

**THE HIGH COURT
JUDICIAL REVIEW**

[2014 No. 426 J.R.]

BETWEEN

**SECULAR SCHOOLS IRELAND LIMITED
AND**

APPLICANT

**THE MINISTER FOR EDUCATION AND SKILLS
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan on 4th day of September, 2015

Introduction

1. The applicant seeks relief by way of judicial review in respect of a decision of the first respondent made on 10th June, 2015, to refuse its application for patronage of a new primary school in Carrigtwohill in County Cork. By order of 20th July, 2015, Noonan J. granted leave to the applicant to apply for judicial review for the following reliefs:-

- "1. An order of certiorari quashing the decision of the First Named Respondent her servants or agents to refuse to consider the Applicants Application for Patronage of a New Primary School in Carrigtohill in the County of Cork made on the 10th day of June 2015 for the reason 'The Application has been deemed invalid.'
2. An order of certiorari quashing the decision of the First Named Respondent made on the 10th day of June 2015 to refuse the Applicants Application for Patronage of a New Primary School in Carrigtohill in the County of Cork.
3. An order of certiorari quashing the decision of the First Named Respondent made on the 10th day of June 2015 that Patronage of a New Primary School in Carrigtohill in the County of Cork be awarded to the Cork Education and Training Board.
4. A Declaration that the Decision making process of the First Named Respondent made on the 10th day of June 2015 in refusing to consider the Applicants Application is *ultra vires*, and is in breach of the principles of natural justice and constitutional justice, in breach of the Education Act 1998, Bunreacht na hÉireann and the European Convention on Human Rights.
5. A Declaration that the decision made deeming the Applicant's Application invalid is void in circumstances that they failed to afford the Applicant an opportunity to address the purported invalidity in circumstances where no such notice or form and or no adequate form was provided which stipulated the mandatory requirements before an award of patronage can be considered for a State Funded School.
6. If necessary, and appropriate, an order of mandamus directing the Respondents by themselves, their servants or agents, to consider and determine the application for Patronage of a New Primary School in Carrigtwohill in the County of Cork in accordance with law and Bunreacht na hÉireann and the European Convention on Human Rights."

The Factual Background

2. On 5th February, 2015, the first respondent announced the establishment of seven new primary schools and on 12th February, 2015, applications were invited by the Department from patrons and prospective patrons to operate two of the schools.

3. Since June 2011, an independent external group the New Schools Establishment Group ("the NSEG") is tasked with advising the Minister on applications for patronage of new schools which were intended to be established, following an assessment of the applications and a report prepared by the Department of Education and Skills. The respondent submitted that in any application for patronage of a new school that the published material makes clear that such applicants must comply with a number of necessary criteria set out in the document *New Arrangements for Patronage of New Schools*. The following criteria must be satisfied by prospective school patrons:-

- "• Confirmation that the prospective patron is willing to accept and open special education facilities;
- Confirmation that the prospective patron is willing to have up to three streams subject to demand for the school;
- Confirmation that the prospective patron is willing to enter into the standard lease agreement with the Department of Education and Skills. Otherwise the prospective patron could provide their own school site;
- Confirmation of willingness to operate by the rules and regulations laid down in various Department of Education and Skills circulars and operating procedures and to follow the prescribed curriculum;

- Confirmation of willingness to operate the school within the resourcing and policy parameters established by the Department of Education and Skills;
- Confirmation of willingness to be part of a campus development with other primary or second-level schools as identified by the Department;
- Confirmation of willingness to enrol children in the area for whom the Department has identified the need for a school."

4. In her affidavit sworn on 6th August, 2015, Jacky Hynes, Assistant Principal Officer in the Department of Education and Skills, stated that full details of the requirements necessary for an application were available to the applicant, being provided on several occasions including:-

- (i) On 12th February, 2015, an e-mail was forwarded to various individuals, including the applicant, which attached a document "invitation for applications for patronage of new Primary Schools to start September 2015" together with another document called "New arrangements for patronage of new schools". The said document set out that any applications for patronage must satisfy a number of requirements.
- (ii) The Department responded to a query by Mr. Breen, a Director of the applicant, by e-mail dated 17th February, 2015, in which as part of the response, the Department included the criteria that would apply in determining received patronage applications. The link on the Department's website to the criteria was also included.
- (iii) During a meeting at the Department's Offices in Tullamore on 24th February, 2015, the applicant and other attendees were provided with information and details, including a copy of the guidelines. It was explained that it was necessary to comply with the Guidelines.

5. The respondent deemed that the applicant's application was invalid as it failed to contain a complete statement of commitment to the required conditions. The applicant's submission contained a statement of commitment to only one of the seven conditions (albeit the applicant contended that it did not confirm any of the purported requirements and that the respondents "took it upon themselves to extract the 'confirmation' from the 'characteristic spirit' document that they had requested from us"). The NSEG agreed with the Department's view in relation to the invalidity of the application. The application did not, therefore, reach the comparative assessment stage. The Department of Education and Skills' *Patronage Assessment Report to the New Schools Establishment Group* for the Carrigtwohill area stated in regard to the applicant's application:-

"Secular Schools Ireland – the applicant has only confirmed its willingness to meet one of the requirements outlined above specifically, that it is willing to enrol children in the area for whom the Department has identified the need for a school.

A commitment to all of the requirements outlined is mandatory before an award of patronage can be considered for a State funded school. As this applicant has not given those commitments, the application has been deemed invalid and has not been processed further."

Summary of the Submissions

6. Article 42.1 provides that the parents are the "primary and natural educator of the child" and guarantees to respect the inalienable right and duty of parents to be the primary educator of their own child. The applicant submitted that the recognition of a patron is a constitutional right for parents to exercise. The Minister only has powers in terms of recognition under the Education Act 1998 ("the Act of 1998") directly related to the fact that the State provides "for free primary education" under Article 42.5., and this power of recognition is based on parental preference. The Minister is required under the Constitution to "provide for" the exercise of parental choice by putting in place a mechanism to deliver access to the rights of parents. The applicant submitted that the Minister does not have the power to refuse to process an application and it is not for the Minister to "award" recognition of a patron. The applicant submitted that it complied fully with the criteria required (statement of "characteristic spirit"; memorandum and articles of association; the company's charter; names and details of 98 children; details confirming the company's incorporation; four directors; and, application for a charity number) and had the greatest number of parental preferences – 98 students had signed up. It was submitted that the first respondent, its servants or agents interjected themselves between parents in the exercise of that right and frustrated same.

7. The applicant asserted that the applicant's application was not processed in that the Department's officials made a determination that the application was invalid, due to an alleged failure to specifically confirm that the applicant will comply with what the applicant terms "self declaratory statements", and further took it upon themselves not to process the application further. The applicant contended that this was *ultra vires* the Act of 1998. The applicant also submitted that being excluded *in limine*, as occurred in this case in pursuance of a constitutional right, was a disproportionate and draconian response.

8. The applicant contended that it was not afforded due process as the Department did not inform its Directors of any alleged defect in the application or give the applicant any opportunity to remedy the alleged defect. Ms. DeBurgh, Director of the applicant, averred in her grounding affidavit sworn on 20th July, 2015, that attendees at the meeting in Tullamore were expressly told:-

"anyone who submitted in the wrong format, would be contacted by the Department of Education, after the date of submission, and asked to re-submit the information in the format requested."

9. In reply to the respondent's submissions, the applicant rejected the argument that the criteria must be met in making an application and the assertion that "*they were a prior requirement*" was not set out in the documentation as furnished to the applicant in respect of the specific process for recognition of patronage for Carrigtwohill. The phrase in the document *New Arrangements for Patronage of New Schools* that "the following requirements will have to be satisfied by prospective school patrons" evidences the fact that they are post-conditional requirements. The applicant submitted that, in any event, they are self-declaratory. At no stage did the applicant suggest or imply that it would not carry out any aspect of the legislatively described patronage.

10. In regard to the duty to give reasons, the act of deeming the application of the applicant to be invalid did not constitute a reason. It was asserted that neither the process nor the reasons can be gleaned from the report, despite submissions by the respondents to the contrary. It was further submitted that there was no evidence put before the NSEG in order to arrive at an

independent and reasoned decision.

11. The respondents submitted that no wrong has been committed by the respondent against the applicant. The application was assessed by Department officials with the assessment reports and overall report prepared for consideration by the NSEG. The applicant simply failed to comply with the requirements as set out in the document *New Arrangements for Patronage of New Schools*. Thus, the application was deemed invalid. The application was not ignored, was considered at the time and it was deemed invalid. The respondents further observed that it is notable that the applicant even now gives no commitment to the required conditions and offers no explanation for the failure to do so in its application. The respondents were unable legally or factually to interpret, question or overlook the applicant's failure.

12. In regard to due process, the respondents submitted that due process relates to criminal trials. There is no obligation on the respondents to return the application to applicants due to defects therein and to do so would be unfair to other applicants who had applied in the correct form.

13. The assertion by the applicant that the requirements were not conditions precedent in making the application, and that the documentation provided to the applicant did not set out their nature to be a prior requirement, is incorrect. The Minister has power to seek advanced confirmation with terms and conditions such as those set out in the *New Arrangements for Patronage of New Schools*. Section 10(2)(f) of the Act of 1998 provides:-

"(2) The Minister may designate a school or a proposed school to be a school recognised for the purposes of this Act where the Minister, on a request being made for that purpose by the patron of a school or a proposed school, is satisfied that—

...

(f) the patron agrees that the school shall operate in accordance with such regulations as may be made by the Minister from time to time under section 33 and with this Act and with any other terms and conditions as may reasonably be attached to recognition by the Minister."

14. In regard to the provision of reasons, the respondents submitted that the assessment report provided the reasoning as to why the application was deemed invalid and thus not processed further.

15. In this application, the applicant does not demonstrate any power which the Minister has exceeded. Further, the application does not demonstrate any principle of justice, term of statute or convention which has been offended in respect either of the rule or the breach.

Decision

16. I think the application is misconceived. Although much of the argument by the applicant during the hearing was directed towards the constitutional rights of the applicant and its members in relation to the education of their children, there is in fact no dispute on these rights. The dispute concerns the exercise of those rights. In this regard the respondents have put in place a structure to do just that. The Minister obviously has to ensure that any patronage awarded is to appropriate persons who will guarantee to meet the established criteria. The Minister is bound to do so in order to ensure the proper education of children and the efficient disposition of scarce resources. This is the purpose of s. 10(2)(f) of the Act of 1998. In this regard there has been provided a *modus operandi* for application including seven criteria which any prospective school patron must meet. No case is made that these are unfair or unreasonable. On their face they appear to be eminently sensible and practical. I would consider that these are vital guarantees that must be obtained from any prospective patron to ensure the proper conduct of the school in question. I am satisfied that the applicant was made fully aware of the need to commit to these criteria. It is somewhat puzzling that the applicant has not even to date done so. I think the decision to declare the application invalid was correct and appropriate. If the applicant is serious about meeting the obligations of a school patron, it should have had no difficulty in giving such guarantees none of which in any way impinge upon their constitutional or other rights in relation to education. The officials are not required to go back to applicants whose applications are invalidly made in order to engage with them. The applicant was made fully aware of the requirements and failed to meet them. It is the author of its own problem. The application for relief is refused.