SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

Claim No. SKBHCV 2003/0100

HCVAP 2004/001

In the Matter of an application by Kaleel Jones, by his next friend Leonie Hendrickson, for Judicial Review

And in the Matter of the Decision of the Principal (Ag) of the Sandy Point Primary School to suspend the Applicant form Sandy Point Primary School

BETWEEN:

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

and

THE MINISTER OF EDUCATION OF ST. CHRISTOPHER AND NEVIS

and

ANTHONY WILTSHIRE

Appellants/Respondents

and

KALEEL JONES (a minor by his next friend Leonie Hendrickson)

Respondent/Appellant

Before

The Hon. Mr. Brian Alleyne, SC	Chief Justice (Ag)
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Mr. Ronald S. Scipio QC and Mr. Chesney Hamilton for the Appellant
Miss Shelley Isles for the Respondent

Constitutional Law – Discrimination on the grounds of sex – whether rule regulating appearance was discriminatory – section 15 of the Constitution of Saint Christopher and Nevis

The respondent/appellant (Kaleel), a four year old boy who wore a pony tail, was informed by the principal, on his first day at a public school, that he should not return to school unless he had complied with the school rule which provided that: "Boys' hair must be cut short". This rule formed part of Article 3 which dealt with "Uniforms and Appearance". The Chief Education Officer to whom the matter was referred confirmed that Kaleel must cut his hair. Kaleel's parents refused and he was subsequently enrolled at a private school (which did not have a similar rule), at additional costs to them. They sought judicial review of the decision of the principal and the judge found that the "hair length rule" was unconstitutional because it discriminated against boys; which decision is the subject of this appeal by the State.

Held, allowing the appeal by the State, setting aside the declarations and award of costs made in the court below and making no order as to costs in the appeal:

(1) Sexual Discrimination means treating one of the sexes less favourably as distinct from treating the sexes differently. Any consideration of the issue whether a rule in a code of appearance is sexually discriminatory must begin with a consideration of the rule in the context of the whole of the provision in which the rule is contained.

Smith v Safeway PLC [1996] ICR 868 and Schmidt v Austicks Bookshops Ltd. [1977] IRLR 360 applied.

(2) The "hair length rule" read in the context of Article 3 as a whole was not discriminatory and was not therefore in breach of Section 15 of the Constitution. The rule was concerned with regulating appearance in accordance with accepted conventions, which is permissible.

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2008: March 13;
June 2.

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JUDGMENT

[1] BARROW, J.A.: This is an appeal by the State against the decision of Baptiste J. granting judicial review of the decision by the principal of the Sandy Point Primary School refusing to allow Kaleel Jones, a minor, to attend school until he had complied with the school rule that "boys' hair must be cut short." The judge declared that by refusing to allow Kaleel to attend school until he had cut his hair the principal suspended Kaleel and that in suspending Kaleel the principal acted in excess of the power granted to him to suspend a student. However, although the judge found that the rule pursuant to which Kaleel had

been suspended was unconstitutional because it discriminated against boys, he declined to grant a declaration to that effect and to award damages. The Attorney General appealed and Kaleel cross-appealed.

The facts

[2] On 2nd September 2002 four year old Kaleel Jones, who wore a pony tail, attended his first day of school at the Sandy Point Primary School, a public school, that is, one financed and operated by the State. Mr. Anthony Wiltshire, the acting principal, objected to the length of his hair. He told Kaleel's parents that the child's hair had to be cut to comply with the school's rules concerning appearance. These rules were contained in a document issued in 1975 entitled "Rules and Regulations". Article 3 dealt with "Uniforms and Appearance." The portion of this article addressed by the judge in his judgment and by counsel in their respective submissions stated:

> "Hair must be combed. No stylish haircuts for boys or hairdos for girls will be tolerated. Boys' hair must be cut short."

[3] On 3rd September 2002 the Chief Education Officer, Mr. Welcome, confirmed the principal's decision by advising that Kaleel must cut his hair. In consequence, Kaleel stayed away from school for a week. He returned to school, with his hair uncut, on the 9th September and his parents were told by Mr. Wiltshire that he would call the police to have Kaleel removed. As a result Kaleel was withdrawn from school by his father, Gregory Jones. On 26th September the officials of the Ministry of Education were told by Kaleel's parents that the child's doctor informed them that Kaleel would experience psychological trauma if his hair were to be cut. It was agreed that Kaleel would be re-admitted with his hair uncut, but October 4, 2002 was set as a deadline for cutting his hair. The parents did not meet the deadline and Kaleel's hair remained uncut on 4th October 2002.

[4] As a result of this, a further letter was sent to Kaleel's parents dated 7th October 2002 informing them that he should not return to school unless he complied with the school rules. On 9th October 2002 attorneys at law for Kaleel wrote the Chief Education Officer stating that they interpreted this letter as a suspension of Kaleel, that the parents wished

for Kaleel to continue to attend school, and requested his immediate reinstatement. The school authorities did not alter their position nor did Kaleel's parents alter theirs.

[5] During the period of deadlock that followed, the truancy officer for the Sandy Point area wrote to Kaleel's mother, Leonie Hendrickson, noting that Kaleel had not attended school for seventy sessions and advising that legal proceedings would be brought against her. In response the mother once more took Kaleel to Sandy Point Primary School and the authorities reiterated that Kaleel would not be admitted unless he cut his hair like all the other boys at the school. This position was confirmed by the authorities in a letter dated 11th November 2002.

[6] In the end the parents enrolled Kaleel at a private school, further away from his home, at additional costs to them. That school did not have a similar rule. We were told by counsel that the rule at the Sandy Point Primary School was not a generally prevailing rule at public schools. The parents kept Kaleel at the other school even after the judge gave his ruling, on 10th December 2003, essentially striking down the relevant portion of the rule as discriminatory on the ground of sex.

[7] On the appeal by the State the principal contention on behalf of the State was that the rule about boys' hair was not sexually discriminatory and so was not unconstitutional. On the cross appeal by Kaleel the principal contention on behalf of Kaleel was that, having found that the rule discriminated against boys, the judge erred in failing to issue a declaration of unconstitutionality and to award damages for breach of constitutional rights.

The judge's finding of discrimination against boys

[8] The discrimination the judge found was in relation to Section 15 of the Constitution, the relevant parts of which provide:

> "(1) Subject to subsections (4), (5) and (7) no law shall make any provision that is discriminatory either of itself or in its effect.
> "(2) Subject to subsections (6), (7), (8) and (9) a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority.

> "(3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective description by race, place of origin, birth out of wedlock, political opinions or affiliations, colour, sex or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another description."

[9] The specific finding of the judge is contained in the following passage of his judgment:

> "[22] That part of article 3 of the school rules which states that "Boys hair must be cut short" clearly does not apply to girls. This rule subjects boys of the Sandy Point Primary School to a requirement pertaining to the length of their hair to which the girls of the school are not subjected. If they were so subjected the rule would evidently relate substantially to appearance and not to sex. The fact is that there is no requirement in article 3 that girl's hair must be cut short. The conclusion is irresistible that part of article 3 of the school rules which states that "Boys hair must be cut short" is made wholly or mainly on the ground of sex and is discriminatory. Boys have been singled out for or afforded different treatment wholly on the ground of their sex. Further, there is nothing before the court to suggest that the rule is reasonably justifiable in a democratic society."

[10] Having found that the rule was discriminatory the judge went on to find that the "Rules and Regulations" was "an instrument having the force of law" and he used the existing law paragraph in the Transitional Provision[1] in the Constitution to modify the rule by omitting from it the sentence that stated "Boys' hair must be cut short." Part of Kaleel's cross appeal was against the finding that the Rules and Regulations was a law. Mr. Scipio QC submitted on behalf of Kaleel that the document was not a law but merely a policy document. Counsel submitted that what was unlawful was the enforcement of the rule. This action by the principal, it was submitted, constituted treatment in a discriminatory manner by a person acting in the performance of a public office, contrary to section 15 (2) of the Constitution. Counsel for the State agreed that the rules were not a law. In view of this concession, rightly made I think, no issue arises on this appeal as to subsection (1) of Section 15 of the Constitution.

[1] Schedule 2 to the Constitution, paragraph 2.

Less favourable treatment

[11] The essence of the State's appeal was that the rule "boys' hair must be cut short" does not contravene Section 15 and is therefore not discriminatory because discrimination against one or other of the sexes is what constitutes discrimination prohibited by the constitution and that discrimination between the sexes is perfectly lawful. Counsel for the State argued that this is how Section 15 (3) of the Constitution must be understood. Considerable reliance to support the state's position was placed on the English Court of Appeal's decision in Smith v Safeway PLC[2] which decided that discrimination means treating one of the sexes less favourably as distinct from treating the sexes differently. Mr. Scipio accepted the soundness of the decision but sought to show that the rule in the instant case treated boys less favourably than girls, purely and arbitrarily on the ground of sex.

[12] In Smith v Safeway, a well known chain of supermarkets, Safeway, required their staff to comply with a code governing their appearance because they considered appearance as important in attracting and repelling customers. A leaflet regulating appearance required persons working in the food department to wear a uniform that differed in detail according to gender. In addition, male staff was required to comply with the following directions:

> "Fresh shaven, moustaches which do not extend beyond the lip line are allowed. No unconventional jewellery. …
> Tidy hair not below shirt collar length. No unconventional hair styles or colouring."

[13] For female staff the following directions applied:

> "Make-up should be simple and kept to the minimum. Jewellery must be discreet and conventional. … Your hair should be tidy. Shoulder length hair must be clipped back. No unconventional hair styles or colouring."

[14] A male member of staff was dismissed after he began disregarding the code. On a claim before an Industrial Tribunal for compensation for dismissal in violation of the Sex Discrimination Act 1975, on the ground that he was treated less favourably than the employer would treat a woman, the claimant failed. The Tribunal held that a retail store is entitled to have a dress and appearance code; it does not have to make identical provision in relation to men and women; and while the rules governing dress and appearance for both men and women were different rules, they were equally rigorously applied in both

[2] [1996] ICR 868 (CA)

cases, and it was not discriminatory that they made different provisions in relation to the length of hair for men and for women.[3]

[15] On appeal the Industrial Appeal Tribunal decided in favour of the claimant, by a majority comprising the lay members, that the treatment of the claimant was self-evidently less favourable and that the store's appearance requirements could be satisfied without placing hair length restrictions on men only.[4] The view of the dissenting member, upheld on Safeway's successful appeal to the Court of Appeal, was that "provided requirements for men and women can reasonably be related to current perceptions of what is a conventional appearance for men and for women, the requirements do not treat one sex less favourably than the other. The sexes are treated differently but equally by the standard of what is conventional, a standard which [Safeway] are entitled to require of delicatessen assistants."[5]

[16] Both the first instance and the appeal tribunals purported to apply the approach of the Appeal Tribunal in Schmidt v Austicks Bookshops Ltd.[6] In that case a female employee complained that the requirement that she should wear a skirt and not trousers while serving the public was unlawful discrimination on the grounds of sex. The decision of that Appeal Tribunal was given by Phillips J who accepted there was no comparable restriction imposed on men, equivalent to that imposed on women, and that fact provided a basis for arguing that women were being treated less favourably than men. But Phillips J went on to observe that a broader and more positive approach required recognition that although there was less scope for positive rules in the case of men, in that the choice of apparel open to men was more limited, men also were subject to restrictions. They were not allowed to wear Tee-shirts and would not have been allowed to wear unconventional clothing. The judge continued:

> "And so they were subjected to restrictions, too, albeit different ones – because, as we have already said, the restrictions to which the women were subjected were not appropriate to the men. Experience shows that under the Sex Discrimination Act

[3] At p 874
[4] Ibid
[5] Ibid
[6] [1977] IRLR 360

> 1975 a lot depends on how one phrases or formulates the matter of which complaint is made. Here it has been formulated in the terms of skirts and overalls. As has been pointed out, in another case it might be in terms of earrings for men, long hair, all sorts of possibilities. But it seems to us that the realistic and better way of formulating it is to say that there were in force rules restricting wearing apparel and governing appearance which applied to men and also applied to women, although obviously, women and men being different, the rules of the two cases were not the same… It seems to us, if there are to be other cases on these lines, that an approach of that sort is a better approach and more likely to lead to a sensible result, than an approach which examines the situation point by point and garment by garment."[7]

[17] In Smith v Safeway Phillips LJ approved the submission of counsel that the principle to be derived from Schmidt is that:

> "Rules concerning appearance will not be discriminatory because their content is different for men and women if they enforce a common principle of smartness or conventionality, and taken as a whole and not garment by garment or item by item, neither gender is treated less favourably in enforcing that principle."[8]

[18] Counsel for the employee in Smith v Safeway submitted that conditions of employment which place restrictions on men which do not apply to women, or vice versa, are unlawful. In response to this submission Phillips LJ stated:

> "There is an important distinction between discrimination between the sexes and discrimination against one or other of the sexes. It is the latter that is forbidden by the Sex Discrimination Act 1975.
> "Discrimination is defined as being treated less favourably. In my judgment, this is plainly the meaning of discrimination in [the relevant European directive] and the 1975 Act fully reflects that directive. In many instances, discrimination between the sexes will result in treating one more favourably than the other, but this will not necessarily be the case. If discrimination is to be established, it is necessary to show, not merely that the sexes are treated differently, but that the treatment accorded to one is less favourable than the treatment accorded to the other. That is the starting point of the judgment adopted in Schmidt, and in my judgment, it is plainly correct."[9]

(3) As noted, another principle established in Schmidt and approved in Safeway was "that one considers the effect of a code governing appearance overall, not item by item." The court firmly rejected the argument of counsel for the employee that each element in the code has to be examined separately to see whether that element is discriminatory. Phillips LJ said:

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[7] At p 875-876
[8] At p 876
[9] Ibid

> "In my judgment, a package approach to the effect of an appearance code necessarily follows once one accepts that the code is not required to make provisions which apply identically to men and women. Phillips J held that this was the approach more likely to lead to a sensible result in that case and cases like it. I agree. This is not to say that when applying the test, the requirement of one particular item of a code may not of itself have the effect that the code treats one sex less favourably than the other. But one has to consider the effect of any such item in the overall context of the code as a whole."[10]

[20] "The next element of the approach in the Schmidt case", Phillips LJ stated,[11] "is the assumption that a code which applies a conventional standard of appearance is not, of itself, discriminatory." His Lordship stated he could accept that one of the objects of the prohibition of sex discrimination was to relieve the sexes from unequal treatment resulting from conventional attitudes, but he did "not believe this rendered discriminatory an appearance code which applies a standard of what is conventional."[12] On this point His Lordship concluded with the observation that: "A code which applies conventional standards is one which, so far as the criterion of appearance is concerned, applies an even-handed approach between men and women and not one which is discriminatory."[13]

[21] Finally, Phillips LJ stated, and to him the most important element of the approach in the Schmidt case was that, looking at the code as a whole neither sex must be treated less favourably as a result of its enforcement.[14]

[22] One of the most fundamental propositions that Smith v Safeway confirms is that any consideration of the issue whether a rule in a code of appearance is discriminatory must begin with a consideration of the rule in the context of the whole of the provision in which the rule is contained. As Phillips LJ stated, a sensible approach would be to look at the overall effect of the rules and not to single out any one aspect of them. Counsel for the State, Ms. Isles, argued that the trial judge erred when he took the approach of isolating the particular rule, requiring that boys' hair should be cut short, from the set of rules relating to hairstyles for both sexes in determining that the respondent's constitutional right

[10] At p 877
[11] Ibid
[12] At p 877 - 878
[13] At p 878
[14] Ibid

had been violated. Counsel submitted that the trial judge failed to recognize that Article 3 of the Rules of the Sandy Point Primary School placed restrictions on both sexes and neither sex was treated less favourably when Article 3 is looked at in its entirety.

Article 3

[23] It is clear that the judge did not consider the entire Article 3 because he neither reproduced it in his judgment nor discussed any of its provisions apart from the portion already identified. The complete article states:

> "3. Uniform and appearance: Students are required to wear prescribed uniform at all times. Uniforms must be clean and tidy. Shirts and blouses must be neatly tucked in at all times. Any student not wearing the prescribed uniform must present a written excuse from his/her parent/guardian.
>
> "Children may 'dress up' on their birthdays.
>
> "No jewellery is to be worn.
>
> "Beads and other hair accessories should be blue, white or black.
>
> "Hair must be combed. No stylish haircuts for boys or hairdos for girls will be tolerated. Boys' hair must be cut short.
>
> "Girls will not be permitted to wear nail polish or extensions to their hair.
>
> "The prescribed uniform is as follows:-
>
> "Boys: Light blue shirts, khaki short pants, navy socks, black shoes or slippers. White will be accepted.
>
> "Girls: Plaid blue tunic, light blue blouses, navy socks, black shoes or slippers. White will be accepted."

[24] It is inescapable, in my view, that by failing to consider the rule in which hair length is mentioned in the context of this comprehensive treatment on appearance the judge erred in a fundamental way in coming to his conclusion. The judge simply ignored the other rules relating to appearance that placed restrictions on the appearance of both boys and girls including one rule that restricted girls alone. The judge, therefore, made no examination of the provisions of the code on appearance, and therefore no comparison, to see if one sex was treated less favourably than the other. He made no assessment of whether Article 3

achieved an even handed approach in the treatment of the sexes, which would make it not discriminatory.

[25] Had the judge considered the entire article he would have appreciated that the rule on which he focused was not, as Mr. Scipio mistakenly termed it in his supplemental submissions, the "hair length rule", but was part of a rule regulating hair styles for both boys and girls. The rule prohibited "stylish" haircuts and hairdos and contemplated that the way boys present a stylish appearance is by their haircut while girls present a stylish appearance by their hairdos. On my reading, it was merely an elaboration of the rule that boys will not be tolerated with stylish hair cuts to add, as the rule did, that boys must cut their hair short. On this analysis, it was not, therefore, that boys were singled out because of their sex for a requirement that they must cut their hair short. It was because long hair is conventional for girls, but is stylish for boys, that the rule required boys to cut their hair short.

[26] The discussion in Schmidt, that it is not necessarily discriminatory to treat one sex differently from the other, spoke to the situation where a code governing appearance may impose a gender specific restriction on females that is not imposed on males but may, comparably, impose a rule on males that is not imposed on females. Such treatment, it was considered, does not discriminate but differentiates and may be the essence of an even handed approach. A good example of this even handed approach is provided in the instant case, on an overall consideration of Article 3, by the rule immediately following the hair style rule, which specifies that girls will not be permitted to wear nail polish or extensions to their hair. I hope I am not being facetious in remarking that this rule restricts girls but not boys from doing these things.

[27] Seen in the context of an article regulating appearance it is plain that the rule that the judge struck down is not concerned with discriminating against boys, contrary to the judge's finding reproduced above.[15] The rule is concerned with regulating appearance, which the judge accepted is permissible. Further, the context of the rule also makes clear

[15] See paragraph [9], above

that, contrary to the submission of Mr. Scipio, the rule is far from arbitrary. It is clear from Schmidt and Safeway that an employer is entitled to require a conventional appearance of its staff. I should think school authorities, whose right to regulate the appearance of primary school students, including requiring them to wear uniforms, was never doubted, must be even more entitled to require a conventional appearance of students.

[28] In my view, the judge's decision that the rule was unconstitutional for discriminating against boys on the ground of their sex cannot stand.

The respondent's case

[29] The submissions on behalf of Kaleel are incapable of rescuing the judge's decision because those submissions suffer from the same flaw as the decision. By utterly failing to address the other provisions in Article 3, Mr. Scipio's submissions on what he saw only as the "hair length rule" are necessarily unpersuasive. His submissions were that that rule was discriminatory, that it provided different and less favourable treatment for boys based on sex, that there was no justification for the rule, that it was arbitrary and lacked any objective and that the rule in and of itself was discriminatory. With respect, those submissions are of little weight when they ignore the context provided by the other rules in Article 3. Even the case on which Mr. Scipio most relied, Cope v Girton Grammar School Ltd.,[16] shows that he took the wrong approach. The proper approach, as the Equal Opportunity Board of Victoria stated in that decision,[17] is that "… the facts asserted by the complainant must be looked at as a whole to assess whether they amount to discrimination – that is, whether the school subjected the complainant to a detriment by treating him less favourably on the substantial ground of his sex." (Emphasis added.) If the facts, or the rules, are not looked at as a whole, it is inevitable that the whole picture cannot be seen.

[16] (1995) EOC 92-680

[17] [1995] VADT 2, at p 7 HTML version. It seems to have escaped counsel's attention that this interim decision, which decided only that there was a prima facie case of discrimination, was given on 7 March 1995 and was informed by the decision of the English Employment Appeal Tribunal in Smith v Safeway PLC (see pp 7 and 8 HTML version). That decision was reversed by the Court of Appeal, see [14] above, which gave its decision on 16th February 1996.

[30] The decision in Safeway is conclusive that the rules or items in a code of appearance cannot be looked at one by one. It must be even more the case that where there is a number of rules or items you cannot look at just one. That is exactly what Mr. Scipio did. It was a fundamental error.

[31] No alternative basis for supporting the judge's decision is offered in the submissions on behalf of Kaleel. Even if the argument could succeed, I do not see any support for the judge's decision flowing from Mr. Scipio's argument that there is a distinction between the English Sex Discrimination Act 1975 which defines discrimination as "less favourable treatment", and the St. Kitts and Nevis Constitution which defines discrimination as "different treatment". With respect, I am unable to see the relevance, for present purposes, of that supposed distinction. Different treatment is only discriminatory, in the sense prohibited by the Constitution, if it results in less favourable treatment to a person compared to the treatment afforded to other persons. Clearly, if different treatment results in more favourable or equally favourable treatment to a person he has no complaint.

[32] In any case, there is really no distinction, for present purposes, between the English Act and the Constitution as regards the meaning of discrimination. Section 15(3) of the Constitution defines discrimination to mean affording different treatment to different persons, attributable to their respective description (such as by sex, among others), whereby persons of one such description are subjected to disabilities or are accorded privileges or advantages to which other persons are not subjected or are not accorded. Subjecting a person to disabilities or denying him privileges or advantages accorded to other persons is what constitutes discriminatory treatment. A person so subjected or denied is obviously treated not merely differently, but also less favourably, than a person who is not so subjected or denied. It is different treatment which produces such a result that is proscribed. This makes the meaning of discrimination in the constitutional provision no different, in substance, from the meaning of discrimination in the English Sex Discrimination Act 1975. English decisions on that Act are, therefore, helpful in considering allegations of discrimination under the Constitution and the decisions I have

considered support the conclusion that the school rules on appearance did not discriminate against boys.

Conclusion

[33] For the reasons given I would allow the appeal by the State. In insisting that Kaleel be made to comply with the school rule the principal, in the performance of a public office, did not treat Kaleel in a discriminatory manner contrary to Section 15 of the Constitution. Because the principal acted lawfully in insisting on compliance, he did not, in my view, suspend Kaleel by refusing to allow Kaleel to attend school until he had been made to comply with the rule. The issue in the court below, whether or not Kaleel had been suspended was entirely peripheral to the issue of the constitutionality of the school rules and the principal's action. The suspension issue was not argued on appeal. Accordingly, I give no separate consideration to that matter. I would, therefore, set aside the declarations the judge made against the State and the award of costs.

[34] In accordance with Rule 56.13 (6) of the Civil Procedure Rules 2000, which establishes the general rule that costs should not be awarded against an applicant for an administrative order, I would make no order as to costs.

Denys Barrow, SC
Justice of Appeal

Brian Alleyne, SC
I concur. Chief Justice Ag.]

Hugh A. Rawlins
I concur. Justice of Appeal