THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

THE BOARD OF MANAGEMENT OF SCOIL LORCÁIN

APPLICANT

AND

THE SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SKILLS, DIARMUID Ó MURCHÚ, SEAN SHEEHAN AND MICHAEL BAKER

RESPONDENTS

AND

AB AND CD

NOTICE PARTIES

JUDGEMENT given by Hogan J on 29 July 2016

1. The applicant in this case is an Irish Primary School in Monkstown, County Dublin. Scoil Lorcáin was established in 1952 and from then the main aim of the school was to provide education through Irish to children in South County Dublin. The Board of Management adopted an Entrance Policy in 2014 to comply with the Education act 1998 ("the 1998 Act").
2. At the moment, there is much demand for spaces in the school. There are only 60 places available in the Junior Infants class due to commence in September 2016, but according to the evidence, it is clear that over 190 children applied for a place in this Junior Infants class.
3. "Ciara" is one of these children, the daughter of the notice parties, AB (The Father) and CD (The Mother). Ciara was born in February 2012. On 12 June 2012 Ciara's parents put an application into Scoil Lorcáin for a place for their daughter in September 2016. The parents said she was being raised through Irish and they sought a place in the school for their daughter on this basis. It is clear, however, that the father is an Irish learner (because he is attending Irish Courses with, for example, Gael Linn) and the mother does not have much Irish at all.
4. The Entrance Policy of Scoil Lorcáin gives priority to children who are being raised through Irish if the number of applications for places is more than the number of places that are available. It is not questioned as to whether the School is correct to have an entrance policy which gives priority to

children who are being raised through Irish. The only question is whether this policy was executed in a way that is correct and fair.

5. In this case the parents are separated. Unfortunately, there is disagreement between the parents over which school would be appropriate for Ciara. This question was put forward to the High Court. On 13 November O'Hanlon J ruled that it would be in the interest of Ciara to attend the Scoil Lorcáin Pre-School and Scoil Lorcáin after that if it was possible. Directly after the ruling of the High Court Ciara started attending the Lorcáin Pre-School in November.
6. When a parent of a child who is being raised through Irish applies to be given priority in accordance with the policy, the Board can ask the parent and the child to present themselves to the school in order to satisfy the school that Irish is the spoken language at home. Around December 2015, the Board arranged for two senior teachers to interview the Father and his daughter in order to make this assessment.
7. According to the teachers, the father did not have much Irish and he had difficulties speaking the language. It was also the teachers opinion that the child only had very limited Irish. They said in their notes that they made every effort to get something out of her… she did not have enough Irish at all.
8. Even though the teachers made every effort to get an answer from her, she was not able to answer basic questions nor have a conversation in Irish. The board decided after the recommendations of the teachers that there was not enough evidence to satisfy it that the child was being raised through Irish. The principal of the school confirmed to the mother in an email dated 26 January 2016 that the definition according to Scoil Lorcáin of "a child being raised through Irish" is a family in which at least one parent is speaking in Irish alone to the child.
9. After this, the Father appealed the decision to the Board at first, but this appeal failed. Then, he appealed under article 29 of the 1998 act to the secretary general. The Secretary General organised an appeals committee to hear the appeal.
10. The committee came together on the 29 February 2009 (I assume this should be 2016?) to hear the appeal against the decision of the school. There were three members of the committee – Mr Ó Murchú, Mr Sheehan and Mr Baker. The hearing went on for an hour and a half. There were representatives from both sides present: The principal of Scoil Lorcáin and the chairperson of the

board of management of the school, the father was there with a barrister and the mother was there with an observer.

11. The committee heard oral submissions. Mr Ó Maolchalain (Counsel for the Father) submitted that the pass mark for the assessment was unknown. He also said that the Father was learning Irish and he made every effort to speak Irish to his daughter all the time. The Father gave evidence in Irish with regard to the efforts he had made to improve his Irish. It is true that he was not cross-examined about this. The School's representative said however that there was a lack of evidence that the child had Irish and that there had been guidance given to the father with regards to the criteria that would be in use during the assessment.
12. It is clear from the affidavit of Mr Ó Múrchú that the members of the Committee had enough practise teaching at every level, in Irish Schools, as members of Management Committees and 12 years as school inspectors in Gaeltacht areas. Furthermore, one of the members of the Committee was practised in dealing with appeals under s29 for many years.
13. The Committee made its own decision and the appeal succeeded. The Committee referred the decision to the Secretary General of the Department of Education, as is required in accordance with section 29(5) of the 1998 Act and – as is usual – the decision was accepted. Because the appeal against the school succeeded, Ciara was entitled to a place in the school.

S29 of the 1998 Act: Appeal to the Secretary General

14. S29(1), (2) and 3 of the 1998 Act set out:

(1) Where a board or a person acting on behalf of the board—

(a) permanently excludes a student from a school, or

(b) suspends a student from attendance at a school for a period to be prescribed for the purpose of this paragraph, or

(c) refuses to enroll a student in a school, or

(d) makes a decision of a class which the Minister, following consultation with patrons, national associations of parents, recognised school management organisations, recognised trade unions and staff associations representing teachers, may from time to time determine may be appealed in accordance with this section,

the parent of the student, or in the case of a student who has reached the age of 18 years, the student, may, within a reasonable time from the date that the parent or student was informed of the decision and following the conclusion of any appeal procedures provided by the school or the patron, in accordance with section 28, appeal that decision to the Secretary General of the Department of Education and Science and that appeal shall be heard by a committee appointed under subsection (2).

(2) For the purposes of the hearing and determination of an appeal under this section, the Minister shall appoint one or more than one committee (in this section referred to as an "appeals committee") each of which shall include in its membership an Inspector and such other persons as the Minister considers appropriate.

(3) Where a committee is appointed under subsection (2) the Minister shall appoint one of its number to be the chairperson of that committee and who, in the case of an equal division of votes, shall have a second or casting vote.

S19 of the Education (Welfare) Act 2000

15. The Board of Management must decide which of the applicants will get a place in the school and which of them will not. This must be based on the enrolment policy which the school has published in accordance with section 15(2)(d) of the 1998 Act. S 19 of the Education (welfare) act 2000 provides:

(1) The board of management of a recognised school shall not refuse to admit as a student in such school a child, in respect of whom an application to be so admitted has been made, except where such refusal is in accordance with the policy of the recognised school concerned published under section 15(2)(d) of the Act of 1998.

(2) The parent of a child who has made an application referred to in subsection (1) shall provide the recognised school concerned with such information as may be prescribed by the Minister.

(3) As soon as practicable, but not later than 21 days, after a parent has provided, in accordance with subsection (2), such information as may be prescribed by the Minister thereunder, the board of management of the school concerned shall make a decision in respect of the application concerned and inform the parent in writing thereof.

Decision of the Committee

16. The appeals committee accepted the submissions which the father put forward in relation to s29 on behalf of his daughter, Ciara. According to its jurisdiction, as was laid down by the Supreme Court in the case of The Board of Management of St Mologa's National School v The Secretary of the Department of Education and Skills, the Appeals Committee gave a full hearing to this case. The Committee made its decision after an assessment of the range of points that were in the written and spoken arguments from both parties, as well as the enrolment policy that was published by the school in 2014.
17. The Committee made its decision based on the following reasons:
    1. In the enrolment policy of the school, it was mentioned that every child would be welcomed to Scoil Lorcáin regardless of the language background which he or she has. The appeals committee were of the view that this statement does not correspond with section 2.6 of the policy, which shows that if the number of applicants is greater than the number of spaces in the school, places will be distributed firstly to students who are being raised with Irish.
    2. The board of management of Scoil Lorcáin sis not give enough information to the parent about the system of assessment in which fluency of Irish of the child and the parent would be assessed. The appeals committee accepted the view of the parent that the interview did not encourage the parent and child to have a conversation together in Irish in order to assess each of their abilities.
    3. The enrolment policy of the school did not mention the process which they have to collect evidence in relation to the spoken language abilities of the parent and child whom is being raised through Irish.
    4. There were no criteria laid out in the enrolment policy to assess the fluency of the parent.

5. The definition which was given in the email of the 26 January 2016 ("*the definition we have for this is a family where at least one parent speaks Irish only to the child*") does not correspond with the enrolment policy of the school. There is no such definition mentioned in the policy.
6. The committee was told that the result of an interview was set aside on one occasion and a place was given to a child in the school when other evidence of fluency of the parent and child was provided to the school. Such an opportunity was never given to the father in this case.

The Jurisdiction of the Committee

18. It is true that the Supreme Court confirmed in the St Mológa case that the appeals committee had full jurisdiction under s29. This was said as an answer to the claim that the jurisdiction was one of rehearing and because of this that the committee did not have jurisdiction to intervene except for when the first decision of the board of management is incorrect in terms of law or unreasonable.
19. Notwithstanding, it is clear from the judgement of O'Keefe J in the cases of *Lucan Educate Together v Secretary General, Department of Education [2009] IEHC 86* and *Co Westmeath VEC v Secretary General, Department of Education [2009] IEHC 373, [2010] 1 I.R. 192* that the Committee has no jurisdiction whatsoever to review the entrance policy of the school which was accepted under article 15(2)(d) of the 1998 Act.
20. In the case of Lucan Educate Together the Appeals Committee stated in its decision – dealing with a decision of the school to refuse to register children with learning difficulties:
21. "It is the view of the Committee that the inclusion in the school's enrolment policy of the criterion 'if the child presents with a general learning disability, it must fall within the mild range' is inappropriate in the context of recent legislation." O'Keefe J overturned the decision of the Appeals Committee. He said:

> "The first conclusion to be stated in relation to this reason, that a part of the school enrolment policy is inappropriate in the context of recent legislation is that it is vague and uncertain in its own terms. It purports to be a determination of the lawfulness of a part of the school's enrolment policy in the context of unspecified recent legislation. In my judgement, as expressed, it does not amount to a valid reason.

> The enrolment policy is prepared by the Board of Management in accordance with s15(2)(d) [of the 1998 Act]. There is no evidence before the court that the Minister made any directions in relation to the applicant's enrolment policy. Section 19 of the Education (Welfare) Act 2000, provides that the Board of Management shall not refuse to admit as a student in such school a child, except for such refusal is in accordance with the enrolment policy published under s15(2)(d) of the Act of 1998. In my opinion, the Committee cannot strike down or disregard a provision in the enrolment policy of a school and substitute what it may consider as appropriate. The enrolment policy when published has to have regard to the matters set out in Section 15(2)(d). This includes respecting the right of parents to send children to a school of the parents' choice, but it does not confer on a parent the right to send a child to the school of their choice."

22. Because of this, the only task of the Appeals Committee is to resolve this question: did the Board follow the published entrance policy correctly in this case? I understand that this task is not always as simple or straightforward as that: The Committee must have some jurisdiction in order to make sense of the policies, as well as some freedom in order to put the policy in action. The expertise and experience of the Committee in matters of education should be considered, because this court does not have the same expertise.
23. In this context, we must examine the actual reasons which the Committee gave in this case.

Ground 1: Inconsistencies in the Policy

24. The Committee decided that the statement in section 1.8 of the entrance policy which mentioned that every child would be welcomed to Scoil Lorcáin regardless of their language background he or she has conflicts with section 2.6 of the policy , which states that if there are more applicants than spaces in the school, places will be given firstly to children who are being raised with Irish.
25. In my opinion, it is clear that the Committee made an error when they accepted this view. There is no inconsistency between the statement that the places will be given firstly to children who are being raised with Irish on one hand, and the statement that the school would welcome every child, regardless of the language background he/she has, on the other hand. For example, it is true without a doubt that there are many schools under the patronage of the Roman Catholic Church or the

Church of Ireland which have similar sections in their published entrance policies; giving priority to children that are being raised with a particular religion on one hand, and welcoming children from every religious background at the same time. A statement like this in an entrance policy means that the school gives priority to one group (e.g. Gaeilgeoirs or Roman Catholics), but they welcome every child.

26. Furthermore, I do not accept that these statements from the Committee are essential to the decision, because the statements in question were not relating to the final decision of the Committee. In my view, in relation to the rationale that was used in the cases of *Lucan Educate Together* and *Co. Roscommon VEC*, I have doubts in relation to the jurisdiction of the Committee to make a statement like this at all. The one and only task which the Committee has is to interpret and apply the policies of the school in special cases. It is not appropriate for the Committee to look behind the policies or try indirectly to criticise them.
27. It is clear from this case that it is a difficult thing to apply this principle consistently, especially because entrance policies vary greatly from school to school. Not all the policies are written with the accuracy and depth that is necessary, in order that the Committee is able to assess the appeal under s29 in a simple way. As it now stands, however, The Committee need only accept the entrance policy at face value and it is not correct for the Committee to look behind the policies in any way.
28. It is as if this interpretation of s29 is too narrow. The Committee should have a broader role in reviewing published entrance policies. But in the end, this would be a policy decision for the Oireachtas to make.
29. Furthermore, because these statements from the Committee are non-binding, and were not central to the final conclusion, I do not believe that it would be appropriate to annul the entire decision on this ground alone.

Ground 2: Information for parents in relation to any fluency assessment of Irish

30. Two main reasons are given under this heading. Firstly, it is submitted that the school did not give enough information to the parents in relation to the assessment system which would be utilised in order to assess the fluency of the parents and the children in Irish. Secondly, the Committee accepted

the opinion of the parent that the interview did not assess his ability nor the ability of the child to converse with each other.

31. Even though the notes in the 2014 policy make it clear that any parent wishing to display that their child is being raised through Irish may be called into the school to show this to the Board of Management ("… the parent may be asked into the school to show to the members of the Board of Management that Irish is the language which is used to communicate between parent and child…."), I believe that the Committee was right to say that there was not enough information available to the parent in relation to the method of assessment.
32. What I do not accept, however, is the conclusion from the Committee that the school failed to give enough opportunities to the father to show his or his daughter's ability to talk to each other in Irish. It is clear from the detailed notes written by the two teachers which describe the interview with the father and child on 8 December 2015 that every effort was made to assess the language capabilities of the two parties.
33. Although the teachers understood that the father had made commendable efforts to speak Irish, they both decided that the child did not have enough Irish for them to say that she was being raised through Irish. They came to the conclusion that the child did not have a knowledge of Irish vocabulary for colours or numbers and that she was unable to identify any furniture of the house. In addition to this, she did not know any song or poem in Irish.
34. In my opinion, the evidence available does not support the conclusion which the Appeals Committee came to which states that the Father did not get an adequate opportunity to display his ability to speak to his child in Irish. According to the evidence, this conclusion is not sustainable. Because this is a very important decision from the Committee, and because this conclusion from the Committee means that the appeal should be allowed, the decision should be set aside on this basis alone. Even though administrative bodies have a certain amount of freedom in relation to fact finding, there should be a reasonable factual basis for the final decision. As was stated by the Supreme Court, any decision of this kind should be bona fide, correct and precise in relation to the facts, and it should not be unreasonable: Refer to the decision of O'Higgins CJ in *The State (Lynch) v Cooney* [1982] I.R. 337, 361.

Ground 3: The Entrance Policy of the school did not mention the process which the school has to collect evidence in relation to assessment of language speaking abilities of parents and children who are being raised through Irish.

35. The reason given for ground 3 is very similar to the reason given for ground number 2; It was said in both grounds that the entrance policy did not detail how the language abilities of the parents and children would be valued. This is a further example of the difficulties which I have mentioned above; that there would be many cases in which the Committee cannot directly and simply exercise the terms of the entrance policy.
36. Accepting the experience of the Committee, I find that the Committee were entitled to conclude that the enrolment policies should include more details setting out how the language abilities of the applicants would be assessed.

Ground 4: There were no criteria laid out in the enrolment policy in relation to assessing the fluency of the parent.

37. It is true that the enrolment policies do not detail the standard of Irish fluency that is required from a parent. The result of the Committee's conclusion, however, is the decision that there were not sufficient standards in order to assess language capabilities to be found in the policies. In keeping in line with what I have just said in relation to ground number 3, I agree that the Committee was entitled, in principle, to come to a conclusion such as this as a result of its expertise in matters of education. I agree with this even though – from one view – this conclusion is an indirect criticism of the enrolment policies.
38. Similarly, in relation to this case, it is implicit, at least, in the enrolment policy that the school would expect that the parent would have a sufficient mastery of the language so that they would at least be reasonably able to raise their child through Irish. Common sense should be exercised in this context: I believe that it would be unrealistic to demand of parents that their Irish should be perfect and idiomatic in terms of grammar. From an objective outlook, however, in terms of the commitment in the policy that the child should be raised through Irish to obtain enrolment priority, this is a clear signal that the child should have a mastery of the language to a standard that would be appropriate

for a child of that age with a parent with a reasonable standard of Irish – It does not need to be perfect.

39. The same thing could be said with reference to the other types of requirements that are found frequently in school entrance requirements. For example, if it is stated in an enrolment policy of a secondary school that priority would be given to a child that is raised through Catholicism, it would be implicit that the child would have basic knowledge, at least, of basic principles of the religion, like sacraments, the Bible, the Holy Trinity and the 10 Commandments. It cannot therefore be said that there were not clear guidelines in the entrance policy, even though the phrase "raised through Catholicism" was not explained precisely.
40. In the context of this case, it is clearly indicated that, because of the requirement that the child should be raised through Irish, the child should show some reasonable competence in the language, again, at a level that is appropriate for his age. Therefore, it was reasonable for the school to expect that the child would have a standard corresponding with that of a child of four years of age and that they would know the vocabulary for colours, numbers or household furniture at least, even if their answers were not perfect.
41. As a result of this, in my opinion, the Committee made an error because they failed to identify that the enrolment policies imply, when properly construed, that the applicants would have a reasonable standard of Irish, at a level which is age appropriate. Therefore, insofar as the Committee accepted the opposite conclusion in their decision, they understood (incorrectly) that there was no identifiable standard in the enrolment policies, and in that way they misinterpreted the enrolment policies. Furthermore, because there was an explicit statement in relation to the language assessment they required, they ignored the fact that the enrolment policy implies that there would be a reasonable standard of Irish required.
42. It follows, therefore, that the Committee made their conclusions on the wrong basis – That there was no identifiable standard of language to be found in the enrolment policy – when in fact the opposite was true. Because of this, the conclusions of the Committee are not based on fact, and because of this the decision should be set aside.

Ground 5: The definition given in the email of 26 January 2016 ("*the definition we have for this is a family where at least one parent speaks Irish only to the child*") ag teacht le Polasaí Cláraithe na scoile. There is no such definition mentioned in the policy.

43. It is true that the special definition given in the email from the school on the 26 January , which shows the meaning of the phrase "raised with Irish" limited to situations where at least one parent speaks in Irish only to the child. If this is the meaning which was used by the school in reality, it is clear that "Ciara" would be denied in accordance with another standard instead of the standard which was proposed by the school.
44. I don't believe, however, that this was the standard which was put into place by the school in reality. It seems to me that it is implicit in the notes which the teachers prepared describing the interview with the father and child on the 8 December 2015 that the child would come under the definition of being raised through Irish if it was shown by her that she had a reasonable, age appropriate standard of Irish and that she is able to speak in Irish at a reasonable, age appropriate level with one parent, at least.
45. In respect of this, even though the Committee was correct to say that the definition of "raised through Irish" given in the email did not show accurately the extent of what was laid out in the enrolment policy, based on the evidence as well this was not the standard which was put in place by the school when they denied a place to "Ciara".

Ground 6: The Committee was told that the result of the interview was set aside once before and a place was given to a child when other evidence of fluency of the two parties was provided to the school. There was no such opportunity given to the Father to provide extra evidence in this case.

46. It can be said that there were cases in the past when the school set aside the result of the interview and gave a chance to give extra evidence of the standard of Irish of the child and the parent. The first thing to note, however, is that if this did happen, it was not provided for in the entrance policy of the school.
47. It follows, therefore, that the Committee was incorrect to give attention to this element. As I have said above, it is clear from the case of *Lucan Educate Together* that the Committee is limited to the

method of scrutiny that was put forward in the entrance policy. The Committee cannot give attention to elements that are unrelated to the correct implementation of the entrance policies.

48. The past practise is not relevant to the enrolment policies, except when the Committee is satisfied that the past practise is so firm and regular that it is correct to accept it that it is de facto supplementing or changing those enrolment policies. There is no evidence of this in this case: It is as if the Committee deviated from the policies in certain cases. If this is true, the evidence given is that this was an isolated case.
49. To this extent, the Committee was mistaken in giving attention to a consideration that was immaterial as a matter of law.

Conclusions

50. As has been shown by this case, the Committee does not have an easy role under article 29 of the 1998 act. This is because the actual question in relation to the way the school policies are interpreted for any one school is not a simple question.
51. For the reasons I have set out, I believe that the Committee made an error when they came to the conclusion that there was no identifiable standards to be found in the enrolment policy of the school, when in reality there were such standards. In relation to many of the other main conclusions of the Committee (e.g. that there wasn't enough of a chance given to the father or daughter to show their ability to converse with each other in Irish) the conclusions were not based on the evidence and in the end they are not sustainable in terms of the figures.
52. Because of this, I quash the decision of the Committee, but I refer the matter back to the Committee for further judgement in accordance with Order 84, rule 27(4). One has to remember that the role of the Committee is one of appeal and that they can consider fresh evidence in order to come to their conclusion. In my understanding of the enrolment policy of the school, specifically the requirement that the child is raised with Irish, the Committee should ask themselves whether there is enough evidence before them to satisfy themselves

that the child's competence with Irish is reasonable and age-appropriate (There is no requirement that the child's Irish is perfect or fluent) and shows that there is at least one parent who makes an effort to speak to the child in Irish on a regular and permanent/fixed basis.