Approved Judgment

Redacted

THE HIGH COURT

[2022] IEHC 575

[2022 476 JR]

BETWEEN

T.D. AND D.D. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T.D.)

APPLICANT

AND

THE MINISTER FOR EDUCATION, M.B., J.K. AND K.F., THE BOARD OF MANAGEMENT OF A SCHOOL AND THE PATRON OF A SCHOOL

RESPONDENTS

JUDGMENT of Ms. Justice Bolger delivered on the 29th day of July , 2022

1. This is an application by the parent of a four-year-old child for an order for *certiorari* and declaratory relief in relation to the outcome of their s. 29 appeal against the decision of the Board of Management of the sixth named respondent national school to refuse their application to enrol their child for the school year 2022-2023 in accordance with the school's admissions policy. I heard the application on 26 July last. Because it relates to a school place for the school year due to commence on 1 September and the need for all parties to have clarity in advance of that date, I have expedited delivery of my judgment. For the reasons set out below I am refusing the application.

Background

2. The school's board of management (hereinafter referred to as the Board) published its submission policy on the 29 September, 2021 in which it set out the criteria it would use to

prioritise applications for enrolment where the school was oversubscribed. The policy includes criteria 1 prioritising siblings of pupils attending the school in the previous school year and criteria 2 prioritising applicants currently living within the Roman Catholic parish boundary of the town.

3. The applicant, who lives in the town in the parish and close to the school, applied for a place for her child for the school year 2022/23. In February 2022 she was informed that the criteria had been applied as the school was oversubscribed and her child was not being offered a place but was placed number three on the waiting list. The applicant sought a review of that decision from the Board in which she asked for a copy of the Roman Catholic parish boundary of the town and a breakdown of the 28 applicants offered a place on the basis of how many were offered based on criteria 1 (the sibling rule) and of those how many are considered to be within the Roman Catholic parish boundary of the town. The applicant raised points about the suitability of the admission policy which she accepted before this court were outside the jurisdiction of a s. 29 appeal. The Board conducted a review and upheld their previous decision. The Board did not respond to the applicant's request for a copy of the map or information about the breakdown of the applicants who were enrolled pursuant to the sibling criteria 1.

4. The applicant appealed the Board's decision refusing enrolment to the first to fourth named respondents in accordance with s. 29 of the Education Act, 1998 as amended by the Education (Admission to Schools) Act, 2018. Her appeal made a number of points, many of which were outside the jurisdiction of the appeals committee. The applicant's Counsel contended that some of her grounds of appeal were relevant points including an issue about the lack of a clear boundary line within the parish, how the ages of successful pupils were verified, the fact she had sought a copy of the boundary map of the parish but had not

received it and her request that her application be reconsidered as part of the s. 29 appeal and her child be offered a place in junior infants in 2022-2023. The board furnished the Appeals Committee with a questionnaire which identified the number of children who secured a place under criteria 1 (the siblings' rule) and criteria 2 (residence in the parish). That breakdown had not been furnished to the applicant. The appeal was considered by the Appeals Committee and by written decision dated 10 May 2022 it was refused.

5. These proceedings seek to quash that decision, various related declaratory relief and an Order remitting the matter to the first to fourth named respondents with a direction to reconsider it and reach a decision in accordance with the findings of this court.

Issues

6. The applicants have identified the following three issues:

1. Whether the decision of the Appeals Committee has a proper evidential basis and is supported by proper reason;
2. Whether the Appeals Committee applied fair procedures in reaching its decision; and
3. Whether the school's admission policy is operable and effective when it does not specify the Roman Catholic parish boundary of The town, and if so, what the proper course of the Appeals Committee was.

7. The respondents added a fourth issue if the applicant is found to be entitled to any of the reliefs sought, whether the court should refuse to grant such relief in exercise of its discretion on grounds of futility.

The applicant's case

8. The applicants focused much of their criticism of the process followed by the Board and the decision of the Appeals Committee on the absence of a map attached to the admissions policy showing the boundaries of the town's Roman Catholic parish. Without such a map the applicant contended that the Appeals Committee could not have had an evidential basis for its decision as it could only have concluded the admission policy was correctly applied if it had the addresses of the children who were admitted ahead of the applicant's child along with a map of the parish with which to compare them. The applicant relied on the fact that the information in relation to the breakdown of children admitted under criteria 1 and criteria 2 that was furnished to the Appeals Committee by the Board was not shared with them before the decision issued and were therefore denied fair procedures. The applicant also relies on the absence of an oral hearing but did not pursue this strongly, understandably so given the statutory entitlement of the Appeals Committee to make its decision without an oral hearing.

9. The applicant argued that the admission policy was not operative and effective because it did not specify where the parish boundary by reference to a map and that it was therefore incumbent on the Appeals Committee to satisfy itself that the children enrolled ahead of their child were actually resident within the boundary. She wanted the Appeals Committee decision to be quashed, and the matter remitted to a fresh Appeals Committee for examination and determination of the appeal which, she contends, could lead to the Appeals Committee directing the Board to offer their child a place or could elevate the child's position on the waiting list which she argued would be of significant benefit to them. The applicant relied on various statutory provisions in particular s. 29E(1) (as inserted by the Education (Admission to Schools) Act 2018) in relation to the obligation of the Appeals Committee to "examine and determine an appeal". Heavy reliance was also placed on the dicta of Coffey J. in the *Board of Management of St. Marnock's National School v. Secretary General of the*

Department of Education and Skills and Others [2017] IEHC 683 and of Ní Raifeartaigh J. in *Management of Presentation College Athenry v. Secretary General of the Department of Education and Skills and Others* [2017] IEHC 521. It was argued that the principle of *audi alteram partem* required the Appeals Committee to allow the applicant an opportunity to see and comment on information furnished by the Board to the Appeals Committee before it reached its decision.

The respondents' case

10. The first and fourth respondents and the fifth and sixth respondents were separately represented but made broadly similar arguments in which they urged the court to uphold the decision of the Appeals Committee or, if necessary, exercise its discretion not to grant relief on the basis that a remittal to a fresh Appeals Committee could have no benefit for the applicant's child and would be futile. The respondent emphasised that the task of the Appeals Committee, as amended by the 2018 Act, to examine and determine the appeal and that the appeal was restricted to the grounds of appeal as identified by the applicant. Those grounds of appeal, according to the respondents, focused almost exclusively on the applicant's attempt to impugn the admissions policy which the case law on s. 29 appeals clearly confirms cannot be done as the Appeals Committee's task is to simply establish whether the Board followed the published policy correctly in processing the applications for enrolment. They rely on the decision of Ní Raifeartaigh J. in *Management of Presentation College Athenry v. Secretary General of the Department of Education and Skills and Others* [2017] IECA 521 and the summary of the authorities set out therein. They reject the applicant's contention that the Appeals Committee should have interrogated the addresses of all children ranked ahead of the applicant's child in relation to criteria 2 (residence in the parish) and by reference to the parish map which they accepted was not furnished to the applicant or the Appeals Committee

but they argue that this and the breakdown of places furnished under each of the criteria was irrelevant as the applicant knew at all times that she resided within the parish and sought to avail of that (as she was entitled to). The applicant never made it part of her appeal to the Board or the Appeals Committee that any of the successful children under criteria 2 were not resident in the parish or that the Appeals Committee should have satisfied themselves that they were so resident by interrogating their addresses by reference to a parish map. Insofar as a remittal to a new Appeals Committee was concerned, they argued that this could not benefit the applicant's child as there was no reality to the type of interrogation of addresses that the applicant sought eliciting evidence of non-compliance with the admission policy. The fourth and fifth named respondent specifically relied on the averment of the chairperson of the Board in his Affidavit in which he confirmed that 18 places were allocated to the applicants falling within category 1 and the ten remaining places were offered to applicants currently living within the Roman Catholic boundary of the town in order of their respective ages. The applicant had not served a notice of intention to cross examine this deponent and therefore his evidence to the court stood unchallenged which meant that any remittal of the appeal to a fresh Appeals Committee could not improve the applicant's child's position on the waiting list and would therefore be futile.

Statutory provisions

11. Section 15 (1) (d) of the Education Act, 1998 requires a Board of Management of a school to publish an admissions policy. Section 29 provides for an appeal against a decision of the Board to refuse admission or to expel a student. Prior to the Education (Admission to Schools) Act, 2018 the same procedures applied to all s. 29 appeals whether relating to a refusal to enrol or a decision to expel. The 2018 Act introduced new procedures for those appeals as confirmed by the long title to the Act

"to provide an amended appeals process where a student had been expelled or suspended from, or have failed to gain admission to, a school".

12. Section 29 (1) (c) (i) establishes a specific procedure for an appeal against a decision to refuse to enrol a child due to oversubscription. The Board must firstly be requested to conduct a review and upon the conclusion of that process, the parents (or a child if they are over eighteen) may "appeal a decision in accordance with this section and ss. 29A to 29F." Section 29B allows the Minister to determine procedures for the conduct of the appeal including at s. 29B (1) (d) "the form and manner in which an appeal shall be brought, including the period during which an appeal shall be brought." Section 29B (h) sets out the information that "shall" be submitted to an Appeals Committee by an applicant making an appeal under s. 29 (1) (c) (i) which "shall" include at (iv) "the grounds of the appeal". Section 29C sets out the requirement of a request for a review from the Board which, pursuant to subs. 2, "shall"

"(a) be based on the implementation of school's admission policy and the content of its annual admission notice, and

(b) set out the grounds of the request."

13. A particularly important provision for the purpose of this application is s. 29E (1) which provides:

"An Appeals Committee shall, in accordance with procedures determined by the Minister under s. 29B, examine and determine an appeal under s. 29 (1) (c) (i) without an oral hearing and, when doing so, shall rely on the same evidence and materials as were available to and relied upon when the decision to refuse admission was made."

Statutory provisions introduced under s. 29B

14. The Minister published procedures for hearing and determining appeals under s. 29 (1) (c) (i) in April 2022. Whilst it is not clear to me that they were definitely in place at the time of this Appeals Committee decision on 11 April 2022, no suggestion was made by any of the parties that they were not and therefore proceeding on the basis that they were:

"3.5. The Section 29 Appeal Form must be completed in full, and must specify the following:

(a) the applicant's full name, address and where available email address and telephone number,

(b) the student's full name, address and date of birth,

(c) the type of decision being appealed,

(d) the grounds on which the decision is being appealed,

(e) the name and address of the school concerned,

(f) the date of the decision to refuse admission.

4.2. A notification will issue simultaneously to the board of management, informing it of the receipt of the Section 29 Appeal Form and the grounds of appeal set out therein.

4.3. The board of management will be asked to submit by a specified date, in advance of the examination of the appeal, a copy of the school's admission policy and school's annual admission notice along with any documents or information relating to the evidence and materials as were made available and relied upon when the decision to refuse admission was made to the Section 29 Appeals Administration Unit.

4.5. All information and documentation provided by the applicant and by the board of management in relation to the appeal will be treated in strict confidence and will not be

disclosed to any other party to the appeal without the consent of the applicant or board of management, as the case may be, other than in accordance with these procedures, with the Data Protection Privacy Statement applicable to these procedures or as otherwise provided by law.

6.4. Appeals will be examined and determined without an oral hearing by the appeals committee and, when doing so, the appeals committee will rely on the same evidence and materials as were available to and relied upon when the decision to refuse admission was made".

The school's admission policy

15. The school's admission policy is dated 29th September, 2021. It is a lengthy document running to some nine pages. I consider the following to be potentially significant in this application.

1. Under para. 6 under the heading "Admission of students to junior infants" the following are included in the statements made.
    - The official application form must be used… All applications must be sent in electronically, with proof of address required before the 31st January of the relevance year.
    - The following documentation is required in order for the application to be considered a "**complete application**:
    - Copy of the applicant's birth certificate and proof of address (as above) in the form of utility bill in the name of one of the Parents, which must be dated no later than three months prior to the date of 31st January."
2. Under the heading "Criteria used to prioritise applicants for junior infants"

The criteria and priority order 1-4 below, are used to determine admission, where the number of applications received outnumber the number of places available.

1. Siblings of pupils attending the school in the previous school year [it is to be noted that reference to siblings is to be taken as including reference to step siblings].
2. All applicants currently living within the Roman Catholic parish boundary of the town.
3. All other applicants.

3. In the event that there are two or more students tied for a place in any of the categories above (i.e., the number of applicants exceeds the number of remaining cases), the following arrangements apply:
    1. Applicants ages will determine the outcome i.e., places will be offered beginning with the oldest eligible applicant in the oversubscribed category and proceeding in descending order of age from oldest to youngest, until all available places have been filled.
    2. If this process fails to offer a solution, and two or more applicants remain tied to a place, the name/s will be drawn by lots"

16. The policy does not clarify the boundaries of the town Roman Catholic National Parish by reference to a map or otherwise. The applicant asked for a copy of a map when she made her appeal to the board but this was not furnished to her. The chairperson of the board swore an Affidavit in these proceedings in which he accepted that the policy does not specify

the parish boundary but that this information is available upon request to applicants seeking admission to the school and he exhibited a copy of the map.

The applicant's appeal to the Board

17. By letter dated 16 February 2022 the applicant appealed to the Board and made a number of points therein which, while sincerely held and made, were accepted at the hearing of this application to be outside the jurisdiction of s. 29 which is solely to ensure the proper application of the school submission policy. The applicants did raise the issue of the parish boundary map and asked for a copy of it and for a breakdown of the 28 applicants offered a place for junior infants on the basis of how many were offered based on criteria 1 and of those how many were considered to be within Roman Catholic parish boundary of the town. Those requests were not responded to by the Board and neither the map nor the information was provided to the applicant prior to her s. 29 appeal. The applicant makes further reference in her appeal to the board to the parish boundary at point 6 where she highlights the sibling rule giving priority to applicants living outside the parish boundary getting priority over applicants living within the parish boundary. She highlights applicants living physically closer to M. National School getting priority over applicants living physically closer to Scoil N. purely based on age. She suggested that criteria 2 for applicants who are within the parish boundary should apply a tiered approach so that local the town applicants are offered a place first and any remaining places are then offered to M. National School applicants.

The applicants' appeal to the Appeals Committee

18. Having been unsuccessful in their appeal to the Board, the applicant exercised her statutory entitlement to appeal to the Appeals Committee. Much of the appeal is taken up with points genuinely held but which the applicant now accepts are outside the jurisdiction of the Appeals Committee. These include her claim that the sibling criteria is null and void which the applicant identified as the single most important point in the appeal.

19. The applicant highlighted the Board's failure to respond to any of the questions raised in her appeal to the Board. The grounds of appeal mention the parish and "the lack of a clear boundary line within the parish" which the applicant's counsel sought to rely on to establish that the issue of the parish boundary was part of the appeal. However, I am satisfied that all references to the lack of a clear boundary line in the applicant's grounds of appeal related to areas within the parish and to the applicant's arguments about children in a different area of the parish being unfairly prioritised over children living in the town much closer to the school. This contention was clearly outside the jurisdiction of the Appeals Committee. The grounds of appeal refer at point 8 to the applicant's submission that she had requested a copy of the boundary map and had not received it and that as it was one of the criteria used that it should be published with the admission policy. Beyond recording the absence of the map, the applicant does not identify any error in how the Board applied criteria 2 or how the absence of the map prejudiced her application. She makes no mention of needing the map to confirm that any of the children enrolled ahead of her child under criteria 2 were in fact resident in the parish boundary. She makes no suggestion that she was unaware of the location of the boundary and indeed demonstrates some knowledge of it insofar as her appeal is clearly premised on the fact that both the town and 'M.' are in the parish as well as her own stated knowledge that she and her family reside within the parish. The applicant raises an issue about the Board's verification of other applicants at point 9 in circumstances where the policy

stated that a copy of the birth certificate is required by the admission policy for the application to be considered a complete application but that a copy of the applicant's child's birth certificate was not requested as part of the initial application process and was only requested after 8 February 2022 for pupils who were offered a place at that point. She raises an issue at point 10 of the policy's use of a utility bill to verify addresses and questions that process. However, as the verification method of using a utility bill is expressly set out in the admissions policy, the applicant's criticism of this is outside the Appeals Committee's jurisdiction as it cannot impugn the policy and can only assess whether it was properly applied.

20. The applicant concludes her appeal with a general statement that the Board have not followed the appropriate guidance when drafting or maintaining the school admissions policy or admissions notices nor have they adhered to the process around admissions as she says she has highlighted through the points in her appeal.

The determination of the Appeals Committee

21. The Appeals Committee's determination delivered under cover letter dated 10th May 2022 summarises the applicant's grounds of appeal. Those relevant to this application include:

- "There is no clear boundary line within the parish of the town".
- "The applicant has requested a copy of the boundary map of the Roman Catholic parish of the town but has received it."
- "Page 4 of the admission policy indicates that a copy of the applicant's birth certificate is required in order for the application to be considered a complete application. A copy of the birth certificate was not requested as part of the initial application process, it was only

requested after 8th February, 2022 for children who were offered a place at that point. How were places offered without verification age?"

- "The appellant request that the application is reconsidered as part of the s. 29 appeal and that he is offered a place in junior infants 2022-2023."

22. The Appeals Committee correctly states that it has no jurisdiction to review or impugn a school's admission policy and that its remit is to apply the policy and decide whether it was properly followed.

23. The Appeals Committee referred to the annual admission notice in respect of admission to the 2022-2023 school year, "accepted that these were the correct documents and applied the measures set out in the admission policy when examining the appeal." They referred to the issue of the late submission of applicants' birth certificates and were satisfied that the Board's application of this part of the policy did not disadvantage the applicant's child in relation to the processing of the other applications. They addressed the applicant's point about the sibling rule being null and void and found that it was in accordance with s. 62(7)(e) of the Education Act 1998 as amended by the 2018 Act.

Decision

24. I will address each of the three issues identified by the parties and set out at paragraphs 4 and 5 above.

1. Evidential Basis and Reasons for the Appeals Committee decision

25. An examination of the applicant's appeal to the Appeals Committee reveals that her concerns with the parish boundaries and the need to verify the entitlement of the children who had been successful in their application for enrolment, was focussed entirely on the

application of criteria 1 i.e., the sibling rule. A similar focus is evident in her appeal to the Board in which she asked for a breakdown of the 28 successful applicants in terms of how many were offered a place on the basis of the criteria 1 sibling rule and of those, how many were considered to be within the parish. In the appeal she identified her critique of the criteria 1 sibling rule as the most important point in her appeal which she describes as no longer fit for purpose. Her reference in her appeal to the lack of a clear parish boundary line was expressly "within the parish" and clearly part of her case that the sibling rule should not be permitted to prioritise children from an area further away from the parish than the village of the town where she lived and in which the school was situate.

26. The only claim made by the applicant that could in any way be seen as relating to the application of criteria 2 i.e., resident in the parish, related to the verification process applied by the Board to the age and address of the applicant. The former was addressed adequately by the Appeals Committee and determined on the basis of the Board's procedures not having disadvantaged her child. The latter was irrelevant as the policy expressly permits verification of address by production of a utility bill and therefore this criticism was an attempt to impugn the policy which was outside the Appeals Committee's jurisdiction.

27. The applicant provided no other basis to suggest that criteria 2 of the policy was not properly applied to the applicants ranked ahead of her child. A s. 29 appeal could conceivably claim that some of the successful applicants were not properly processed, for example that they did not qualify to be included in the parish residence criteria. The basis on which such a claim might be made would have to be assessed by the Appeals Committee having regard to the burden on the applicant to demonstrate a basis for their concern. As confirmed by Ní Raifeartaigh J. in *The Board of Management Presentation Athenry* at para. 58:

"The question of the evidence is a matter for the committee and the court should not interfere unless a conclusion was reached which was entirely unsupported by the evidence."

28. The applicant's counsel argued that the concluding comments to the applicant's appeal to the effect that the Board had not followed the admissions policy, placed the issue of the proper application of the admissions policy before the Appeals Committee, such that the Appeals Committee ought to have assessed the entitlement of each of the successful applicants by reference to their address and a map of the parish. He suggested that the applicant could, within the wide examination and determination that he contends for, advise the Appeals Committee that they were limiting their criticism to the application of criteria 2 only (as he conceded he would do here if the matter was to be remitted to a new Appeals Committee).

29. Simply stating that the policy was not properly applied does not then require the Appeals Committee to interrogate the admissions process whether by an examination of addresses by reference to a parish map or dates of birth (or indeed family relationships insofar as a generalised complaint could also cover the application of criteria 1 siblings rule) particularly in circumstances where the applicant's appeal had never questioned the validity of the successful applicants' entitlements under criteria 2 (residence in the parish) other than in relation to the insufficiency of a utility bill to verify their address.

30. There is a fundamental difficulty with the approach contended for by the applicant in terms of the important procedural issue of the burden of proof. The burden of proof in principle rests on the person making an allegation of wrongdoing. There are exceptional situations where the law shifts the burden of proof such as in a claim for unfair dismissal but many of these, most notably employment equality claims, require that a *prima facia* case of

discrimination must be established by the claimant before the burden of proof can be shifted to a respondent. Here the applicant does not seem to consider even a *prima facia* case to be necessary but simply a general assertion that an admissions policy was improperly applied.

31. The applicant's contention that an appeal against a Board's application of an admission policy should be interrogated by the Appeals Committee, in effect requires the burden of proof to be shifted away from the appellant. The Appeals Committee's determination of an appeal is undoubtedly intended not to be overly formal, for example it is conducted without an oral hearing. Nonetheless it is always constrained by its statutory jurisdiction. Neither s. 29 nor the Minister's procedures (which she is permitted to determine by statute) provides for a shifting of the burden of proof. The Appeals Committee may have to assess whether the applicant child was properly treated in the application of the policy to them but this does not require the Appeals Committee to interrogate all elements of the policy, whether highlighted in the grounds of appeal or not, or to verify the Board's treatment of all other applicants by engaging in a detailed cross checking all of the information furnished by the Board.

32. Neither could the Board's failure to answer questions raised by the applicant in her appeal to the Board or the Appeals Committee's failure to share information with the applicant justify any shifting of the burden of proof in the absence of the statutory basis for doing so.

33. If I am wrong in that then I am satisfied that s. 29 A (1) requires the Appeals Committee to "examine and determine an appeal". It is the appeal and not the decision of the Board that is to be examined and determined. In doing so the Appeals Committee is required to "rely on the same evidence and materials as were available to and relied upon when the decision to refuse admission was made." The breakdown of places assigned under criteria 1

and 2 could not have been part of the evidence and material available to and relied upon when the decision to refuse admission was made as that information was not then in existence. Therefore, it could not form part of the examination and determination of the appeal by the Appeals Committee.

34. In addition, the Appeals Committee's jurisdiction in examining and determining the appeal under s. 29 E (1) is constrained to the grounds of appeal which must be put before the Appeals Committee in accordance with s. 29B (1) (h), a requirement confirmed by s. 3.5 of the Minister's procedures. Regard must also be had to the statutory provisions providing for the mandatory review by the Board at s. 29C which simply requires the appeal to "set out the grounds at the request" (s. 29C (2) (b). This means that at a parent who wishes to challenge a Board's refusal of their application to enrol their child due to oversubscription must identify the parameters of their complaint. A general complaint may not suffice and could certainly not require an Appeals Committee to embark on an interrogation of the Board's stated application of the criteria.

35. The approach I have outlined is required by the new statutory provisions introduced by the 2018 Act. However it is not inconsistent with the caselaw on the earlier s. 29 appeal including the dicta of Coffey J. in *Board of Management of St. Marnock's National School v. Secretary General of the Department of Education and Skills and Others* or Ní Raifeartaigh J. in *Management of Presentation College Athenry v. Secretary General of the Department of Education and Skills and Others* on which the applicants relied in contending for an obligation on the Appeals Committee to conduct a detailed analysis of the veracity of the offers of enrolment made to children ahead of the applicant child.

36. The Supreme Court in *St. Mologa's v. The Department of Education and Science* [2011] 1 IR 362 found that the Appeals Committee jurisdiction was to conduct a full hearing

of the appeal and was not limited to a review of the lawfulness or reasonableness of a board's decision making process. Ní Raifeartaigh J. summarised the jurisdiction on the relationship between the Appeals Committee and the admission policy in *Management of Presentation College Athenry v. Secretary General of the Department of Education and Skills and Others* as including:

i. "The committee should not impugn the enrolment policy; it should apply it. (*County Westmeath V.E.C.* case);

ii. The committee cannot strike down or disregard a provision in the enrolment policy and substitute what it considers appropriate (*Lucan Educate Together* case);

iii. The committee is required to take the decision on the basis of the same matters as the school and is not entitled to take into account extraneous matters such as alternative school placements; (*City of Waterford V.E.C.* case); and,

iv. The committee has no jurisdiction to review the entrance policy of a school and its only task is to decide whether the entrance policy was correctly followed. It should interpret and apply the policy but it is not appropriate to look behind the policies or indirectly to criticise them. It cannot pay attention to elements unrelated to the correct implementation of the entrance policies. (*Scoil Lorcáin* case)."

37. Coffey J. in *Board of Management of St. Marnock's National School v. Secretary General of the Department of Education and Skills and Others* [2017] IEHC 683 stated the following at para. 44 and 45:

> "44. The hearing before the Appeals Committee was as the law requires a full rehearing of E.C.'s application for enrolment in the SL Class. It is clear from the

decided cases that the primary function of an appeals committee when considering an appeal against a refusal of a place in a school is to interpret and apply the school's published admission policy in order to determine whether the refusal of a place was in accordance with the said policy. Where places in a school are over subscribed, an appeals committee must, in the first instance, be satisfied that the successful pupils have been selected in accordance with the school's published admission policy in order to decide whether the resulting or consequent refusal of a place to the Appellant was in accordance with that policy. In this case, the Appeals Committee very properly sought clarity from the Applicant as to what criteria were used to allocate places to the three successful pupils and correctly determined that the Applicant did not have a published Admission Policy to deal with oversubscription and specifically that it did not have a published Policy which required it to select those children who had 'the greatest need'. For these reasons, I am satisfied that the determination of the Appeals Committee to uphold the Notice Party's 'complaint' was made in accordance with the provisions of the Act.

45. For the same reasons I reject the Applicant's challenge insofar as it is contended that the Appeals Committee conducted the appeal otherwise than in accordance with fair procedures. The Applicant at all times either knew or ought to have known that as a matter of law it would be expected to demonstrate that it selected the successful pupils in accordance with its published Admission Policy. The complaint is in any event beside the point having regard to the insurmountable difficulty that the Board of Management did not have a published Admission Policy to deal with oversubscription. It follows, therefore, that there

was no information that the Board of Management could have brought before the Appeals Committee that could have supplied this fundamental deficiency".

38. The circumstances of the cases before Coffey J. were very different to the instant case in that the school's admission policy entirely lacked any or any sufficient criteria by which applicants for enrolment could be prioritised. The decision is authority for the well-established position that the Appeals Committee must be satisfied that the refusal of a place to the applicant was in accordance with the school's published admissions policy which required the school to demonstrate that it selected the successful pupils in accordance with that policy. The decision does not support the applicant's case that the Appeals Committee is required to interrogate the basis on which the successful pupils were selected as long as they are satisfied that the process was conducted in accordance with the policy.

2. Fair Procedures

39. It is unsatisfactory that the Board did not respond to the applicant's request for the map and for a breakdown of applicants offered a place based on criteria 1 (sibling rule) and how many of those were considered to be within the parish. However the applicant's latter request was essentially irrelevant to the appeal given that criteria 1 was a proper and lawful criterion for the Board to use and in accordance with 62(7)(e) of the Education Act 1998 as amended by the 2018 Act.

40. It is also unsatisfactory that information was furnished to the Appeals Committee by the board in relation to the number of pupils enrolled under criteria 1 and criteria 2 was not shared with the applicant prior to the Appeals Committee furnishing its decision. I do not accept that the Minister's procedures permitted the Appeals Committee not to share this information and I note that the Board was not asked for its consent to have that non

contentious information furnished to the applicant, as is provided for at paragraph 4.5 of the procedures. Nevertheless I do not think it can be suggested that the lack of that information prejudiced the appeal that the applicant made to the Appeals Committee, particularly given the statutory remit of the Appeals Committee's task. It is clear from s. 29E (1) that the Appeals Committee is required to rely on the same evidence and materials as were available to and relied upon when the decision to refuse admission was made by the Board. Therefore information that did not come into existence until after the Board's decision to refuse the application for enrolment, could not have been relied on by the Appeals Committee in its examination and determination of the applicant's appeal even if it had been shared by the committee with the applicant.

3. The admission policy was not operative and effective

41. The applicant was sufficiently aware of the boundary to be enabled to make an application for priority on the basis of criteria 2 of residence in the. Her application received the priority which it was entitled by virtue of her residing within the parish. Her child was placed high on the waiting list at number three, behind the resident in the parish children who are older than him. There is no basis to conclude that the absence of a map in the admissions policy rendered the policy inoperative or ineffective.

42. If I am wrong in that then I find that the applicant's case in this regard is essentially an attempt to impugn the admissions policy which, on the basis of the clear and established jurisprudence, is outside the remit of the Appeals Commission and outside the remit of this judicial review. If a parent of a prospective pupil considers an admissions policy to be unlawful in some way, there may be other potential ways of challenging it, but it is not possible to challenge it by way of a s. 29 appeal which can only deal with the application of the policy and cannot impugn it.

4. Futility

43. As I do not consider the applicant has established a basis for granting the relief sought, there is no need for the court to determine whether it should exercise its discretion not to grant relief on grounds of futility. However, in the event that I am wrong in that, I wish to set out my views on the point.

44. The applicant's counsel urged on the court the benefit that could be secured from the appeal being remitted to a fresh Appeals Committee. He made it clear that the focus of such an appeal would be on the Board's application of criteria 2 to allow ten applicants to be enrolled ahead of the applicant's child. It would only be where one or more of them had been improperly prioritised by criteria 2 i.e., residents in the parish, that the outcome of a fresh Appeals Committee could have any benefit for the applicant's child. The applicants relied on the recent decision of the Court of Appeal in *H.A. v. Minister for Justice* [2022] IECA 166 in seeking to illustrate the high bar of the test i.e., that "no benefit will or could obtain to the applicants" (per Donnelly J. at para. 39). The respondent cited the authority of N.*M & Ors v. The relevant Circuit Court judge* [2016] IEHC 449 to justify the refusal to grant relief where to do so would be futile.

45. The applicant argued that a benefit could be obtained from a fresh Appeals Committee in the event that the evidence established a flaw in the application of criteria 2 to the successful applicants enrolled ahead of the applicant's child. The fifth and sixth named respondent sought to rely on an averment sworn by the chairperson of the Board at para. 15 of his affidavit where he stated:

> "For the avoidance of any doubt, I confirm that following the allocation of 18 places to those applicants falling within category 1 (siblings), the ten remaining

places were offered to applicants currently living within the Roman Catholic parish boundary of the town in order of their respective ages, beginning with the oldest eligible applicant."

46. Counsel for the applicant contended that the court could not rely on that evidence as being contrary to the principle that a decision being judicially reviewed or the basis therefore cannot be added to by evidence adduced during the judicial review proceedings that was not available to the applicant previously. I accept that principle, but I do not consider that that is at play here. The respondents do not seek to add to the Appeals Commission's decision but seek to adduce evidence establishing the futility of remitting the applicant's appeal back to a fresh Appeals Commission. That evidence has not been challenged. As the Supreme Court confirmed in the decision of *RAS Medical Ltd v. Royal College of Surgeons in Ireland* [2019] IESC 4, there is an onus on the party who wishes to urge on a court that sworn affidavit evidence should not be accepted in respect of any point of fact material to the court's final determination to ask the court to take appropriate measures such as granting leave to cross examine so that questions concerning the credibility or reliability of the evidence concerned can be put to the witness and the court reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned. In the absence of that course of action being taken by the applicant, the evidence from the chair of the Board stands and it is undoubtedly sufficient to satisfy what I accept is a high test of futility, namely that no benefit will or could obtain to the applicant by granting the relief sought.

Conclusions

47. I am refusing all of the reliefs sought in this judicial review. I am satisfied that the decision of the Appeals Committee refusing the applicants' appeal had a proper evidential basis, was supported by proper reasons and the Appeals Committee properly discharged its

statutory responsibility to examine and determine the applicants' appeal by reference to the grounds of the applicant's appeal. Insofar as the appeal addressed concerns about unclear parish boundaries, this did not relate to disputing the entitlement of a child ranked ahead of the applicant's child within the application of criteria 2 residence in the parish but rather related to a challenge to the Board's application of criteria 1, the sibling rule. The case that the applicant sought to make before this court to the effect that the applicant was denied the opportunity to test the entitlement of those successfully enrolled children following on an application of criteria 2 and/or that the Appeals Committee was obliged to interrogate the Board's stated basis for finding those children to have been entitled to a place on the application of criteria 2, was not one that was made by the applicant in her appeal to the Board or identified by her as part of her grounds of appeal to the s. 29 committee. I am satisfied that the decision of the Appeals Committee has an evidential basis and was fortified by reasons.

48. I accept that the Appeals Committee did not furnish the applicant with a copy of some of the information it had received from the Board, specifically the breakdown of the numbers of children offered a place by reference to criteria 1 and the number of children offered a place on the application of criteria 2. It is unsatisfactory that such information would not have been shared with the applicant. I do not accept that clause 4.5 of the Minister's procedures which require documentation to be treated in the strictest confidence and not disclosed to any other party without the consent of the applicant or board of management as the case may, justifies the Appeals Committee's decision not to share this information with the applicant particularly where the Board's consent was never sought. However, I am not satisfied that the Appeals Committee's failure to share this information with the applicant had any relevant impact on her ability to make her case to the Appeals Committee and/or to be heard in making that case. Insofar as the applicant had sought a breakdown of numbers of children

offered a place in her appeal to the Board, this was clearly in the context of her criticism of the existence and application of criteria 1 and not of criteria 2. Therefore, the fact that the applicant did not have this information could not have been disadvantaged her in her ability to make her appeal in relation to the application of criteria 2 as she does not seem to have considered the information vis a vis criteria 2 to have been relevant and had never asked the Board for it.

49. The provisions of s. 29E(1) also apply. The information that the Appeals Committee did not share with the applicant was not in existence at the time of the Board's decision to refuse her child admission, could not have been relied on by the Board and did not therefore come within what the Appeals Committee was required by s. 29E(1) to rely on in its examination and determination of the applicant's appeal.

50. I am therefore satisfied that there is no basis to find that the applicant is entitled to any of the reliefs she has sought by reference to a denial of fair procedures within the Appeals Committee's process.

51. I am satisfied that the admissions policy was operative and effective even without the inclusion of a parish map, at least insofar as the exercise by the Appeals Committee of its statutory jurisdiction under s. 29 is concerned. It is clear from the evidence that the applicant had sufficient knowledge of the parish boundaries to make her application and to criticise the manner in which the admissions policy had been applied by the Board to children living within the parish but further away from the school than her child did. Whilst it may be regrettable that the Board did not furnish her with a copy of the map that was clearly available to them as they exhibited it in these judicial review proceedings, their failure to do so did not restrict the applicant in formulating her appeal to the Appeals Committee or restrict the Appeals Committee in their ability to satisfy themselves that the Board had

properly applied the admissions policy including in relation to those specific elements of their application of it that had been criticised by the applicant in her appeal.

52. If I am incorrect in my conclusions then I am satisfied that I should exercise my discretion against remitting the applicant's appeal to a fresh Appeals Committee as to do so can have no benefit for the applicant and would be futile.

Indicative view on costs

53. In the normal course of events in accordance with s. 169 of the Legal Services Regulations Act, costs follow the cause which would require the applicant to be made responsible for the costs of all of the respondents. However, I have some concerns about the applicant's treatment by the Board in that she made simple requests to the Board for information which were ignored and which the Chair said on Affidavit was (at least in relation to the map) available to any applicant for admission. The Appeals Committee chose not to share information that the Board had furnished to them. Such a failure to share information can lead to an understandable sense of unfairness on the part of an applicant and particularly someone such as the parent of a child who will want to do the very best they can to secure a school place for their child in the school of their choosing. In those circumstances it seems to me that there is some basis for considering an alternative approach to costs having regard to the conduct of the Board in relation to the request for information made to them, the conduct of the Appeals Committee in not seeking the consent of the Board to share the information furnished to them by the Board with the applicant as well as whether it was reasonable for the applicant to raise those issues in the proceedings. I will list the matter before me on a date suitable to the parties in order to finalise the issue of costs and the making of final orders.

29-7-22