

THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 726 J.R.]

BETWEEN

THE BOARD OF MANAGEMENT OF ST. MARNOCK'S NATIONAL SCHOOL

APPLICANT

AND

SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SKILLS, JACK CLEARY, MARIE LYNCH AND MARY T. DUNNE.

RESPONDENT

AND

MIRIAM CAMPBELL

NOTICE PARTY

JUDGMENT of Mr Justice Coffey delivered on the 14th day of November, 2017

1. This is an application for judicial review and concerns the lawfulness of decisions made by the Respondents in the course of an appeal brought by the Notice Party on behalf of her son pursuant to s. 29 of the Education Act, 1998 against a refusal by the Applicant to enrol him in the Speech and Language Class at St. Marnock's National School for the academic year commencing on the 1st September, 2017.

Summary

2. The Notice Party is the mother of E.C. who is one of fourteen otherwise eligible pupils who were unsuccessful in their application for three available places in the relevant class. An Appeals Committee consisting of the second, third and fourth named Respondents heard and allowed a s. 29 appeal by the Notice Party against the refusal of a place to E.C., primarily on the grounds that despite being required to do so by law, the Applicant did not have a published Admission Policy setting out the criteria to be applied to the selection of otherwise eligible pupils, where available places in the SL Class were oversubscribed. Having determined that the relevant policy could not be used to select anyone in the event of oversubscription, the Appeals Committee nonetheless applied the policy to determine that a place should be granted to E.C. on the basis that he was eligible for selection and made a recommendation to that effect to the First Named Respondent notwithstanding the fact that there were thirteen other unsuccessful pupils who were equally eligible and in circumstances where all three available places in the class had already been allocated. Upon receipt of the Appeals Committee's determination and recommendation, the First Named Respondent gave a direction to the Applicant to allocate a place to E.C. Although it raises other issues, the gravamen of the Applicant's complaint to this Court is that the recommendation made by the Appeals Committee and the direction given by the First Named Respondent were unreasonable and irrational.

3. The Applicant seeks the following reliefs:

- (1) an Order of *certiorari* quashing the determination of the Second, Third and Fourth Named Respondents (hereinafter "the Appeals Committee") made pursuant to s. 29 of the Education Act, 1998 (as amended) ("the Act of 1998") in the case of an appeal taken by the Notice Party on behalf of her son ("E.C."), which said determination was communicated by letter dated the 15th August, 2017;
- (2) an Order of *certiorari* quashing the direction of the First Named Respondent made pursuant to s. 29 of the Act and on foot of the determination of the Appeals Committee directing the Applicant ("the Board of Management") to arrange for E.C.'s enrolment in the Speech and Language Class, St. Marnock's National School from the 1st September, 2017, which said direction was made by way of letter dated the 15th August, 2017 and;
- (3) an Order remitting the matter back to the First Named Respondent ("the Secretary General") for the purpose of a further hearing before a new constituted Appeals Committee pursuant to the provisions of s. 29 of the Act.

The Facts

4. St. Marnock's National School, ("the School") is located in Portmarnock, Co. Dublin and is a "recognised school" within the meaning of s. 10 of the Act. Since 1998 it has operated a distinct Speech and Language Class ("the SL Class") together with its mainstream classes. The SL Class was established with the stated aim of providing children with severe speech and/or language impairment with the opportunity to spend one or two years in a small class setting in order to receive intensive educational and speech and language therapy support. The SL Class is staffed by a full-time teacher and a part-time senior Speech and Language Therapist employed by the Health Service Executive. The class is limited in size to seven places in accordance with the pupil/teacher ratio of 7:1 stipulated by the Department of Education and Skills in Circular 38/2007. The class caters for the entirety of North County Dublin and has been heavily oversubscribed for many years.

5. By virtue of s. 15(2)(d) of the Act, a "recognised school" is required to "publish" a policy on "admission to the school" ("Admission Policy") and is further precluded by s. 19(1) of the Education (Welfare) Act, 2000 from refusing admission to a student unless its refusal is in accordance with the policy so published.

6. In this case, the School published two documents which provide information relating to admission to the SL Class:

- (1) a document entitled "Enrolment Policy";
- (2) a leaflet entitled "Referral Information for School Year September 2017" ("the Information Leaflet").

7. The documents do not refer to each other and critically make no provision as to what criteria are to be applied in order to

determine priority in the event that there are more eligible applicants than places available in the SL Class.

8. Whereas the Enrolment Policy sets out the four eligibility criteria that must be met by a child applying for the SL Class, the Information Leaflet sets out the procedure for application for admission to and selection for the SL Class. The leaflet provides that admission to the SL Class is by way of "referral" from a Speech and Language Therapist or a psychologist. It states that a referral so made should be accompanied by specified expert reports. It further provides that selection for the class is to be by a body described as an "Admissions Advisory Committee" ("the AA Committee") which is required to make a "decision" regarding each referral following an "intake meeting" to take place in March/April 2017.

9. E.C. was one of seventeen children referred to the School for admission to the SL Class prior to the closing date of the 1st March, 2017.

10. In accordance with the Information Leaflet, the Board of Management referred the applications and the relevant supporting material to the AA Committee, who met to consider and assess the relevant referrals and expert reports on the 8th March, 2017 and 29th March, 2017.

11. The minutes of the two meetings are contained in a document dated 7th April, 2017. The minutes disclose that the AA Committee determined that seventeen of the pupils met the relevant eligibility criteria following which the AA Committee proceeded to rank the remaining applicants in order to determine which of the pupils were of the "highest priority".

12. As a result of carrying out its assessment, the AA Committee ranked E.C. fifth in order of priority. After the successful three applicant pupils had taken up their offers, the Board of Management by letter dated 26th April, 2017 wrote to the parents of E.C. to inform them that the Board were unable to offer him a place in the SL Class due to "insufficient places". The letter also informed E.C.'s parents of their right to appeal initially to the Chairperson of the Board of Management and thereafter to the Secretary General pursuant to s. 29 of the Act.

13. By letter dated 15th May, 2017 E.C.'s parents sought a review of the Committee's decision by the Applicant which was considered by the Board of Management on 8th June, 2017. The minutes of that meeting disclose that having been informed by the School's Principal that the "appropriate processes" had been followed in the selection of the three successful pupils, the Board of Management determined that it could only offer places to those children "with the greatest need" and therefore were not in a position to offer to a place to E.C.

14. By letter dated 9th June, 2017 the School Principal wrote to E.C.'s parents to inform them of the outcome of the internal appeal to the Board of Management. He explained that after prioritising the needs of the different children who applied, the three available places had been allocated to "those children with greatest need". The letter also informed the parents of their entitlement to appeal under s. 29 of the Act.

15. On 5th July, 2017 the Notice Party submitted an appeal in writing against the decision of the Board pursuant to s. 29 of the Education Act, 1998.

16. The grounds of appeal relied upon by the Notice Party are somewhat discursive in their nature but when looked at in the round they disclose a complaint based on her son's need for a place in the SL Class and specifically the fact that after applying for the class prior to the 1st of March, 2017, E.C. had received a diagnosis of dyspraxia in May, 2017. She also made a complaint that the children applying for the SL Class should be seen by the School as part of the selection process and queried whether her son "lost out" because another child from his school had been offered a place.

17. Upon receipt of the appeal, the Secretary General appointed a facilitator in an attempt to broker settlement between the Notice Party and the Board of Management. Unhappily the facilitation process was unsuccessful which was outlined in a report dated 17th July, 2017, from the facilitator to the Secretary General.

18. On the 9th August, 2017 the Appeals Committee heard the Notice Party's appeal at which the Board of Management was represented by its Chairman and another Board Member, Ms Niamh McCarthy. In the course of the hearing, the Appeals Committee sought information as to what criteria had been applied by the AA Committee to give the highest rankings to the three successful pupils for the SL Class. The Chairman of the Appeals Committee has sworn an affidavit in which he gave unchallenged evidence that when he sought information on this issue from him, the Chairman of the Board of Management informed the Appeals Committee that he did not know how the AA Committee had ranked the pupils. It is not disputed that the Chairman of the Board of Management conceded that despite seeking the relevant information from him, the School principal (who was a member of the AA Committee) informed him that even he was unable to advise as to what methodology or criteria had been used in ranking the pupils. Furthermore, it is not in dispute that the Chairman of the Appeals Board was also informed by Ms McCarthy that before the hearing of the appeal, she had sought, but had not received information from the AA Committee. At all events, the relevant information was never produced to the Appeals Committee and neither the Board of Management nor the Appeals Committee sought to adjourn the matter to procure the relevant information prior to the Appeals Committee determining the appeal.

The Decision of the Appeals Committee

19. The Appeals Committee upheld the appeal and gave the following reasons for its determination which it recorded in writing as follows:

- E.C. meets the eligibility criteria set out in the School's enrolment policy for the enrolment of children in the speech and language class (this was acknowledged by the School representative).
- There were three vacancies in the Speech and Language Class.
- There were seventeen eligible pupils, including E.C., for the three vacancies.
- The Board of Management allocated the three places to pupils recommended by the Admissions Advisory Committee.
- The Admissions Advisory Committee is, as its name states, an advisory committee. Offers of places are made by the Board of Management, not by the Advisory Committee. The Minutes of the Board of Management meeting of the 8th June, 2017 makes this clear where it is recorded that the Board of Management had considered their letter of appeal but were not in a position to offer [E.C.] a place as the School could 'only offer places to those children with

the greatest needs’.

- The enrolment policy does not set out criteria for the allocation of places in this class.
- There is no provision in the policy to support the allocation of places ‘to those children with the greatest needs.’ (See Board of Management Minutes of the 8th June, 2017).
- The Board of Management was not in a position to inform the Appeals Committee as to how the three successful applicants were prioritised over [E.C].”

20. Having set out the reasons for its decision to uphold the appeal, the Committee then recorded that it had to “determine” whether E.C. should have a place in the SL Class. It determined that E.C. should be granted a place and recorded the following reasons for its decision:

“It found that E.C. meets the qualifying criteria set out in the policy;

it found that there was no term in the policy which provided a basis for refusing one of the available places in the class to him. The appeals committee, therefore, upholds this appeal.”

21. Having determined that E.C. should be granted a place in the SL Class, the Appeals Committee then proceeded to recommend to the Secretary General that E.C. be enrolled in the SL class from the 1st September, 2017. It recommended that the Board of Management “develop criteria for the allocation of places in the Speech and Language Class in the event of over-subscription”.

The Decision of the Secretary General

22. The evidence before this Court indicates that the functions assigned to the Secretary General under s. 29 (7) of the Education Act 1998 were assigned to the Principal Officer of the Parents, Learners and Database Section of the Department of Education and Skills in accordance with s. 29 (11) of the Act. By letter dated the 15th August, 2017 the Principal Officer of the School’s Division wrote to the Board of Management to inform it that the Appeals Committee had upheld the appeal and to direct the Board of Management to contact the Notice Party to arrange for E.C.’s enrolment in the SL Class from the 1st September, 2017. Although no point has been taken on the issue, there is no evidence before the Court that the Principal Officer who signed the letter giving the relevant direction to the Board of Management was in fact the Principal Officer of the Parents, Learners and Database Section of the Department or indeed that the nominated person in fact gave the relevant direction. No reasons are recorded in the letter for the making of the decision to give the direction. Other than an averment that the Secretary General “decided to accept the recommendation of the Appeals Committee” (see para. 12 of the Affidavit of Martin McLaughlin), there is no evidence before the Court as to who made the decision to give the direction or as to the reasons relied upon by that person for the making of the decision to give the said direction. The relevant direction was communicated by Tom Deegan, Principal Officer of the Schools Division both to the parents of E.C. and to the Board of Management by letter dated 15th August, 2017. The only “reasons” referred to in the letter are the reasons given by the Appeals Committee for its determination, a copy of which was attached to the said letter.

The basis of the challenge

23. The Applicant challenges the determination of the Appeals Committee on the basis that it was made in breach of fair procedures and was irrational or unreasonable and on the basis that the First Named Respondent’s decision to accept the recommendation of the Appeals Committee was on the same basis. The Respondents oppose all of these grounds.

The issues

24. The Applicant made the follows submissions:

- (1) it asserted that it had a published Admission Policy to deal with oversubscription based on the selection of eligible Applicant pupils who were “in greatest need”. Whilst it was conceded that neither its Enrolment Policy nor its Information Leaflet make express provision for either prioritisation or prioritisation on the basis of “greatest need”, it was nonetheless argued that an inference to that effect is warranted and arises from the reading of the two documents as a whole;
- (2) it was contended that the Board of Management had no notice of the fact that it would be required to demonstrate that the three successful Applicant pupils had a greater need for the available places than E.C. and further argued that the Appeals Committee failed to observe fair procedures in determining that the Board of Management was not in a position to inform the Appeals Committee as to how the three successful Applicant pupils were prioritised over E.C. without first adjourning the hearing in order to procure the relevant information from the AA Committee;
- (3) it was contended that having determined that the School’s published Admission Policy did not set out criteria for the selection of otherwise eligible Applicant pupils in the event of over subscription, it was unreasonable and irrational for the Appeals Committee to apply the policy in order to decide that E.C. should be granted a place merely on the basis that he was eligible;
- (4) it was further argued that insofar as the Appeals Committee had decided that there was no published Admission Policy which could be applied to select anyone for the SL Class, it was unreasonable and irrational for the Appeals Committee to uphold the appeal for the additional and allegedly inconsistent reason that the Board of Management was not in a position to inform the Appeals Committee as to how the three successful Applicants were prioritised over E.C.;
- (5) it was contended that the direction of the Secretary General to the Board of Management to enrol E.C. in the SL Class was an unlawful direction because there was no evidence to establish that the relevant discretion had in fact been exercised and further because the direction was in any event tainted with the same unreasonableness and irrationality that vitiated the recommendation of the Appeals Committee.

25. In answer to the Applicant’s challenge, the Respondents made the following submissions:

- (1) they contended that there was nothing in the documents relied upon by the Applicant whether taken individually or together to give rise to the inference that selection for the SL Class in the event of oversubscription was to be on the basis of “greatest need”;
- (2) they denied that the Appeals Committee failed to observe fair procedures contending that the Board of Management either knew or ought to have known that the Appeals Committee would as a matter of law have to conduct a full

rehearing of the matter in which it would have to be satisfied that the refusal of a place to E.C. was in accordance with the School's published Admission Policy;

(3) they contended that the School's published Admission Policy was fundamentally deficient in that it did not set out criteria for the allocation of places in event of oversubscription;

(4) they asserted that the decision of the Appeals Committee to apply the published Admission Policy to recommend the granting of a place to E.C. was reasonable and rational;

(5) they further asserted that the direction of the Secretary General to that effect was also reasonable and rational in all of the circumstances.

The relevant legal principles

26. Under the Constitution every child in the State has a right to free publicly funded education. The State is not obliged to provide education but it must make arrangements for its provision. Whilst it must respect parental choice, the State does not have to meet that choice in every aspect provided it adopts an education scheme that is rational and reasonable.

27. The admission policies of individual schools are governed by the Education Act, 1998 whose objectives are stated by s. 6 of the Act to be the promotion of equality of access and participation in education, the promotion of parental choice in education and the enhancement of transparency in the making of decisions.

28. In order to promote its objectives, the Act makes provision for the regulation of admission practices to schools recognised under the Act.

29. Section 9 (m) of the Act provides that a school shall:

"establish and maintain an admissions policy which provides for maximum accessibility to the school."

30. Without making any provision as to what such a policy should actually contain, s. 15(2)(d) of the Act, as amended, requires the Board of Management of a recognised school to publish:

"the policy of the school concerning admission to ... the school ... including the policy of the school relating to the ... admission ... 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."

31. Section 33 of the Act provides that the Minister for Education and Skills may make regulations relating to all or any of the matters set out in the Act including at s. 33 (g) of the Act "admission of students to schools" but to date this power has not been exercised in respect of enrolment.

32. Section 19 of the Education (Welfare) Act, 2000 provides that the Board of Management shall not refuse to admit a student except where such refusal is in accordance with the Admission Policy of the school concerned.

33. The right of appeal against a refusal of admission to a "recognised school" is given by s. 29 of the Education Act, 1998 which provides as follows:

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

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

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

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

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

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

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

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

(4) In hearing and determining an appeal under this section an appeals committee shall act in accordance with such procedures as may be determined from time to time by the Minister following consultation with patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers and such procedures shall ensure that—

(a) the parties to the appeal are assisted to reach agreement on the matters the subject of the appeal where the appeals committee is of the opinion that reaching such agreement is practicable in the circumstances,

(b) hearings are conducted with the minimum of formality consistent with giving all parties a fair hearing, and

(c) appeals are dealt with within a period of 30 days from the date of the receipt of the appeal by the Secretary General, except where, on the application in writing of the appeals committee stating the reasons for a delay in determining the appeal, the Secretary General consents in writing to extend the period by not more than 14 days.

(5) On the determination of an appeal made under this section, the appeals committee shall send notice in writing of its determination of the appeal and the reasons for that determination to the Secretary General.

(6) Where—

(a) an appeals committee upholds a complaint in whole or in part, and

(b) it appears to the appeals committee that any matter which was the subject of the complaint (so far as upheld) should be remedied,

the appeals committee shall make recommendations to the Secretary General as to the action to be taken.

(7) As soon as practicable after the receipt by the Secretary General of the notice referred to in subsection (5), the Secretary General—

(a) shall, by notice in writing, inform the person who made the appeal and the board of the determination of the appeals committee and the reasons therefor, and

(b) in a case to which subsection (6) applies, may in such notice give such directions to the board as appear to the Secretary General (having regard to any recommendations made by the appeals committee) to be expedient for the purpose of remedying the matter which was the subject of the appeal and the board shall, within such period (if any) as may be specified by the Secretary General in that notice, act in accordance with such directions.

(8) The Minister, in consultation with patrons of schools, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, shall from time to time review the operation of this section and section 28 and the first such review shall take place not more than two years from the commencement of this section.

(9) In the case of a school which is established or maintained by a vocational education committee an appeal against a decision of the board of such school shall lie, in the first instance, to the vocational education committee and thereafter to the Secretary General in accordance with subsection (1).

(10) The Minister shall, from time to time, following consultation with vocational education committees, national associations of parents and recognised trade unions and staff associations representing teachers, prescribe—

(a) the procedures for appeals under this section to vocational education committees, and

(b) which appeals shall inquire into whether the procedure adopted by a board in reaching a decision or conducting an appeal was fair and reasonable and which appeals shall be by way of a full re-hearing.

(11) The Secretary General may, in accordance with sections 4 (1) (i) and 9 of the Public Service Management Act, 1997, assign the responsibility for the performance of the functions for which the Secretary General is responsible under this section to another officer of the Department of Education and Science.

(12) For the purposes of subsection (1)(c), "student" means a person who applies for enrolment at a school and that person or his or her parents may appeal against a refusal to enrol him or her in the same manner as a student or his or her parents may appeal a decision under this section.

34. The nature of the appeal given by s. 29 of the Act was considered by the Supreme Court in the case of the Board of Management of *St. Molaga's National School v. the Secretary General of the Department of Education and Science and Ors* [2011] 1 I.R. 362 in which it was held that an appeals committee established under s. 29 of the Act has jurisdiction to conduct a full hearing on an appeal under the section and is not limited to a review of the decision making process of the Board of Management. In the case of *City of Waterford Vocational Education Committee v. The Secretary General of the Department of Education and Science and Ors* [2011] IEHC 278, Charleton J. observed that a s. 29 appeal is "broadly the same as an appeal from the Circuit Court to the High Court" thereby suggesting that it is in the nature of an appeal *de novo*.

35. The Act describes an appeal pursuant to s. 29 as "a complaint" and requires an Appeals Committee to carry out the following functions:

(1) in the first instance, to determine whether the complaint should be upheld in whole or in part;

(2) in the event that the Appeals Committee decides to uphold a complaint either in whole or in part, to decide whether

the "matter" giving rise to the relevant complaint should be "remedied";

(3) if it decides that the matter should be remedied, the Appeals Committee has a mandatory duty to make recommendations to the Secretary General "as to the action to be taken" (see s. 29(6)(b) of the Act).

36. The function of an appeals committee in deciding whether to uphold a complaint against a refusal of a place in a school has been considered by the High Court in six cases from which the following principles can be discerned:

(1) an appeals committee has no jurisdiction to review a school's Admission Policy – its only task is to interpret and apply the policy and decide whether the policy was correctly followed (see *Bord Bainistíochta Scoil Lorcain v Roinne Oideachais* (unreported decision of the High Court delivered by Hogan J. on the 29th July, 2016));

(2) an appeals committee should not impugn the relevant policy but rather should apply it and cannot strike down or disregard a provision in the policy and substitute what it considers appropriate (see *Lucan Educate Together National School v. Secretary General of the Department of Education and Science* (unreported judgment of O'Keeffe J. delivered on the 27th January, 2011));

(3) although it is entitled and required to conduct a full hearing, an appeals committee must conduct the appeal within the parameters of the school's Admission Policy (see *Board of Management of Presentation College Athenry v. Secretary General of the Department of Education and Skills and Ors* [2017] IEHC 521);

(4) in applying the school's Admission Policy, the appeals committee must only have regard to the relevant and particular facts which were before the Board of Management when it made its decision (see *County Westmeath V.E.C. v. Department of Education* [2010] 1 I.R. 192).

37. There is as yet no decided case which gives guidance as to what an appeals committee should do in a s. 29 "refusal" appeal where the relevant school either does not have a published Admission Policy at all or does have such a policy but it does not contain criteria for the selection of pupils in the event of oversubscription.

38. The Minister for Education and Skills has adopted Rules which govern the hearing of s. 29 Appeals. Rule 33 is of relevance to this case in that it requires an appeals committee to have regard to, *inter alia*, "the educational interests of all other students in the school" and "any resource implications" arising from the issues under appeal.

39. In the ordinary way, an appeals committee established under s. 29 of the Act must observe fair procedures and must act reasonably and rationally. It is accepted by the Secretary General that such directions as he may give on foot of a recommendation made by an appeals committee must also be reasonable. The legal principles applicable to judicial review for unreasonableness were summarised by Denham J. in *Meadows v. Minister for Justice* [2010] 2 IR 701 at 743-744 as follows:

"The relevant factors in the general test are as follows:-

(i) in judicial review the decision-making process is reviewed;

(ii) it is not an appeal on the merits;

(iii) the onus of proof rests upon the Applicant at all times;

(iv) in considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense;

(v) the nature of the decision and decision maker being reviewed is relevant to the application of the test;

(vi) where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the court should be slow to intervene in the technical area;

(vii) the court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 referred to as the "implied constitutional limitation of jurisdiction" in all decision making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."

Decision

40. The law does not prescribe what an admission policy of a school must contain but it does require at a minimum that the policy be published in order to secure the statutory objectives of, *inter alia*, equality of access to education and enhancement of transparency of decision making that underlie the Education Act, 1998.

41. Implicit in the requirement of publication is that the school disseminate its admission policy in the public domain in a manner that is readily accessible and discernable to any one who wishes to peruse its contents.

42. Speech and Language Therapists provide assessment, diagnosis and therapy for children with a wide range of communication difficulties in many different settings including local health centres, hospitals and schools. The fact that the SL Class could be regarded as a therapeutic programme which just happens to be in a school and to which admission is by way of referral from health professionals does not relieve the Applicant from complying with the publication requirement under the Act.

43. The Applicant asserts that its Enrolment Policy and Information Leaflet when read together afford evidence by way of inference that the AA Committee was required to prioritise and select the pupils who had "the greatest need". Assuming without deciding that it forms part of the School's published Admission Policy, the Information Leaflet merely requires the AA Committee to make "a decision" regarding each "referral" and no more. There is nothing in the Information Leaflet whether read in isolation or together with the School's Enrolment Policy to warrant an inference that the AA Committee was required either to prioritise the relevant pupils or to do so on the basis of "greatest need". The only evidence before the Court as to how the AA Committee went about its business is to be found in the Affidavit of the School Principal who has sworn that the relevant pupils were "ranked in order of priority". I have no doubt that the members of the AA Committee went about their work carefully and diligently but there is no evidence that they in fact ranked the pupils in order of "greatest need". Even if such evidence was before the Court, it does not elevate the criterion of

"greatest need" into a criterion that was published in the School's Admission Policy. Accordingly, I am satisfied that the School's published Admission Policy did not set out any or sufficient criteria by which otherwise eligible pupils could be prioritised and selected for the SL Class in the event of oversubscription. This is both surprising and regrettable having regard to the fact that the Board of Management acknowledges in its evidence to the Court that the SL Class has been "heavily oversubscribed for many years".

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

45. For the same reasons I reject the Applicant's challenge insofar as it is contended that the Appeals Committee conducted the appeal otherwise than in accordance with fair procedures. The Applicant at all times either knew or ought to have known that as a matter of law it would be expected to demonstrate that it selected the successful pupils in accordance with its published Admission Policy. The complaint is in any event beside the point having regard to the insurmountable difficulty that the Board of Management did not have a published Admission Policy to deal with oversubscription. It follows, therefore, that there was no information that the Board of Management could have brought before the Appeals Committee that could have supplied this fundamental deficiency.

46. As a result of upholding the Notice Party's "complaint", the Appeals Committee had a consequent duty arising under s. 26(9)(b) of the Act to decide whether "the matter" should be remedied and, if so, to make a recommendation to the Secretary General "as to the action to be taken".

47. Having found that the School's published Admission Policy did not set out criteria for the allocation of places in the SL Class in the event of oversubscription, the Appeals Committee made two recommendations which on their face appear to be contradictory:

(1) a recommendation that the Board of Management develop criteria for the allocation of places in the SL Class in the event of oversubscription;

(2) a recommendation that E.C. be enrolled in the SL Class for the 1st September, 2017 by reason of the fact that he met the eligibility criteria set out in the said Policy.

48. I am satisfied that having found that the School's published Admission Policy did not set out any criteria by which the otherwise eligible seventeen pupils could be prioritised for the allocation of the three available places in the SL Class, it was wholly unreasonable and irrational to apply that Policy which it had found to be fundamentally deficient and inoperable in order to determine and recommend to the Secretary General that E.C. should be given a place in the SL Class. The decision to recommend that E.C. should be given a place in the SL class merely because he was eligible to be considered for a place in the Class was manifestly unfair to the other thirteen unsuccessful pupils who were no less eligible and also entitled to equality of access to the Class under the Act. The recommendation is further unsatisfactory in that it is unclear as to whether the allocation of a place to E.C. was to be at the expense of all three of the successful applicant pupils, one of the successful applicant pupils or none. Insofar as the recommendation purports to create an additional place in the SL Class, there is no evidence that the Appeals Committee followed its own Rules and specifically the requirement under Rule 33 that it should have regard to "the educational interests of all other students in the school" and the "resource implications" arising from its decision.

49. A recommendation by an appeals committee does not of itself have any direct legal effect, save that it is a matter to which the Secretary General must have regard in exercising his powers and functions under s 29(7)(b) of the Act. No point has been taken by Respondents in these proceedings as to whether the impugned recommendation made by the Appeals Committee in this case is amenable to judicial review. It will be for another Court on different facts to decide whether an unreasonable recommendation by an appeals committee can be rendered irrelevant and impervious to judicial review by a subsequent direction that is reasonable having regard to the criteria set out in s 29(7)(b).

50. Section 29(7)(b) of the Act gives the Secretary General discretion to give:-

"such directions to the board as appear to the Secretary General (having regard to any recommendations made by the appeals committee) to be expedient for the purpose of remedying the matter which was the subject of the appeal..."

51. It remains to be decided on appropriate facts whether the word "expedient" gives to the Secretary General a remedial power that is materially different and more flexible than that given to an Appeal Committee established under s. 29 of the Act.

52. In this case, however, there is no evidence to suggest that the relevant Principal Officer who gave the relevant direction adopted reasons for so doing that were in any way different to the reasons given by the Appeals Committee for the making of its impugned recommendation which are referred to in the letter giving the direction. Insofar as the Affidavit of Martin McLaughlin seeks to advance reasons for the giving of the direction which are different to the reasons recorded in the determination of the Appeals Committee, the explanation so offered is at best an attempt at ex post facto rationalisation which falls foul of the *Ermakov* Principle by which a Court when reviewing a decision must confine itself to the decision itself and the reasons contained in it (see *Ermakov v Westminster City Council* [1996] 2 All E. R. 302).

53. The s. 29 appeal was heard on the 9th August, 2017, some three weeks before the commencement of the SL Class on the 1st September, 2017. The Appeals Committee in effect found the School's published Admission Policy to be inoperable for the purpose of selecting anyone at all for the SL Class for the 1st September, 2017. The matter to be remedied was clearly the fact that there was no effective policy that could be interpreted and applied to the selection of otherwise eligible pupils for the Class in the event of oversubscription. Absent an operable and effective published Admission Policy to deal with oversubscription, the Appeals Committee should have remitted the matter to the Board of Management of the School with a recommendation that the Board should adopt such a Policy and rerun the selection process prior to the commencement of the academic year on the 1st September, 2017. It would then have been for the Secretary General to give such directions to the Board of Management as appeared to him to be "expedient" for the purpose of remedying "the matter" and to set out the reasons for the giving of the relevant directions if they were different to

those of the Appeals Committee.

54. For the reasons stated above, I will grant the reliefs sought and remit the matter back to the First Named Respondent for the purpose of a further hearing before a newly constituted Appeals Committee pursuant to the provisions of s. 29 of the Act of 1998.