate.

Article 33 deals with the education of suspended pupils and proposes an amendment to Article 86 of the Education (Northern Ireland) Order 1998, as follows:

(9) The Order specifies that it is the duty of the Board of Governors of a grant-aided school to make arrangements for the provision of suitable education for a suspended pupil at any time during the pupil's suspension from school.

(10) The Department of Education may determine particular circumstances where it would be appropriate for an education and library board to make arrangements to assist the Board of Governors in meeting this statutory requirement.

(11) Suitable education is defined under the Order as efficient education suitable to the pupil's age, ability and aptitude and to any special educational needs he or she may have.

The Children's Law Centre is concerned by the potential impact of the proposed delegation of responsibility to schools to ensure that all suspended pupils receive a suitable education during a period of school suspension.

We would recommend that additional monies be made available to schools to ensure that this new statutory duty can be met in circumstances where the school budget, for whatever reason, cannot stretch to provide a suitable education to the individual child. We would further recommend that the Department of Education define clearly and widely the circumstances where the Board may be required to intervene and make suitable educational provision and to ensure that a mechanism is introduced whereby individual children's needs shall be taken into account and the school's and Education and Library Board's ability and respective duties to meet the child's individualised educational needs can be independently assessed.

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Last updated on 12th February 2008

20[20] [1997] NIJB, 109, Queen's Bench Division (Crown Side), Coghlin J, 3rd June & 3rd July 1997
