THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 250 J.R.]

BETWEEN

BOARD OF MANAGEMENT OF PRESENTATION

COLLEGE ATHENRY

APPLICANT

AND

SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SKILLS, MARGARET COONEY, CATHERINE O'CARROLL, AND JOE HARRISON

RESPONDENTS

AND

O.I. AND S.I.

NOTICE PARTIES

JUDGMENT of Ms. Justice Ni Raifeartaigh delivered on the 26th day of July, 2017.

Nature of the Case

1. This case concerns a challenge by way of judicial review to a decision made by an appeals committee ("the committee") appointed by the Department of Education ("the department") pursuant to s. 29 of the Education Act 1998 ("the Act of 1998"). The committee allowed an appeal on behalf of a child ("C.I.") from a decision of the board of management of a secondary school refusing to enrol him in the school. The applicant school seeks *certiorari* of the determination of the committee as well as of the direction of the Minister directing the school to arrange for the child's enrolment in the school in September, 2017, and an order remitting the matter back to a newly constituted committee. The primary issue in the case is whether the committee was entitled to take into account the fact that the parents of the child in question had moved their child to a particular primary "feeder" school for the last two years of his primary education as a result of discussions with the former principal of the secondary school in question. The enrolment policy of the secondary school provided that, in respect of children who did not fall into certain categories, such as siblings of children already in the school, the selection procedure was to be by random lottery. The child in question had not been selected by lottery but the effect of the committee's decision, if valid, is that the school would be required to admit him despite his not having been selected in accordance with the procedure set out by the school's enrolment policy.

Relevant Legislative Provisions

2. Section 15(2)(d) of the Act of 1998 deals with the publication of school policies and provides that, in carrying out its functions, a school's board of management shall:-

> "publish, in such manner as the board with the agreement of the patron considers appropriate, the policy of the school concerning admission to and participation in the school, including the policy of the school relating to the expulsion and suspension of students and admission to and participation by students with disabilities or who have other special educational needs, and ensure that as regards that policy principles of equality and the right of parents to send their children to a school of the parents' choice are respected and such directions as may be made from time to time by the Minister, having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned, are complied with".

No directions have been published by the Minister pursuant to this section.

3. Section 19(1) of the Education (Welfare) Act 2000 ("the Act of 2000") provides that:-

> "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."

4. Section 29 of the Act of 1998 provides that, where a board of management refuses to enrol a student in a school, the parent of a student may appeal that decision to the Secretary General of the Department of Education and such appeal should be heard by a committee appointed in accordance with the section. On the determination of an appeal, the committee sends notice in writing of its determination and the reasons for it to the Secretary General. Under s. 29(6), where a committee upholds a complaint in whole or in part and it appears to the committee that any matter which was the subject of the complaint should be remedied the committee shall make "recommendations" to the Secretary General as to the action to be taken. Section 29(7) provides that, as soon as practicable after the receipt by the Secretary General of that notice, the Secretary General may give such directions to the board as appear to the Secretary General to be expedient for the purpose of remedying the matter which was the subject of the appeal and the board "shall act in accordance with such directions".

Admissions and Enrolment Policy of the School

5. The admissions/enrolment policy of Presentation College Athenry ("the school") in its revision of 19th September, 2016, provided detailed criteria for the selection of incoming pupils. It provided as follows:-

> "Criteria for selection first year
>
> The Board of management will set a figure each year for the number of students to be accepted into first year. This figure will depend on the overall number of students in the school and the overall capacity for which the school can cater and is contingent on provision of the necessary accommodation and resources by the Department of Education and Skills.

Presentation College Athenry will offer 180 places in first year for September 2017.

Admission to the school in First Year will depend on the places available in that given year. The school must receive a fully completed application form before the closing date. Attendance at the Open Night is not compulsory, but can be helpful. In the event that the number of applications exceeds the number of places available, places will be allocated according to the following order of priority.

1. Brothers and sisters of current students who have completed all of their second level education at Presentation College Athenry. (sic)

2. Brother and sisters of past students who completed all of their second level education at Presentation College Athenry.

3. Sons and daughters of school staff employed by the school at the time of enrolment.

4. Students who have attended Scoil Chroí Naofa for all of their Primary education and boys who were enrolled there from junior infants until first class.

5. Sons and daughters of past students who completed all of their second level education at Presentation College Athenry and who are attending the feeder primary schools as listed on page 4 of his policy.

6. *Students attending the feeder primary schools as listed on page 4 of this policy."* (Emphasis added).

In this judgment, I will refer to children in the last category referred to as the "category six" children.

6. The enrolment policy went on to provide as follows:-

> "A random selection process will apply to all or any category where there are insufficient places available. An Admissions Committee appointed by the Board will conduct the random selection. The membership of this committee will be decided at a meeting of the Board prior to the random selection. A member of the legal profession appointed by the Board will act as an independent observer. The principal will contact parents after the random selection draw. …
>
> Should places become available due to students not accepting their offer a further random selection will be drawn. The random selection draw will be conducted by the Admissions Committee appointed by the Board of management. The parents of students not offered a place may appeal the decision to the Board of management and/or to the Secretary General of the Department of Education and Skills under s. 29 of Education Act (1998) as amended by the Education Miscellaneous Provisions Act 2007. …"

7. The enrolment policy also says the following:-

> "Exceptions to the above may be made at the discretion of the Board of Management in cases of need that Presentation College Athenry could uniquely address."

8. Page 4 of the enrolment policy sets out a list of primary schools, of which Craughwell National School is one. This was the primary school attended by C.I., the child at the centre of the present proceedings who fell within category six of the above policy.

Relevant Facts

9. On the 21st October, 2016, an application was made on behalf of the child, C.I., by the notice parties, the child's parents, for his admission to first year of the secondary school for the academic year commencing September 2017. The school had received a total of 298 applications for 180 available places for the 2017/2018 school year. The school offered places to applicants who came within the first five categories of the order of priority set out in the enrolment policy. This came to a total of 173 applicants leaving 7 remaining places to be filled from "category six" students. In accordance with the terms of the enrolment policy set out above, a random selection process was then conducted by the admission's committee appointed by the school and a member of the legal profession acted as an independent observer. C.I. was not selected from this random selection process. Every year a number of applicants fail to take up places offered to them and a number of additional lotteries take place. This occurred for the academic year 2017/2018 and the number of students to be enrolled from category 6 increased to thirty-four students; however, C.I. was not selected from any of the additional lotteries. By letter dated 27th October, 2016, the school wrote to the parents of C.I. to inform them that C.I. had not been offered a place in the school for the academic year 2017/2018.

10. An appeal application was completed and submitted to the department by the notice parties on or about the 8th November, 2016. This was accompanied by an affidavit sworn by the mother of C.I., which said that the details and information contained in the appeal were true and accurate to the best of her knowledge, information and belief. The appeal form itself described the following circumstances concerning the child's application to Presentation College Athenry:-

> "We live in Ballymore, Craughwell, County Galway. When our eldest child, C.I. began his primary education in 2008 in Gaelscoil de hÍde, Oranmore, it was our intention that he would progress onto our local and nearest post primary school, Presentation College Athenry.
>
> When we enrolled C.I. in Gaelscoil de hÍde, we were unaware of a post primary feeder school policy for Presentation College Athenry. We assumed at that time that children living in Craughwell were entitled to attend Presentation College Athenry, because all of the children we knew in our locality attended Presentation College, and children attending Gaelscoil de hÍde who were also from Craughwell, progressed on to Presentation College Athenry.
>
> However in September 2014 we became aware that the Admissions Policy to Presentation College Athenry might pose a barrier to admittance to the secondary school because of our choice of Primary school. Without delay we contacted the Principal of Presentation College, Mr. Gerry Doherty (retired 2015) and had a lengthy conversation with him in relation to the issue. He advised that if we wished for C.I. to attend Presentation College we should transfer him from Gaelscoil De hÍde, Oranmore to Craughwell National School to ensure admittance to Presentation College. He informed us that every child from Craughwell National School who applied to the Presentation College have always been offered a place. Mr. Doherty advised that we contact him again in January 2015 as he would be able to give us an indication of how many

children from Craughwell National School had applied to Presentation College and had been offered a place…

We duly contacted Mr. Doherty in January 2015 and he confirmed during this call that all of the children attending Craughwell National School in 6th class that year had been offered a place in Presentation College Athenry. Based on this information my husband and I decided to transfer C.I. from Gaelscoil de hÍde to Craughwell National School at the end of the school year 2015.

Moving C.I. was one of the hardest things we have ever done and was not a decision we took lightly. The transfer to the Craughwell National School was not a easy transition as there was no available place for him in 6th class so he had to repeat 5th class. His academic transcripts will show that this was not necessary as his Stens were excellent throughout primary school. C.I. spent happy years in the Gaelscoil and had bonded with all the children in his class. He had built relationships with teachers, parents and many other children throughout the school. However, as C.I.'s parents we were confident that the move to Craughwell National School was the correct thing to do to ensure he will be able to attend the secondary school of our choice, Presentation College Athenry.

After all that we have a family we as a family have gone through to ensure C.I. can attend Presentation College, we are now being informed that he his not been offered a place (sic). *We believe we have a legitimate expectation of admission based on the advice we received directly from the Principal Mr. Gerry Doherty and actions we took based on his advice…*

We have made enormous sacrifices to ensure C.I. can attend the school and strongly believe that he should be granted admission based on the fact that we took the advice of the Principal Mr. Gerry Doherty and acted on it to ensure he would be offered a place …" (Emphasis added).

11. By letter dated the 16th November, 2016, the department wrote to the school to advise that it had received the appeal and sought all relevant material from the school no later than 28th November, 2016. The school submitted copies of its enrolment pack together with minutes of certain board of management meetings. Also, in light of the grounds of appeal as set out above, the school principal, Mr. Cathal Moore, contacted the former principal of the school, Mr. Doherty, by email in order to ascertain what representations, if any, he had made to the parents of C.I.

12. Mr. Doherty replied by an email dated 7th December, 2016 saying as follows:-

"1. I have received many phone calls in relation to admissions to P.C.A. over the years.

2. I have always honestly and fairly answered questions as they arose.

3. My advice to any parent who wished to have the opportunity to enrol their child into our school was that they had to fall within the school admissions policy. If a child was not in our feeder school catchment area there was no chance of admission. Consequently parents had to decide their own course of action in this regard.

4. At the time there had been a very high intake of students from Craughwell N.S. – this had been the case for many years.

5. Every student who attends Craughwell N.S. have similar expectations for enrolment but only in accordance with the admissions policy. The same applies to all students in all of the schools in our catchment area.

6. *I did not guarantee nor could I guarantee any student a place in our school*. The admissions policy has to be followed. Indeed [Mrs. I] does not say I guaranteed a place for C.I. – they had an expectation – that is all. Like every other student in our feeder schools.

7. I am not aware of any student in the Craughwell area who progressed to P.C.A. from Gaelscoil de hÍde other than through the admissions policy procedure.

8. I cannot confirm if all students in Craughwell N.S. received an offer for enrolment for 2015.

9. Finally on a personal note, I have sympathy with the family in question I have always said it has never been the school's intention to keep students out but numbers have dictate how many students the Board can take.

In my time there had always been pressure to control our numbers and officials often pointed out to me that there were other schools equally deserving of increasing numbers.

The problem of enrolment is going to be repeated as long as parents/students have confidence in our school."

13. The committee held a hearing in relation to the case on 15th December, 2016. The school's case was presented by the principal, Mr. Moore. In the present proceedings he swore an affidavit in which, *inter alia*, he describes the appeal hearing (as well as the factual chronology set out above). He says that he referred to the enrolment policy and explained that the consultative process for the policy was comprehensive and included the parents, students and staff. He said that the policy was drafted and re-drafted. He said that he was appointed to implement the policy and procedures for enrolment, and that he had no discretion to enrol a particular student and had to adhere to the policies and procedures laid down in the enrolment policy. He read the email from former principal, Mr. Doherty, to the committee in its entirety. In his affidavit in the present proceedings, he said that he believed the contents of the email were accepted by the parents. He said that Mr. Doherty did not and could not have given a guarantee of a place for C.I. and that this was again accepted by the parents. At the hearing, he expressed sympathy for C.I. and his parents but made it clear that the school had simply applied the enrolment policy.

14. Mr. Moore said that one of the members of the committee asked him if there were students in the school who did not attend feeder schools and he confirmed that there were, but added that they fell within earlier categories as set out in the enrolment policy and the appeal then concluded. I make the comment in passing that this reply indicated to the committee that there were children in the secondary school from non-feeder primary schools but who were there within the parameters of the enrolment policy; namely, that they fell into one of categories 1-5 such as, for example, being at the time of admission a sibling of another child already in the school. Thus, they were not in the same position as C.I.

Determination of the Appeals Committee

15. The determination of the committee was communicated to the school by way of letter from the department dated 28th December, 2016. In upholding the appeal, the committee stated that it had reached its decisions for the following reasons:-

> • "C.I. applied to Presentation College Athenry, for a place in first year for September, 2017. He was correctly placed in Cat. 6 *i.e*. 'students attending the feeder primary schools as listed on page four'. C.I. was not successful in the lottery.
>
> • However, *the evidence provided to the appeals committee demonstrated that the parents had a reasonable expectation that C.I. would be offered a place, following consultation with, and advice received between September 2014 and January 2015 from the then Principal/Secretary of the Board of management. On the basis of the advice given, the parents made significant changes to their children's education i.e. they moved C.I. and his sister to Craughwell N.S., where C.I. had to repeat 5th class. They did this in order to guarantee C.I.'s place in the Presentation College Athenry, leading to a significant legacy issue. This evidence was supported by a sworn affidavit*.
>
> • The appeals committee in the interest of natural justice and fairness balanced *the schools' own acknowledged legacy issues alongside the parents legacy issue."* (Emphasis added)

The decision went on to say as follows:-

> "In arriving at its decision the appeals committee took into account a range of issues, including the following:-
>
> • The School's Admission and Enrolment policy;
>
> • The oral presentations;
>
> • The Facilitator's report;
>
> • The written documentary evidence presented in advance;
>
> • The sworn affidavit submitted by [C.I.'s mother]"

The committee made the following recommendation:-

> "the appeals committee recommends that C.I. be offered one of the two remaining places in Presentation College Athenry for September 2017."

Further Correspondence between the School and the Appeals Committee

16. By letter dated the 31st January, 2017, Mr. Moore wrote to the Assistant Principal Officer in the department stating that the board of management was disappointed with the determination. The letter went on to say as follows:-

> "The Board understands that for an appeal to be upheld the school must have breached its own Admissions and Enrolment policy or procedures. The Board fails to see where the school's policy or procedures have not been adhered to in relation to this appeal. The Board is also requesting clarification of certain aspects of the Determination".

The letter also said:-

> "The Board is surprised that in its Determination the Appeals Committee accepted the evidence of the parents' affidavit above the written evidence of the former school Principal Mr. Gerry Doherty. The parents' claim that Mr. Doherty who was Principal of the school at that time told them that their child would get a place in the school if they were in a feeder school. Mr. Doherty would never have given such a guarantee because it would have been contrary to the school's published admission policy. This fact was clearly established at the hearing and accepted by the parents."

The letter also said:-

> "The Board does not understand what the committee means by 'the school's own acknowledged legacy issues'."

17. By letter of the same date, a reply was received enclosing the following response from the committee:-

> "The parents exercised due care and caution when considering the move to Craughwell N.S. following consultation with the former principal. The initial contact was in Oct. 2014. The former principal suggested they wait until the applications for Sept. 2015 were processed after which he confirmed that all applicants from Craughwell N.S. were admitted. This convinced the parents to move C.I. and his sister into Craughwell N.S. This was a significant step as C.I. had to repeat 5th class as there was no place for him in 6th class. *The parents felt that they had a legitimate expectation and provided a sworn affidavit to support this.*
>
> *The Appeals Committee accepted the evidence of the parents in their sworn affidavit. The former principal's response, presented orally by the current principal at the hearing was general in nature and did not specifically address the points raised by the parents*. The current principal prefaced his reading of this email by pointing out that they had drafted and redrafting it carefully.
>
> *The parents' affidavit referred to a 'legacy issue'. The current principal referred to school 'legacy issues'* while acknowledging that there are and will be students in Presentation College Athenry who did not attend one of the feeder schools listed in the schools admission and enrolment policy." (Emphasis added).

Judicial Review Proceedings

18. Leave to bring judicial review proceedings was granted to the applicant school on 20th March, 2017. The applicant school seeks to rely on a number of grounds which may be summarised as follows. The applicant claims that the reasons identified by the

committee in upholding the appeal and recommending C.I. be offered a place in the school are irrational in that, *inter alia*, the evidence before the committee did not support a finding that the former principal of the school had given the parents of C.I. a "guarantee" that C.I. would be offered a place in the school if he moved to Craughwell National School; that the decision of the committee fails to take account of, or give effect to the school's enrolment policy; that C.I. was not entitled to a place in the school under the enrolment policy; and, that the reliance placed by the committee on the school's "own legacy issues" failed to take account of the fact that admission to the school was governed by the enrolment policy. The applicant also claims that the decision was vitiated by the failure of the committee to address its proper jurisdiction under s. 29 of the Act of 1998 and that it acted in the incorrect belief that it was entitled to disregard the enrolment policy. The applicant also relies on the ground that the committee placed reliance on sworn affidavit evidence in circumstances where there is no such provision permitting same in the Act of 1998 and where it failed to inform the applicant that it intended to rely on such evidence in breach of natural and constitutional justice. In respect of the "legacy issues" it is claimed that the committee fell into error in improperly carrying out a balancing exercise between the "legacy issues" of the school as against those of the parents and, in doing so, failed to have regard to the enrolment policy and, therefore, acted outside its jurisdiction under s. 29 of the Act of 1998. On that basis, it is claimed that the committee acted *ultra vires* in recommending the admission of C.I. who had not satisfied the requirements for admission pursuant to the enrolment policy. The application was grounded upon an affidavit sworn by Mr. Moore.

19. A statement of opposition dated 9th May, 2017, was filed on behalf of the respondent. An affidavit was sworn on behalf of the committee by Ms. Margaret Cooney; chairperson of the committee. *Inter alia*, her affidavit refers to the fact that C.I's mother's affidavit was admitted without complaint at the hearing by the applicant or their legal representatives. She avers that the issue of feeder schools had arisen in respect of other appeals in relation to the same secondary school in which members of the committee acted and that the awareness and knowledge of the committee members in relation to what had been referred to as "legacy issues" was not objected to by the applicants. She says that Mr. Moore presented an email as evidence of Mr. Doherty without Mr. Doherty being present, stating, as a preface to its presentation, that they had drafted and re-drafted that email carefully. I pause to note that it was accepted on behalf of the respondent at the oral hearing that this is in fact an error and that the "drafting and re-drafting" reference at the committee hearing was made by Mr. Moore in respect of the enrolment policy and not the email. She said that the committee had not given any greater weight to the evidence of the parents merely because of the affidavit and that they permitted the applicant to adduce the email from Mr. Doherty as it was central to the issues raised by the parents' appeal. She said that the Committee had particularly noted the absence of a "categorical denial" by Mr. Doherty of the matters set out by the parents. She also noted that the parents were available for cross-examination on behalf of the applicant but that this was not pursued to any degree.

20. Mr. Moore swore a replying affidavit in which he noted, *inter alia*, that the applicant was not legally represented at the hearing of the appeal. He said that he did not draft the email or assist Mr. Doherty in the drafting of same and his only reference to drafting and re-drafting was in relation to the enrolment policy being the subject of this process. He took issue with the statement of Ms. Cooney that the email did not contain a categorical denial of the matters set out by the parents. He says that he read the email in full at the hearing and the parents did not take issue with it. In relation to the legacy issue, he said that he had attended approximately twenty-two hearings before committees against decisions to refuse enrolment to applications for 2017/2018 school year. In the course of those hearings, he was asked by a committee member whether there were students in the school who had not attended at one of the feeder schools in the policy. As indicated in his first affidavit, he confirmed that there were a number of students in the school who had been offered a place in the school but had not attended at one of the feeder schools but that these students had satisfied one of the higher criteria set out in the enrolment policy of the school; such as, being a sibling of a student currently in the school. He averred that he remains unclear as to the origin of the term "legacy issue" as used by the committee.

21. Ms. Cooney swore a further affidavit in which she avers, *inter alia*, that "there was no acceptance of the contents of this [*i.e.* the former principal's] email by the notice parties" and she understood that the notice parties "did not accept" the email's contents and that they were of the view that "they had received such a guarantee". She also said that the origin of the phrase "legacy issue" was Mr. Moore himself, who had used it at earlier hearings with regard to children from non-feeder schools being in the school. She also said that C.I's mother considered that her son's case was a "legacy issue" in that, up to September, 2016, all children from Craughwell N.S. had been admitted to Presentation College Athenry. She explained that there had been nineteen appeals in relation to refusals from the school for enrolment in September, 2017, and she was chairperson in fourteen of those appeals. She also sets out the professional expertise of herself and the other committee members as well as their experience of hearing s. 29 appeals.

The Nub of the Case

22. This case raises a discrete and important legal issue but it arises from a most unfortunate set of personal circumstances. A child, C.I., was moved, from a primary school in which he had spent many years and was well settled, into Craughwell National School where he had to repeat fifth class for reasons unrelated to academic ability and settle in all over again because his parents believed that this would secure him a passage into Presentation College Athenry. They so believed because of their interactions with the then school principal, Mr. Doherty, described above. The secondary school applied the procedures prescribed by its enrolment policy for a child in his category, which was a procedure of random lottery, and C.I. did not secure a place and was refused enrolment in the school. The committee took the factual circumstances into account and decided that C.I. should be given a place in the school. One can readily understand, at the human sympathy level, why the committee took the decision it did. The question arising for this Court, however, is a legal one: was the committee entitled to take into account the personal circumstances of C.I. and in particular the fact that reliance had been placed upon things said by Mr. Doherty, the former principal, at all? Or was it confined, in conducting its appeal, to the parameters of the school's own enrolment policy? What is the proper scope of a s. 29 appeal and is a committee bound by the parameters of the school's enrolment policy in the same way as the school itself? That is the legal issue at the core of these proceedings. In reaching a conclusion on this general issue, which will necessarily be of general application, I must put to one side considerations of personal sympathy for the child in question.

23. There was considerable disagreement between the parties as to the relationship between the school's enrolment policy and the proper scope of a s. 29 committee's jurisdiction. In broad terms, it was argued on behalf of the applicant that the committee was not entitled to depart from the method of selection set out in the enrolment policy and to consider what it called extraneous circumstances such as the particular circumstances which arose in the present case. It was argued that the committee was bound by the parameters of the school's own enrolment policy including its method of selecting applicants falling within "category six". It was argued on behalf of the respondent that the committee was entitled to take all circumstances into account and that its decision-making scope was not constrained by the parameters of the enrolment policy in this regard. Counsel disagreed sharply as to the interpretation to be placed on the authorities and it is accordingly necessary to closely examine these authorities concerning the scope of s. 29 committee decision. There are five such authorities; one, a decision of the Supreme Court; and, four decision of the High Court which will be examined below.

No Real Issue of the Legal Doctrine of Legitimate Expectation

24. Before I turn to deal with those authorities, however, it may be helpful to mention one matter. The phrase "legitimate

expectation" made its way into the case and there was argument as to whether the doctrine could apply in the present circumstances. The phrase first appears in the written application of C.I.'s parents to the committee, where it was stated that they believed they had a legitimate expectation of admission based on the advice they received directly from Mr. Doherty and the actions they took based on that advice. The committee, in its decision of 28th December, 2016, said that the evidence "demonstrated that the plaintiff had a reasonable expectation that C. would be offered a place". In its letter dated 31st January, 2017, the committee said that "the parents felt that they had a legitimate expectation". For its part, the school used the language of "guarantee", saying in its letter of 31st January, 2017, that "Mr. Doherty could never have given such a guarantee because it would have been contrary to the school's published admissions policy" while Mr. Doherty's email said "I did not guarantee nor could I guarantee any student a place in our school". One can see, therefore why the issue of legitimate expectation was discussed by counsel.

25. There was some debate by counsel as to whether the doctrine could apply in circumstances such as the present and the Court was referred to authorities including *Lett & Co. Ltd. v. Wexford Borough Council* [2012] 2 I.R. 198; *Fakih v. Minister for Justice* [1993] 2 I.R. 406; and, *V.I. v. Commissioner of An Garda Síochána* [2007] 4 I.R. 47. Counsel on behalf of the applicant argued, for example, that an important constraint within the doctrine is that it cannot be invoked to compel a statutory decision-maker to exercise its statutory discretion in a particular way, citing, *inter alia*, the judgment of Clarke J. in the *Lett* case. He also argued that only the courts may vindicate a legitimate expectation and not the statutory decision-maker itself; however, while the respondent did not entirely agree with the applicant's interpretation of the doctrine in particular aspects, the main point made on its behalf was, in essence, that the committee was *entitled or at liberty* to take into account the circumstances that had arisen although it was not *bound* to give effect to a legitimate expectation on the part of the parents in the exercise of its statutory discretion. Having regard to this submission, it does not seem to me that the respondents were invoking the doctrine of legitimate expectation in the true meaning of the legal doctrine but were rather making a different argument; namely, that the committee's jurisdiction was sufficiently broad so as to permit a consideration of matters outside the enrolment policy which in this case happened to be the interactions between the parents and former school principal which had resulted in the parents moving the child into a different primary school. That being so, it does not seem necessary to me to pursue the "legitimate expectation" authorities any further and the Court's main emphasis should be upon the cases turning on the proper scope of a committee established pursuant to s. 29 of the Act of 1998.

26. For my own part, I find it difficult to see how the doctrine of legitimate expectation could apply in the present context. If it were to arise at all, one would anticipate that it would be invoked by the parents of the child directly against the school and by their bringing proceedings against the school on the basis of what the school's former principal (potentially an "agent" of the school) had said to them and on foot of which they had taken action. This is not to say that legitimate expectation proceedings would be unproblematic. One issue which would arise would be whether the school is a "public authority" for the purpose of the doctrine. Another would be whether the school's implementation of an enrolment policy constitutes the exercise of a statutory discretion by a statutory decision-maker in the sense that this concept has been deployed in the legitimate expectation authorities in order to place a limitation on the doctrine or at least the remedies available under it (see; Clarke J. in *Lett*). And of course, it would be necessary to decide very precisely what had been said by the principal and whether he had, in fact, guaranteed a place in the school or whether the parents had, objectively speaking, a reasonable expectation of getting a place in the school in view of whatever had been said. None of this seems to me properly to arise in the present case which is instead concerned with the different issue of the scope of a committee's jurisdiction on a s. 29 appeal and whether it is constrained by the enrolment policy of the school or is at large to take into account any circumstances it wishes with regard to the admission of a child to the school.

Authorities on the Scope of a Section 29 Appeal

27. The starting point on the scope of an appeal to a committee pursuant to s. 29 of the Act of 1998 is the *Board of Management of St. Molaga's National School v. Department of Education* [2011] 1 I.R. 362. This was a case in which the Supreme Court on appeal dealt (only) with a preliminary issue as to the correct interpretation of s. 29 of the Act of 1998. However, for reasons that will become apparent, it seems to me important to consider the case as a whole, including the totality of the High Court judgment of Irvine J., particularly because the broad issue in the case, namely the capacity of a school to admit a student, is closer to the issue in the present case than any of the circumstances of the cases which followed.

28. The factual backdrop to the *St. Molaga* case was as follows. The school was a senior primary school in the Balbriggan area under the patronage of the Roman Catholic Archbishop of Dublin. For a period of nine years prior to 2007, the board of management of the school tried to continue the expansion the school in the face of a lack of resources and, in particular, permanent physical accommodation. It had doubled the number of its students in the ten years prior to 2007. A significant number of classes were being taught in twelve prefabricated classrooms. There were concerns about matters such as; the lack of P.E. facilities; the shortage of storage facilities and ancillary rooms for other activities; the inadequacy of the kitchen; and, the risk of fire due to the strain on the electrical system. There was no classroom for non-teaching needs such as for the psychological evaluation of students or the assessment of special needs students. At times, the principal was obliged to hand his office over to such activities and work in a desk from the main corridor. Repeated requests for assistance from the department to provide additional permanent accommodation had been rejected. Accordingly, in March, 2007, the school decided to implement a policy whereby it would accept students only from a particular feeder school for a period of four years. The notice parties and their children were residing in Balbriggan from February, 2008. They had moved to the area in the knowledge that it would be difficult for them to find places in the local school. They sought enrolment for their children in the school and were refused. At that time, the board had already rejected similar applications from forty-one other students for the forthcoming academic year. It is clear that the reason for the refusal was the school's view that it lacked the capacity to take the two extra children.

29. The notice parties appealed the refusal of the board to enrol their children. The committee upheld the appeal and notified the secretary of the department to this effect in a written report. In its report it stated that, in arriving at its decision, it had taken into account a range of issues including: (1) the oral and written presentations of both parties; (2) that the school was the school of choice of the notice parties who now resided in the parish of Balbriggan; (3) that the school was the nearest school to the family home; (4) the concern expressed by the notice parties regarding the children's future education; (5) the expressed willingness of the school to facilitate all pupils who apply for enrolment should the school have sufficient permanent accommodation to do so; (6) the school's desire to procure permanent accommodation for a twenty-four teacher school; (7) the difficulties of the school in maintaining the E.S.B. supply within an increasing number of prefabricated buildings; and, (8) the school's implementation of department circular 09/99 with regard to the integration of pupils from the dyslexia units.

30. The applicant school brought judicial review proceedings seeking to have the decisions of the committee quashed. The applicant submitted that an appeal under s. 29 was limited to a review of the lawfulness of the decision to refuse enrolment and that the committee had no jurisdiction to interfere with a decision which was essentially a management decision made in accordance with a valid enrolment policy. It was argued that it could not have been intended that the committee would have the power to "second guess a decision of a board of management as to a school's capacity". The respondents argued that the appeal provided for in s. 29 was "a broad and flexible remedy" which was not confined to providing a method whereby a decision of the board of management could be reviewed. They also submitted that the committee was not bound by the terms or confines of a particular enrolment policy

and argued that they were entitled to look at "the lawfulness of that policy" and "whether it was applied correctly" as well as "all the circumstances surrounding a refusal to enrol". They submitted that they had:-

> "[T]he right to conduct a full inquiry into any decision made by a board of management which results in a refusal to enrol a student even if that decision is based on management considerations and further submit that their powers extend to the right to reverse any such decision."

31. Irvine J. in the High Court approached the matter in two distinct stages. First, she addressed the question of the scope of the appeal to the committee as a matter of statutory interpretation and, having conducted a detailed examination of the statute as well as certain authorities on the history and current state of the State-school relationship in Ireland, reached the conclusion that the form of appeal provided for in s. 29 was an appeal limited to a review of the board of management decision. However, in the second stage of her judgment, she went on to consider what the result should be should she be in error in her first conclusion and the scope of the appeal was not so limited. In the course of that particular discussion, Irvine J. clearly considered that the question of the school's capacity to take the child was the core matter falling for assessment. That being so, she distinguished carefully between matters that the committee *was* entitled to take into account and matter which it was *not*. Matters which were relevant to the question of the school's capacity, she said, were matters such as; the number of classrooms; the physical accommodation in the school; the physical space for staff; the number of children already in the school; the department circulars regarding ideal class size; health and safety issues; and, matters relating to the standard and quality of education provided. She also said, however, that the committee *was not* entitled to take into account matters such as the fact that the parents wished to send their children to this school because it was closer to their home nor was it entitled to take into account the academic ability of the children. For completeness, I should add that Irvine J. also discussed the manner in which the committee had calculated the number of children already in the school and found its calculations erroneous because of the manner in which children with special needs had been dealt with in these calculations. Having conducted this examination, Irvine J. concluded that the committee had based its decision upon a significant number of matters which were immaterial to its considerations and had failed to have regard to matters which were material and would have quashed the decision on that ground. Thus, it is clear that Irvine J. took the view that even *if* the scope of the appeal was an appeal in the fullest sense of the term, it was still confined to the issue of whether the school had the "capacity" to the children in question.

32. As regards the first conclusion of Irvine J., namely that the scope of the appeal under s. 29 was limited to a review of the board of management's decision, this – and only this – became the subject of a Supreme Court decision. The Supreme Court determined that it would consider a preliminary issue regarding the jurisdiction of the committee when hearing an appeal pursuant to s. 29 of the Act of 1998. The Supreme Court allowed the appeal on this preliminary issue, holding that the committee had the jurisdiction to conduct a full hearing on an appeal under s. 29 of the Act of 1998 and was not limited to a review of the decision making process of the board of management. In the course of her judgment on behalf of the court, Denham J., as she then was, said the following at paras. 24-28:

> "Taking an overview of s. 29 it is clear that the words 'appeal' and 'appeals' are dominant. They appear 21 times, excluding references to 'appealed' and 'appeals committee'. Further, the decision making body is called an 'appeals committee'.
>
> The words in s. 29 are very clear. The term 'appeal' is not obscure. It has a plain meaning in relation to procedures. The concept of an appeal is a full hearing on the merits with the jurisdiction to make a determination on the issues raised. An appeal goes beyond a review of a decision making process.
>
> As the words of s. 29 are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law.
>
> Consequently, the appeals process enables the appeals committee to have a full hearing on the matter and if so determined to replace its judgment on the matter for that of the board and to make such recommendations as it considers appropriate. Such a decision is anticipated as a possible outcome of an appeal by the section itself, in the provisions enabling a Secretary General to require a board to remedy a situation in accordance with the recommendation of an appeal committee.
>
> Thus the jurisdiction of an appeals committee is not limited to a review, for example, of the lawfulness or reasonableness, of a decision of a board of management."

33. Because of the way in which the issue was dealt with by the Supreme Court, namely, by way of a preliminary issue on a question of statutory construction, the Supreme Court decision does not in any way engage with the facts of the *St. Molaga* case and the question of whether the decision of the committee in that particular case should be quashed was not addressed.

34. Counsel on behalf of the respondent in the present case sought to rely upon the Supreme Court decision for the proposition that a committee, which is conducting an appeal pursuant to s. 29, is effectively "at large" in terms of what it may consider on an appeal and that it is not bound or constrained by the terms of the school's enrolment policy although it was accepted that it should (and in this case, did) take it into account. Counsel for the applicant, conversely, argued that the Supreme Court decision did not in any way liberate the committee from the parameters of a school's enrolment policy and that the emphasis on the broad scope of the committee's jurisdiction on appeal by the Supreme Court must be read in the context that the alternative under consideration was the interpretation favoured by the High Court; namely, a mere review of the lawfulness of the board's decision.

35. The judgment of Denham J. is succinct and deals only with the narrow point of statutory interpretation. It does not tease out the precise scope of the interaction between a school's enrolment policy and a decision of a committee in detail because of the manner in which the point arose for decision by the court on appeal. It doesnot express any opinion on the manner in which Irvine J. addressed matters in the second part of her judgment. What is clear is that the appeal is in the nature of a full re-hearing of "the matter" (a word used by Denham J. twice in the passage set out above) and not merely a review of the lawfulness or reasonableness of the board of management decision on "the matter". What is perhaps less clear for present purposes is what was meant by Denham J. when she used the word "matter". Was "the matter"; (a) the question of whether the school had the *capacity* to take the child once all the children from the feeder school had been admitted in accordance with the enrolment policy?; or, (b) a more general question; namely, whether the child should be admitted having regard to all the circumstances not limited to the question of capacity or the enrolment policy? The issue in the *St. Molaga* case was the straightforward issue of whether the school had the capacity to take the child and there were no unusual factors such as the circumstances arising in the present case, factors which might be described as

"extraneous" to the enrolment policy. Further, the precise point being addressed by the Supreme Court was whether the appeal was a full re-hearing or whether it was a review of the board's decision. Bearing those two factors in mind, I do not think that the above passages cited from the judgment of Denham J. can support what I have set out as interpretation (b) above; namely, that a committee is entirely "at large" and is not constrained by the parameters of an enrolment policy; the position contended for on behalf of the respondent. In my view, that issue did not arise for decision in *St. Molaga* case and was not expressly decided upon by the Supreme Court; accordingly, it is necessary to consider whether and how this issue has been addressed in subsequent judgments of the High Court.

36. With regard to these High Court decisions, counsel on behalf of the applicant submits that this Court is bound by what he says are clear decisions to the effect that a committee, while undoubtedly free to conduct a *de novo* hearing, cannot go outside the parameters of the school's enrolment policy. Counsel on behalf of the respondent argues that these authorities did not decide the issue arising in this case and, therefore, this Court is not bound to construe the relationship between the school's enrolment policy and the committee's jurisdiction in the manner contended for on behalf of the applicant. It is therefore necessary to examine these High Court decisions in some detail in order to assess what they did and/or did not decide.

37. In *County Westmeath V.E.C. v. Department of Education* [2010] 1 I.R. 192 a boy who was enrolled in a secondary school was advised not to return to the school due to disciplinary problems although he was not formally expelled. As a result of this, his parents applied to enrol him in a community college under the management of the applicant. The board of management of the community college refused to enrol the student, primarily on the basis of the enrolment policy of the college, which provided that the college did not accept transfer applications from students already enrolled in local post primary schools other than in exceptional circumstances. The parents appealed this decision to the committee on the grounds that their son did not have a school which he could attend for his pre-leaving certificate year. They had withdrawn their son from the first school after the decision had been made by the board of management of the community college. The committee upheld the appeal and the department directed the enrolment of the student in the community college. The applicant sought an order of *certiorari* quashing the decision of the committee and the direction of the first respondent to enrol the boy in its school.

38. Some of the matters considered by the High Court (O'Keeffe J.) related to the sufficiency of evidence for the committee's conclusions; a common ground of challenge in judicial review proceedings. However, for present purposes, it may be noted that one of the reasons given by the committee for its decision was that the enrolment policy of the college "might be" at variance with the rights of parents to enrol children in a school of their choice. O'Keeffe J. condemned this reason, stating as follows at paras. 51-52:-

> In my opinion, what this reason is stating is that the enrolment policy may be *ultra vires* or contrary to law as it does not reflect adequately or at all the right of parents to enrol their child in the school of their choice. Section 15(2)(d) does not give an absolute right to a parent to enrol their child in the school of their choice. Such a right of parents to send their children to a school of their choice must be respected in the published enrolment policy of the school having due regard to the matters set out in section 15(2)(d) of the Act of 1998. Furthermore, it appears to me that the manner in which this reason is drafted in the decision is *directed at the enrolment policy itself, rather than its application by the board of management. It is the enrolment policy itself that is being impugned.*
>
> It is true to say that there was no express finding made by the appeals committee that the enrolment policy of the college was at variance with the rights of parents to enrol their child in the school of their choice. Nevertheless, I conclude that this reason influenced materially the decision of the appeals committee and that the appeals committee was not entitled to entertain such consideration as a basis for allowing the appeal of the notice parties. The conclusion of the appeals committee that the enrolment policy of Mullingar Community College may be at variance with the rights of parents to enrol their child in the school of their choice is in the manner expressed *ultra vires* the appeals committee powers. By giving such a reason for its decision it is clear that the issue raised was considered sufficiently important by the appeals committee as to form one of the reasons for its decision. Furthermore, parents do not have an absolute right to enrol their child in the school of their choice, as I have already stated. (Emphasis added).

39. In *Lucan Educate Together National School v. Department of Education* [2011] IEHC 86 the High Court (O'Keeffe J.) considered the decision of a committee in relation to a child who had been refused a place in an outreach class of children with autism. The applicant was a national school which had established an outreach class for children with autism and had drawn up an enrolment policy for admission. The enrolment policy specified various requirements to be fulfilled. One of these was assessment and approval from a particular clinical support team. It also stated:-

> "A child will be accepted for admission when all of the following criteria have been met:-
>
> (a) (i) the child has a diagnosis of Autism Spectrum Disorder (this diagnosis being made from a professionally recognised clinical and psychological assessment procedure).
>
> (ii) if the child presents with a general learning disability, it must fall within the mild range (this diagnosis must also be made from a professionally recognised clinical and psychological assessment procedure)." (Emphasis in original).

40. Having considered the material furnished to the school by the parents in respect of the child, the school advised the parents that S. would not be enrolled in the outreach class because they would not be able to meet his educational requirements as recommended. The school construed the material submitted as supporting a diagnosis of "significant developmental delay" and "significant learning disability".

41. The parents appealed to a committee, which upheld their appeal on the basis that, *inter alia*, S. did satisfy the main criteria for enrolment in the outreach class. They referred to a particular report dated 6th June, 2006, and stated that the child met the criterion for autism with sub-threshold attention deficit hyperactivity disorder and mild learning disability. The committee also decided that the inclusion in the school's enrolment policy of the criterion that a child must fall within the mild range of general learning disability was inappropriate in the context of recent legislation.

42. The High Court held that there had been a conflation by the committee of the issues of "intellectual disability" and "adaptive skills" which were two different areas of mental functioning. Accordingly, insofar as the committee had made a finding that the reports indicated that the child had only a mild learning disability, this was not substantiated on the facts or the evidence available and was, therefore, an unreasonable conclusion. This was, as it were, a straightforward application of the "insufficiency of evidence" judicial review approach.

43. More importantly for present purposes, the court also discussed the committee's view that the criterion in the enrolment policy

that the learning disability be mild was inappropriate in the context of recent legislation. O'Keeffe J. said that this reason was "vague and uncertain in its own terms" and purported to be a determination of the lawfulness on the part of the school's enrolment policy in the context of unspecified recent legislation which was not a valid reason. He went on to say that the enrolment policy was prepared by the board of management in accordance with s. 15(2)(d) of the Act of 1998 and that s. 19 of the Act of 2000 provided that the board shall not refuse to admit a student except where such refusal is in accordance with the enrolment policy. In his opinion, a 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 had to have regard to the matters set out in s. 15(2)(d). This included respecting the rights of parents to send children to a school of their choice but it did not confer the right to send a child to the school of their choice.

44. The next decision is the case of *City of Waterford V.E.C. v. Department of Education* [2011] IEHC 278. This was a case in which the High Court (Charleton J.) dealt with an application for judicial review in respect of a committee decision in respect of the expulsion of a child from a school. The child in question was thirteen years of age and began to encounter difficulties almost as soon as entered first year in the school. He was suspended on a number of occasions and he was offered counselling by arranging home visits and by involving the school chaplain. His bad behaviour persisted and again there were further counselling sessions and disciplinary reports and at least one further home visit. Disruptive behaviour continued and ultimately the board of management held a special meeting in the course of which the child's behaviour was discussed. The school decided to expel him. The matter made its way to a committee under s. 29 of the Act of 1998. The committee upheld the appeal requiring the school to take the child back into the school and stated that it had made its decision for two reasons; (1) that he was only thirteen years of age and had been out of school since May of his first year; and, (2) that there was a distinct lack of other educational alternatives for him in the City of Waterford. The High Court held that the committee was not entitled to take into account the lack of alternative placements for the child. It was required to take the decision on the basis of the same matters that the board of management takes the decision which is a direct assessment of the child's behaviour. In the course of his judgment Charleton J. said as follows at para. 17:-

> "What a school board, and thus what an appeals committee, cannot take into account are the alternatives which the education welfare officer may be in a position to offer; the resources of the school; and external resources. It is worth emphasising that on an appeal the appeals committee is concerned with whether or not the expulsion was warranted. This has nothing to do with whether there is an alternative place. The responsibility for that function is elsewhere. These are separate and distinct statutory functions. It would be wrong for an appeals committee not to grant an appeal where, in the first instance, the expulsion of the pupil was not warranted, simply because the pupil has an alternative place in education available to him or her and thus does not want to go back to the school. Equally, the appeals committee cannot grant an appeal because the pupil does not have an alternative place."

45. The most recent decision on a committee is the decision of Hogan J. sitting in the High Court in *Bord Bainistíochta Scoil Lorcáin v. Rionne Oideachais* (unreported, High Court, Hogan J., 29th July, 2016). This particular case was conducted through the Irish language. It was a judicial review in respect of a decision of a committee overturning the decision of the board of management in relation to the enrolment of a child in an Irish speaking primary school. The entrance policy of the school gave priority to children who were being raised through Irish if the number of applications for places was greater than the number of places available. An application was made on behalf of a child for a place in the school and arrangements were made to have the father and his child interviewed. According to the teachers who conducted the interview, both father and the child had very limited Irish. The child was not able to answer basic questions nor have a conversation in Irish. On the basis of the report of the interviewing teachers, the board of management decided that there was not enough evidence to satisfy it that the child was being raised through Irish. The school principal wrote an email in which she said that the definition of "a child being raised through Irish" was a family in which at least one parent was speaking in Irish alone to the child.

46. An appeal to a s. 29 committee was successful as a result of which the child became entitled to a place in the school. The committee based its decision upon six reasons as follows:-

> i. That there was inconsistency between the statement in the enrolment policy of the school that every child would be welcomed to the school regardless of what language background the child had and the statement that places would be distributed firstly to students being raised in Irish in the event that there were a great number of applicants than spaces;
>
> ii. That the board of management of the school did not give enough information to the parents about the system of assessment by which the fluency of Irish of the child and the parent would be assessed;
>
> iii. That the enrolment policy of the school did not mention the process which they had to collect evidence in relation to the spoken language abilities of the parent and child;
>
> iv. That there were no criteria laid out in the enrolment policy to assess the fluency of the parent;
>
> v. That the definition set out in the email sent by the school principal did not correspond with the enrolment policy of the school, as there was no such definition mentioned in the policy;
>
> vi. That on one previous occasion a place had been given to a child in the school when other evidence of fluency of the parent and child was provided to the school, whereas such an opportunity was never given to the father in this case.

47. In his judgment, Hogan J. started by pointing out that the Supreme Court had confirmed in the *St. Molaga* case that a committee had jurisdiction under s. 29 to carry out a full hearing. However, he said that it was clear from the decisions in *Lucan Educate Together National School v. Department of Education* and *County Westmeath V.E.C. v. Department of Education* that the committee had no jurisdiction at all to review the entrance policy of a school which was accepted under s. 15(2)(d) of the Act of 1998. The only task of the committee was to resolve the question of whether the board followed the published entrance policy correctly.

48. Turning to each of six reasons given by the committee, it seems to me that the most relevant parts of the discussion by Hogan J. relate to the first reason and the sixth reason. As regards the first reason (set out above), Hogan J. held that the two statements in the entrance policy were not inconsistent with each other. He went on to say that he doubted, in any event, the jurisdiction of the committee to make statements like this because the only task the committee had was to interpret and apply the policies of the school and it was not appropriate for the committee to look behind the policies or try indirectly to criticise them. As regards the last reason, namely that another child had on a previous occasion been admitted to the school when other evidence of fluency of the parent and child was provided to the school, Hogan J. also held that the committee was incorrect to give attention to this element

because the committee was limited, according to the *Lucan Educate Together* case, to the "method of scrutiny that was put forward in the entrance policy" and "cannot give attention to elements that are unrelated to the correct implementation of the entrance policies". He said that the past practice was not relevant to the enrolment policies unless it were so "firm and regular" that it was correct to accept that it was a de facto supplementing or changing of the enrolment policies. It seems to have been an isolated case and there was no suggestion that it was a regular practice; therefore, the committee was mistaken in having given attention to a consideration that was immaterial as a matter of law. In quashing the decision of the committee and remitting it for further judgment, Hogan J. said that the central question the committee should ask themselves is whether there was enough evidence before them to satisfy themselves that the child's competence with Irish was reasonable and age appropriate and that there was at least one parent who made an effort to speak to the child in Irish on a regular basis.

49. In summary, the key statements of the above four High Court decisions in relation to the relationship between the committee's role and the enrolment policy of a school are as follows:-

> 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).

50. It will be recalled that in the *St. Molaga* case, the department had made arguments, set out at para. 30 above, that the scope of the appeal before the committee was very broad and that these arguments included an argument that the committee was not bound by the terms or confines of a particular enrolment policy and that they were entitled to look at "the lawfulness of that policy" and "whether it was applied correctly" as well as "all the circumstances surrounding a refusal to enrol". It seems to me that the above High Court authorities clearly did not interpret the Supreme Court decision as approving all of those arguments. For example, it is clear that they did not consider that the committee is entitled to look at the "lawfulness of the policy" or to "impugn the policy" in any other way. Therefore, while the Supreme Court did consider that the scope of the appeal pursuant to s. 29 was a re-hearing rather than a narrow review, it was not interpreted in subsequent High Court decisions as approving all of the arguments made on behalf of the department in the *St. Molaga* case.

Application

51. In the present case, there is no question of the committee seeking to "impugn" or criticise the enrolment policy itself in any direct sense; however, the enrolment policy prescribed a method of random lottery for choosing between applicant students falling within "category six". The committee took into account, in deciding that the applicant should be given a place in the school, the interactions between the former school principal and the parents which had led to their removing the child from his then primary school and placing him in a different primary school where the child had to repeat fifth class. It seems to me that in doing so, the committee did cross the line into territory which was described as prohibited by the High Court authorities. What the committee did could be described in various ways, using the language of the High Court decisions discussed above; for example, it could be said that the committee had regard to matters extraneous to the enrolment policy; or that it chose not to apply the policy (insofar as the policy provided for a particular method of selecting children in category six *i.e*. the method of random selection by lottery); or it "disregarded" the policy insofar as it departed from the enrolment policy's prescribed method for selecting students in category six; or it paid attention to "elements unrelated to the correct implementation' of the policy". The essential point is that it took into account certain circumstances which the enrolment policy would not have permitted to be taken into account.

52. Counsel on behalf of the respondent referred to the provision in the enrolment policy itself which says that:-

> "Exceptions to the above may be made, at the discretion of the board of management, in cases of need that Presentation College Athenry could uniquely address."

This, he argues, pointed to the fact that the lottery selection was not the only method of choosing students and that there was a residual discretion in the selection process. I do not accept this argument because the exception clearly relates only to cases of "need" that the college can "uniquely address" and no case was ever made to the board, the committee, or this Court that this criterion had been fulfilled in the present case. The particular provision seems to me to create a narrowly drawn exception to the lottery principle for children in category six rather than indicating that there is a more general residual discretion residing in both the board and committee.

53. It was also argued on behalf of the respondent that this construction of the role of the committee, namely the construction that the committee cannot step outside the parameters of the enrolment policy, would render the appeal process redundant in all, or at least almost all, of such cases. That may be so where a particular school has chosen random selection as the method by which places should be allocated to applications falling within a particular category. It does not preclude consideration of such matters as to whether the school has, in fact, reached capacity before employing that random selection method or whether the other categories have in fact been filled up with eligible students. Nor would it preclude a meaningful assessment where the enrolment policy of a particular school concerned something such as the child's proficiency in a language or academic ability or some such matter. However, if a school has chosen by way of policy to deal with the capacity problem, by way of a random selection procedure once certain categories (for example, siblings of children already in the school) have been filled, it follows that the role for a consideration of personal circumstances is correspondingly limited. A policy of random selection, by its nature, does not take into account the personal circumstances of individuals. If the enrolment policy precludes the school from considering the personal situation of any of the children in "category six" then it seems to me that the committee is also so precluded in the case of an individual child who brings an appeal. The position would be different if the enrolment policy of the school itself gave a more general discretion to the board of management and, therefore, to the committee; however, presumably the whole point of the random selection process is to avoid a situation where the school has to make difficult and invidious choices about the personal circumstances of different applicant students. If the respondents' arguments were correct as a matter of law, the situation would be that the school would have no discretion with regard to students falling within "category six" whereas the committee, if presented with appeals from all of the unsuccessful "category six" applicants, would be entitled to exercise discretion to decide which of them gets a place in the school. In

the present case, one cannot but have sympathy for C.I. and the child's family given the background circumstances but there are many personal circumstances which may be compelling and if a committee is entitled to depart from the random method of selection in one case it is entitled to do it in others. The overall effect could interfere significantly with the implementation of the particular enrolment policy carefully considered and chosen by the school in question.

54. Accordingly, I have reached the conclusion that, as a matter of law, the previous High Court authorities do require that a committee conduct its full appeal (as described by the Supreme Court) within the parameters of the school's enrolment policy and that the committee in the present case erred in taking into account the circumstances of this particular child *i.e.* the fact that he had been placed in a particular feeder primary school following discussions with the former secondary school principal. The enrolment policy provided for a particular method of selecting children to be admitted to the school which, for children in the circumstances of this child, consisted of random selection by lottery. This method of selection was exclusive of other matters to be considered in respect of a "category six" child with the exception of cases of "need" which the school could "uniquely address". The committee, in my view, was not entitled to depart from or disregard the enrolment policy in that regard.

55. Because of this general conclusion, I do not consider it necessary to enter upon a minute analysis of whether the court is entitled to take into account the supplemental reasons given by letter dated the 31st January, 2017, and the reasons set out in the affidavits sworn on behalf of the committee in these proceedings, or what I might call the "*Ermakov*" aspect of the case (see *R. v. Westminster City Council, exhibit parte Ermakov* [1996] 2 All E.R. 302). It does not appear to me to be necessary to enter into the nuances of the different explanations provided at different times by or on behalf of the committee in circumstances where I have concluded that, in broad terms, the committee was entering into prohibited territory by giving weight to a matter extraneous to the enrolment policy; namely, the interactions between the parents and the former school principal.

Committee's References to Legacy Issues

56. I will deal briefly with the so-called "legacy issue" aspect of the committee's decision. There were two references in the original decision of the committee dated 28th December, 2016, in this regard. The first was as follows:-

> "…On the basis of the advice given, the parents made significant changes to their children's education i.e. they moved C.I. and his sister to Craughwell N.S. where C. had to repeat 5th class. They did this in order to guarantee C.I's place in the Presentation College Athenry, leading to a significant legacy issue…"

I have difficulty understanding what is meant by the reference to legacy issue in that sentence. How did placing the child in the feeder primary school lead to a "significant legacy issue"? The second reference is that:-

> "The appeals committee in the interest of natural justice and fairness balanced the school's own acknowledged legacy issues alongside the parents' legacy issue."

Thus, the committee seems to have been of the view that there were two different "legacy issues"; that of the parents and that of the school. The decision of 28th December, 2016, does not in any way explain what it means when it refers to these "legacy issues".

57. Even if I were to take into account the explanation provided in the letter of 31st January, 2017, I find the reference difficult to understand. When the school queried what was meant by letter dated 31st January, 2017, the replying letter of the same date said:-

> "The parents' affidavit referred to a 'legacy issue'. The current principal referred to school 'legacy issues' when acknowledging that there are and will be students in Presentation College Athenry who did not attend one of the feeder schools listed in the school's Admission and Enrolment policy".

Again, the reference to the *parents* having a "legacy issue" is a reference I simply do not understand. In respect of the *school's* legacy issue, a little more clarity was provided insofar as it appeared to refer to the principal having confirmed that there were non-feeder school children in the school. I fail to understand how this would be an important factor in reaching a decision as to whether this child, C.I., should be admitted to the school when the principal had made clear that those non-feeder school children fell into another category in the school's enrolment policy (e.g. a sibling already in the school), whereas C.I. did not. I do not consider it appropriate, in light of the *Ermakov* principle, to take into account the explanations offered by way of affidavit in the present proceedings, as this was at a considerable remove in time and context from the original decision of the committee. Accordingly, insofar as the decision of the committee clearly appears to have taken these "legacy issues" into account, I would be prepared to quash on this ground if it were necessary to do so as it appears to be consideration lacking in rationality in the legal sense of that phrase.

Alleged Breach of Fair Procedures concerning the Assessment by the Committee of the Former Principal's Email as against the Evidence of the Parents

58. In view of my conclusions above, I do not consider it necessary to deal in any detail with the alleged breach of fair procedures insofar as the committee may have placed extra weight on the evidence of the parents over that of Mr. Doherty and/or the school simply because the parents' account of the facts had been presented via an affidavit to the committee and that of Mr. Doherty via an email. It seems to me that the reference by the committee to the affidavit evidence of the mother was merely descriptive, rather than that the committee was thereby placing greater weight on the evidence simply because it was verified by affidavit. In terms of the content of the evidence, I find the committee's analysis of the evidence, and particularly of the email, somewhat puzzling. However, 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 and I do not think that is the situation here. More importantly, by reason of my conclusion of the primary issue, it does not particularly matter whether they found that a place had been "guaranteed" or whether merely an "expectation" had been created. Accordingly, I do not propose to quash the decision on any ground relating to the manner in which the committee approached the question of the evidence before it on precisely what was said by Mr. Doherty to the parents of C.I..

59. I will grant the relief of *certiorari* sought and remit the matter for a fresh consideration by a committee.