[2019] IEHC 643

THE HIGH COURT
JUDICIAL REVIEW

[2019 No. 525 J.R.]

BETWEEN

F.D. (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND J.C.

APPLICANT

AND

MINISTER FOR EDUCATION AND SKILLS, PAIRIC MCDONOGH, SEAN ROWLEY AND CHRISTINA CASSERLY

RESPONDENTS

AND

BOARD OF MANAGEMENT OF A SECONDARY SCHOOL

NOTICE PARTY

JUDGMENT of Mr. Justice Allen delivered on the 13th day of September, 2019

Introduction

1. This is an application by way of judicial review for an order of *certiorari* quashing a decision of an appeals committee which was appointed pursuant to s. 29 of the Education Act, 1998, rejecting an appeal against a decision of the board of management of a secondary school to permanently exclude a student from the school.

Facts

2. The student is a boy who is sixteen years old. He was diagnosed with autism spectrum disorder at the age of two years and five months. He attended primary school for five years between the age of seven years and twelve years.

3. In 2016 the student's family relocated to the area where the notice party school ("*the school*") is located, specifically because the area had both a primary and a secondary school with dedicated ASD units. Before relocating, the student's mother had visited both schools and had been informed that there would be a place for him in each of them.

4. The student was first enrolled in the primary school for a brief period. The mother took the view that the autism unit in that school was inappropriate for him and his needs, and he was withdrawn from the primary school and home schooled until September, 2016 when he was enrolled in the school.

5. It is accepted that from the outset, and throughout his time in the school, the student's behaviour was challenging. From the mother's perspective, the student struggled in the school which did not have the necessary resources or skills to deal with his disability. From the school's perspective, there was an increasing pattern of unpredictable aggressive behaviour which, notwithstanding concerted efforts, the school was unable to manage.

6. In the 26 months or so during which the student was enrolled in the school, there were over 70 recorded assaults against staff and ten assaults against students. There was daily contact between the mother and the school when she brought and collected her son, and there were 30 formal meetings convened to discuss his behaviour.

7. The event which precipitated the student's expulsion occurred on 14th November, 2018. There is no dispute as to the occurrence or the nature of the incident. The mother describes that the student was particularly distressed and acted out aggressively. The school principal describes that the student threw a water bottle at another student in the ASD classroom. The other student had a shunt in her brain. The water bottle could have hit the other student on the head, and a potential disaster was only averted by the quick intervention of a special needs assistant.

8. Immediately after this incident the mother was sent for and she took the student home. At a meeting on the following day the mother was told that unless she withdrew her son from the school, the principal would recommend to the board of management that he should be expelled. The mother briefly contemplated that she might withdraw her son but having taken advice from the National Council for Special Education decided to fight the proposed exclusion.

9. By letter dated 20th November, 2018 the mother was formally advised of the principal's recommendation to the board of management that the student be expelled:-

> *"… for continuing breaches of our Code of Behaviour in the form of violence towards other students and staff. The investigation was carried out using all reports written after such incidents and also records of supports/strategies used to accommodate [the student] in [the school]. Under Section 8.9 of our Code of Behaviour [the student] is a serious threat to the health and safety of himself, other students or members of staff."*

10. The mother was provided with copies of all of the records which had been provided to the board of management, which was to meet on 26th November, 2018. The mother was advised that she could attend that meeting, accompanied if she wished by some other person, and would have the opportunity to make written and oral submissions.

11. The board of management met on the evening of 26th November, 2018 and heard from the principal and from the mother. The mother contested the significance and characterisation of seven of the eighty recorded incidents. She indicated that while she did not condone, neither did she condemn her son's behaviour. She did say that she was shocked by it. In broad terms, the mother's case was that the school could and should have done more for the student.

12. By reference only to the uncontested incidents, the board of management decided to *"expel the student due to a serious threat to the health and safety of the student, other students and members of staff*", and the mother was advised of the decision by letter dated 27th November, 2018.

13. As required by s. 24 of the Education (Welfare) Act, 2000, the relevant educational welfare officer was notified of the opinion of the school to expel the student, and the reasons for that opinion.

14. Because the school was an Education and Training Board school, there was a right of appeal to the relevant Education and Training Board. The mother availed of that right of appeal, but it was unsuccessful.

15. By notice dated 28th March, 2019 the mother appealed to the Secretary General of the Department of Education and Skills. The Secretary General duly appointed an appeals committee, made up of the second, third and fourth respondents, which met on 8th May, 2019.

16. The substance of the mother's case was that the school could and should have done more for her son. Her case was that the student's behaviour was a manifestation of his disability which had not been recognised and dealt with by the school as such. In a written submission to the appeals board the mother made the case that:-

> *"Lack of training, resources, experience, expertise, understanding and most notably over reliance on SNAs to carry out responsibilities for which they were not trained contributed to the development of my son's anxiety, frustration and inability to cope in the class. He developed clear exit strategy behaviours to remove himself from that classroom. SNAs were expected to understand and modify behaviour and occupy the children with work activities when teachers were regularly absent. Staff changes, including the principal, the class teachers and [special educational needs coordinator], coupled with regular missed classes and timetables precluded my son from being able to rely on predictability. Staff shortages in the school are endemic with scores of missed classes having occurred in the mainstream school with a very negative knock-on effect in the autism specific classroom.*
>
> *[The school] has now had ample opportunity to reflect on their own behaviour and on their need for up-skilling, general management and strategy of the autism specific class. The principal refers to changes which have occurred in the autism unit, changes which were a long time coming and many of which were the result of parental guidance and pressure. They have had ample time to understand that autistic pupils are enrolled in autism specific provision to receive instruction and education from informed, trained and highly experienced staff who understand the complexity of the condition. The fresh professional reports which now follow my son, provide comprehensive instruction and advice on how to meet his individual needs as an autistic learner. Similar information followed him in 2016. The dates of the reports have changed but the advice and content has largely remained the same.*
>
> *I appeal the decision of [the school] to expel my son from their school on the grounds of health and safety. [I] disagree with much of what the school has said about my son in this appeal process. My son was expelled due to the school's own frustration emanating from their own historical incapacity and inability to recognise and meet my son's needs as an actually autistic child. I ask that the expulsion decision based on health and safety be overturned so my son can return to his only*

locally available autism specific classroom, one which was established and funded to meet the educational needs of autistic students in its catchment area."

17. The school provided the appeals committee with a nine-page written submission and a bundle of material.

18. The school's case was that the student had been permanently excluded on the grounds of health and safety. The appeals committee was told that the student had been repeatedly aggressive and violent. It was emphasised that he was over six feet tall, and considerably bigger and stronger than some of the staff.

19. In its submission to the appeals committee, the school refuted the mother's criticisms of the facilities available in the school, and to the student; the level of training and expertise of the staff; and the support and interventions given to the student. The submission specifically addressed the question of "*strategies/interventions*".

20. The Board of Management submitted that:-

> *"It can be seen from all documentation submitted from [the mother] and from the school that the management and staff of [the school] did not stand back and watch this unfold. Every attempt was made to upskill and train staff. The school has clearly made a great effort to communicate regularly and appropriately with [the mother]. Many emails were sent, and phone calls were made to all available authorities seeking advice and assistance.*
>
> *Staff and management in [the school] have gone over and above what is expected of them in this situation while facing the threat of violence on a daily basis."*

21. In a decision dated 10th June, 2019 the appeals committee refused the mother's appeal. To understand the challenges to the committee's decision it is necessary to set it out in full:-

> *"The Appeals Committee does not uphold the appeal under section 29 of the Education Act, 1998.*
>
> *The Chairperson outlined the format of the hearing to the participants.*
>
> *An initial adjournment of some fifteen minutes was given to allow the parties time to read additional written submissions supplied by the appellant at the beginning of the hearing.*
>
> *In accordance with its jurisdiction as set out by the Supreme Court in Board of Management of St. Molaga's National School v. The Secretary General Department of Education & Others, Supreme Court, [2010] IESC 57, the appeals committee conducted a full hearing of the matter under appeal.*

The appeals committee does not uphold the appeal for the following reasons:

- *The committee determined that [the school] adhered to its Code of Behaviour in permanently excluding [the student] from the school.*

- *The committee determined that Board of Management's decision was reasonable in view of the number of assaults and aggressive behaviours perpetrated by [the student] towards himself, other students and staff in the school.*

- *The committee's observation that all the parties accepted that [the student] engaged in unpredictable aggressive and violent behaviours on occasion in the school.*

- *The committee accepted that the frequency of aggressive acts and the difficulty in identifying trigger indicators, constituted a real concern for the board in ensuring they met their duty of care to [the student], to other students and to the staff in the school.*

- *The Chairperson of the Board of Management stated that the board has full confidence in the principal's management and administration of the school, including the accessing of relevant and available resources, the planned upgrading of teachers skills from recognised support agencies, and in accessing available professional support and advisory services in mediating a relevant curriculum.*

In arriving at its decision, the appeals committee took into account a range of issues, including the following:

- *The oral and written submissions from the parties prior to the hearing.*

- *The additional written submissions by [the mother] at the hearing and accepted by all the parties.*

- *The conflict in the submissions from the parties to this appeal as to the quality of accommodation and general resourcing of the ASD and OT accommodation in the school, the relevance and quality of support courses engaged by teachers in upgrading relevant professional skills, the appropriateness and relevance of the mediated curriculum, the effectiveness and quality of school based evaluation in understanding and ameliorating behavioural triggers for [the student], as well as the quality of human resources and material resources available in the school.*

- *Clarification of issues raised and details from the parties during the hearing.*

At the conclusion of the hearing the appellant and the school representatives confirmed they had a full and fair hearing."

The challenge

22. The decision of the appeals committee is challenged on four substantive grounds. The first stated ground is that the committee erred in law and acted *ultra vires* their powers under s. 29 of the Education Act, 1988.

23. The first substantive ground is that the committee was not entitled to decide the issue of expulsion on the grounds that the board had adhered to any particular procedure or on the basis that the "*committee determined that the Board of Management's decision was reasonable*": rather that the respondents were bound themselves to take all matters into account and decide if expulsion was warranted. Specifically, it is suggested that the committee failed to have regard to its obligations in light of the decision of the Supreme Court in *St. Molaga's*.

24. Secondly, it is argued that the statement that the Chairperson of the Board of Management had stated that the board had full confidence in the principal's management and administration of the school was extraneous and irrelevant.

25. Thirdly, it is said that the decision fails to set out the reasons for it. In particular, it is argued that the list of a "*range of issues*" taken into account is not exhaustive, so that the applicant has no way of knowing what other issues affected the decision.

26. Fourthly, it is said that the committee took into account matters which they were not entitled to take into account, specifically "*the conflict in the submissions from the parties*". The committee, it is said, appears to have relied on the fact of the conflict, rather than resolving such conflicts as may have existed. This, it is argued, was irrational.

The answer

27. The statements of opposition of the respondents and the notice party are similar. The chronology of events is admitted, but issue is taken with the applicant's criticisms of the facilities available in, and provided to the applicant by, the school. These matters are said to be, in any event, irrelevant to the issues and not justiciable in the context of these proceedings.

28. The issue before the committee is said to have been "*whether the behaviour of the applicant warranted the expulsion (as per Charleton J. in City of Waterford VEC v. The Secretary General of the Department of Education and Science [2011] IEHC 278.)* It is said that the committee determined that issue in accordance with law.

29. All of the grounds of challenge are denied. In particular, the respondents plead that the committee's reliance on the adherence by the board of management to the Code of Behaviour was material. The respondents and notice party rely on the fact that the decision recites that the committee conducted a full hearing and refers to the decision of the Supreme Court in *St. Molaga's* as demonstrating that the committee was cognisant of its duties and conducted the appeal and came to its decision in accordance with law.

30. The first four bullet points of the decision, it is said, make it clear that the committee made its own findings in relation to the behaviour of the student. The uncontested

finding by the committee, at the third bullet point, that it was accepted by all parties that the student had engaged in unpredictable, aggressive and violent behaviours in school, was a relevant and significant consideration.

31. The respondents and notice party point to the fact that the finding by the committee that it accepted that the frequency of aggressive acts and the difficulty in identifying triggering events constituted a real concern for the board of management is uncontested.

32. The reference in the fifth bullet point of the decision to the statement by the chairperson of the board of management of full confidence in the principal, it is said, "*must be seen in the context of the issues raised in the appeal itself and in light of the other findings made*". Alternatively, it is argued, the decision is correct on the basis of the matters noted in the first four bullet points.

33. The decision of the committee is said to have been focussed on the correct issue, which was whether the behaviours of the student, taken in the proper context, warranted his expulsion and there was, it is said, no legal requirement to adjudicate on other issues raised.

Legal principles

34. The starting point is the decision of the Supreme Court in *Board of Management of St. Molaga's National School v. Secretary General of the Department of Education and Science* [2010] IESC 57. That was an appeal against a decision of the High Court quashing two decisions of an appeals committee which, on appeals under s. 29 against a refusal by the school to admit two pupils on the grounds that it was full, had examined the capacity of the school and decided that the children should be admitted. The Supreme Court gave judgment on the preliminary issue as to the scope of an appeal under section 29. Denham J. (as she then was) in a judgment in which Murray C.J., Hardiman, Fennelly and Finnegan JJ. concurred, said: -

> *"25. [T]he appeals process [under s. 29 of the Education Act, 1988] 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 [of Management] 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 the Secretary General to require a board to remedy a situation in accordance with the recommendation of an appeals committee.*
>
> *26. 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."*

35. While *St. Molaga's* was a case of refusal to enrol, the nature of the appeal is precisely the same in a case of a permanent exclusion from a school.

36. *City of Waterford VEC v. Secretary General of the Department of Education and Science* [2011] IEHC 278 was a judicial review of a decision of an appeals committee requiring a

school to take back a boy which it had decided to expel. Charleton J. took the opportunity to give guidance as to the exercise by an appeals committee of its function under s. 29 in such a case but before doing so, clearly and succinctly set out the legal principles applicable to a judicial review, generally.

> *"9. The legal principles applicable to a judicial review of this kind can be concisely stated. The High Court, having a supervisory jurisdiction over administrative and judicial tribunals, is not entitled to engage in a usurpation of any fact-finding power which is conferred on these tribunals or to otherwise take on their function. Instead, any decision as to the merits may only be reviewed, if of its nature, '[it] is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense': see Meadows v. Minister for Justice [2010] 2 I.R. 701 at 827 per Fennelly J.; see further Efe v. M.J.E.L.R. [2011] IEHC 214, (Unreported, High Court, Hogan J., 7th June 2011) which comments on the proportionality element of such an analysis. The detachment of the High Court from the decision under review is emphasised by the inability of the High Court, even on quashing the decision for that reason, to substitute its own view. Instead, the decision must be returned to the appropriate tribunal so that it may be considered afresh."*

37. In his judgment in *City of Waterford VEC* Charleton J. went on to summarise the law in relation to denial of fair procedures and in the following paragraph he dealt with the need for reasons:-

> *"12. Judicial and administrative tribunals should give reasons for their decisions. These need not be elaborate. The reasons must be such, however, that the parties who have participated in the hearing, with their background knowledge of what the issues were, will be aware as to why the tribunal made its decision in one way or another. … As well as construing any reasons given by a tribunal against the background of the issues which were before it, the entirely of the decision should be read on any subsequent judicial review. The High Court, in exercising its jurisdiction and supervision of judicial and administrative tribunals, is not entitled to take sentences in isolation from the entirety of a document recording the decision or to parse particular sections of the decision so as to distort its meaning. In O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 at 76, Finlay C.J. put the test as to construing the decision of a tribunal in this way: '[w]hat an intelligent person who had taken part in the appeal or who had been appraised of the broad issues which had arisen in it would understand from this document, these conditions, and these reasons'. The degree to which the reasons for a decision have to be elaborated on varies with the nature of the decision itself: F.P. v Minister for Justice [2002] 1 I.R. 164 at 172 to 173 per Hardiman J. Sometimes, in straightforward matters, reasons may be terse. In difficult or technical matters, more than that may be needed. Reasons are to be stated there and then, not added later upon challenge. Where reasons stated within a written decision are shown to be manifestly flawed, they cannot be supplemented by better reasons, or correct reasons, at any stage*

after the decision is made. Sometimes evidence can be admitted to elucidate a reason which is laconically expressed or, exceptionally, where a mistake occurs, to correct a mistake. Elucidation, may, in guarded circumstances, be accepted but not alteration; R. v. Westminster City Council, Ex Parte Ermakov [1966] 2 All ER 302.

13. Finally, a written decision may contain an error of law so as to undermine the record. This is an issue which has become far less important in modern judicial review proceedings".

38. It is settled law that an administrative body must come to its decision by reference to all matters which it is required to take into account, and ignoring anything that it is not entitled to take into account.

39. In *Clare County Council v. Kenny* [2008] IEHC 177 MacMenamin J. recalled the *dictum* of McMahon J. in *The State (Cork County Council) v. Fawsitt* (Unreported, High Court, McMahon J., 13th March, 1981) where it was said:-

"A court or tribunal exceeds its jurisdiction if it addresses itself to the wrong question, takes irrelevant considerations into account or if it makes an order without deciding the issues which it is required to decide before an Order can validly be made."

40. In *Lynch v. Cooney* [1982] I.R. 337 Henchy J. said:-

"It is to be presumed that, when Parliament conferred the power, it intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, among other things, not only that the power must be exercised in good faith, but that the opinion or other subjective conclusion set as a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful - such as by misinterpreting the law, or by misapplying it through taking into consideration irrelevant matters of fact, or through ignoring relevant matters. Otherwise, the exercise of the power will be held to be invalid for being ultra vires*."*

41. In *P&F. Sharpe Limited v. the Dublin City and County Manager* [1989] I.R. 701 Finlay C.J. said:-

"The practical consequences of that are that the decision-making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factor which might be advanced".

42. In *Connelly v. An Bord Pleanála* [2018] IESC 31 the Supreme Court reviewed the authorities in relation to the assessment of the adequacy of reasons given in any particular case and restated the key principles. For present purposes it is useful to recall the judgment of Murray C.J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 where it was said:-

"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.

Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."

43. In *City of Waterford VEC*, as I have said, Charleton J. offered guidance as to the exercise by appeals committee of its jurisdiction in hearing an appeal against a decision to permanently exclude a student. Starting at para. 15 of his judgment he said:-

"15. The crucial issue is as to the jurisdiction of the appeals committee. In this regard I note that the High Court has not previously given guidance as to the exercise of this important function and it is hoped that this judgment will be of assistance in the future.

16. The function of a school board in deciding on the expulsion of a pupil is to consider what is relevant to that decision. This does not include whether other placements may be available in the immediate area should the expulsion take place. Instead, the decision focusses on the behaviour of the pupil and the context in which that behaviour occurred. The appeals committee is in precisely the same position. The issue before it, therefore, is whether the behaviour of the pupil, taken within the proper context, warrants the expulsion. In the course of this judicial review, an affidavit was sworn by a member of the appeals committee giving a reason for the decision to overturn the expulsion of Delta Beta, which was otherwise absent from the decision. This reason was that the behaviour of the pupil did not warrant expulsion. It is clear that the law on administrative and judicial tribunals does not encompass the addition of reasons beyond the document wherein the decision is officially set out. Were such a procedure to be allowed, afterthoughts would replace the reliability which the parties to a tribunal are entitled to expect that the decision of any judicial or administrative tribunal will encompass.

17. As this is the first case of its kind to come before the High Court, it is therefore appropriate to indicate what factors can be taken into account by a board of management in considering an expulsion. These factors will be the same for the appeals committee. In considering whether to require a student to leave a school, it is appropriate to focus on the behaviour of the pupil and the effect of that behaviour on the school; the track record of the pupil up to the point of the precipitating issue or issues; the attempts by the school at diverting, correcting or checking the behaviour; the merits of whatever mitigation is offered for the behaviour (by which I mean contrition, any explanation that is offered for behaviour, and any response of the pupil to the school's efforts); and the demerits of mitigation (by which I mean a lack of contrition, wilfulness, spite or an unwillingness to accept help). 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 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."

44. S*.C. (A minor) v. Secretary General of the Department of Education and Skills* [2017] IEHC 847 was a judicial review of a decision of a s. 29 appeals committee refusing an appeal of a fourteen-year-old boy against a decision of the school to permanently exclude him for smoking cannabis. In a comprehensive judgment, Ní Raifteartaigh J. considered a wide range of complaints in relation to the process by which the boy had come to be expelled, one of which was whether the appeals committee had, or whether its decision showed that it had, conducted a full rehearing. The boy had admitted to smoking a cannabis joint but contested that he had done so on school grounds. The conclusion of a board of management hearing was that he had smoked the joint on school grounds, and he was expelled. The first reason given by the appeals committee for refusing his appeal was:-

"The Board of Management accepted that, following investigation, it was established that S.C. had been using drugs within the school environment during school time. This was the main reason why he was expelled."

45. The decision in that case, as in this, recited that the committee had conducted a rehearing and re-examined the issues involved but Ní Raifteartaigh J. was not satisfied that it had. She said:-

"53. Taking all of the above into account, I am not convinced that the decision-making on the factual issue undertaken by the committee clearly fell within the model of a proper de novo hearing as described by Clarke J. in [Fitzgibbon v. Law Society of Ireland [2016] 2 I.L.R.M. 202]. The decision of the appeals committee does not clearly separate itself from the first instance decision by the board of management; it could not be said, using the language of Clarke J. in Fitzgibbon, that the committee had treated the board's decision as irrelevant. On the contrary, it seems to have considered the board's decision to be highly material to its own decision. The language used in the decision suggests that there was an inter-relationship between the committee's own decision and that of the board of management, whereas its own decision should have been wholly independent."

46. At para. 58 of her judgment Ní Raifteartaigh J. added:

"I wish to add that, in my view, it would be helpful if an appeals committee were to use language more generally throughout its decision which makes it clear that it is making its own findings and not relying on board of management findings, and which makes it clear that it appreciates that the central issue before the committee is not whether the board followed its policy based on findings it (the board) had made but, more directly, whether the committee itself thinks the child should be expelled, based upon facts found by the committee itself, and taking into account the matters set out by Charleton J. in the Waterford VEC case. As set out above, Charleton J. listed a large number of factors which should be considered, including those which weigh in favour of the child remaining in a school as well as the factors weighing in favour of expulsion. To these, I might add the age of the child; it seems to me that the maturity of a child of 13 or 14 is rather different from a child of 16 or 17, and this should also be factored into a consideration of whether the expulsion of a child is warranted. Further, the school's own policy on expulsion contains a comprehensive list of matters to which regard should be had and makes it clear that expulsion is effectively a remedy of last resort."

Discussion

47. The issue on every s. 29 appeal against a decision to permanently exclude a child will be whether the child should be permanently excluded. The conclusion of the appeals committee as to whether the child should or should not be permanently excluded may be the same as, or the converse of, the decision appealed against, but this does not necessarily mean that the original decision was right or wrong, or reasonable or unreasonable. It is easy to contemplate situations in which an appeals committee might form a view as to whether the decision appealed against was right or wrong and it is not objectionable in principle, I think, for the appeals committee, in an appropriate case, to express a view as to whether the decision of the school was right or wrong: but always on condition that it should first clearly make and reason its own decision of the substantive issue.

48. Because the appeal will have been heard on the basis of a de novo hearing, the appeals committee may have had evidence that was not adduced to the board of management, or the committee may have had an explanation or clarification of the evidence that may not have emerged in the course of the board of management hearing. So, for example, there may have been confusion at the hearing before the board of management, which might by new evidence or explanation have been dispelled at the appeals committee hearing, as to whether the place at which a pupil had admittedly smoked a cannabis joint was within or outside the school grounds. If the appeals committee comes to the opposite conclusion to the board of management, it does not follow that the decision of the board of management was wrong. In principle, different decisions based on different evidence may both be correct.

49. I do not understand *Fitzgibbon* or *S.C. (A minor)* to require that the decision of the appeals committee should not refer to the decision appealed against. In circumstances in which the same issue is being considered afresh, it may often be useful to explain why

the conclusion is different – in the example, that it was demonstrated to the appeals committee but had not been to the board of management, that the offence occurred outside school grounds - but the decision of the appeals committee should first and foremost clearly show that it is separate from the decision of the board of management.

50. There are two elements to the applicant's first substantive ground. The first (by way of challenge to the first bullet pointed reason) is that the respondents were not entitled to decide the issue on the basis that the school had adhered to any particular procedure, and the second (by way of challenge to the second bullet pointed reason) that they were not entitled to decide the appeal on the basis that the decision of the board of management was "*reasonable*".

51. I am very much alive to the dangers of parsing or overanalysing and of imposing unreasonably high expectations on the decision of a panel which is expert in the field in which it is operating but not expected to be expert in law. Mr. Feichín McDonagh S.C., for the applicant, argues that it is at best irrelevant whether the school adhered to its own Code of Behaviour. Mr. Conor Power S.C., for the respondents, argues that this is something which the committee is obliged to do.

52. The Procedures for Hearing and Determining Appeals under Section 29 of the Education Act, 1998 issued by the Minister require the appeals committee to have due regard to the established practices within the school for dealing with issues/grievances the subject matter of the appeal, including, where relevant and available, any statutory or non-statutory procedures, guidelines, regulations or other provisions in operation at any time. It seems to me that the substance of this finding was that there had been adherence to the school's Code of Behaviour, and that this was a matter which the appeals committee was entitled to, and obliged to, take into account.

53. One of the arguments made in *S.C. (A minor)* was that a breach of fair procedures at the hearing by the board of management had tainted the conduct of the appeal, and so, the decision of the appeals committee. Ní Raifteartaigh J. did not decide that issue, but it seems to me that in principle an appeals committee is entitled to form a view as to whether the procedural requirements of a code of behaviour were complied with. While the appeals committee must unquestionably make its own assessment and reach its own conclusion, the conduct of the board of management hearing may go to the reliability or consistency of the case made by the student or the school on the appeal.

54. On one view, counsel for the applicant and the respondents may have been at cross purposes. The applicant's argument was that the committee was not entitled to decide the issue of expulsion on the ground that the board had adhered to the school's code of behaviour. That is correct. But it does not necessarily follow that the committee is not entitled to take account of whether it did or did not. In *S.C. (A minor)* Ní Raifteartaigh J. said that the central issue on a s. 29 appeal is not whether the board followed its policy based on the findings which it, the board, had made, but that observation was directed to the nature of the appeal and the significance attached by the appeals committee to the mere fact that the board had followed its policy. I do not believe that a consideration of

whether the board followed a policy is necessarily inconsistent with the conduct of a fresh assessment of the issue as to whether the student should be expelled.

55. The lynch pin of the applicant's case is that the committee's finding that the decision of the board of management was "*reasonable*" showed that it applied the wrong test, and certainly failed to show that it had applied the correct test. Mr. Power, while standing over the decision as a whole, acknowledges that this point "*might have been phrased better" .*

56. It seems to me that the problem with this stated reason goes beyond ambiguity or infelicity of language. In *St. Molaga's* the High Court found that the function of an appeals committee was limited to assessing whether the decision of the board of management had been reasonable. The Supreme Court found that that was the wrong test. The issue which the appeals committee had to decide was whether the boy should be permanently excluded from the school. It was irrelevant whether the decision of the board of management was right or wrong, or reasonable or unreasonable. I acknowledge that I am not to take a word or phrase out of the context of the decision as a whole, but I cannot find elsewhere in the decision anything to indicate that the committee went beyond a consideration of the reasonableness of the board's decision.

57. It is true that the committee referred in the second bullet point to the assaults and aggressive behaviours, which, at the third bullet point were correctly noted not to have been in controversy, but the substance of the assessment appears to have been whether these matters justified the decision of the board of management, rather than whether they justified the expulsion of the applicant. I am fortified in this conclusion by the reference at the fourth bullet point to the conclusion of the committee that the boy's behaviour constituted a real concern for the board in ensuring that it met its duties of care, rather than that the behaviour gave rise to real concern in the minds of the committee for the safety of the boy, the other students and staff.

58. As to the nature of the appeal which was conducted by the respondents, I find no comfort in the reference in the decision to the judgment of the Supreme Court in *St. Molaga's*, or in the recital that the committee had conducted a full hearing of the matter under appeal. It seems to me that the reference to "*the matter under appeal*" does not disclose what the committee thought was the subject of the appeal: whether it was the correctness or reasonableness of the decision of the board of management, which of course it was not, or whether it was whether the applicant should be permanently excluded from the school, which it should have been. Similarly, I do not find in the statement that the committee had conducted a full hearing any comfort that it had reached its own conclusion on the substance of the correct issue.

59. Mr. McDonagh argued that the reason given at the third bullet point, that it was common case that the boy had engaged in unpredictable aggressive and violent behaviours on occasion was "*neutral*". I cannot accept that. The issue before the committee was whether there was a problem with behaviour such as warranted the applicant's permanent exclusion from school. The starting point was whether the applicant's

behaviour was a problem and the committee was entitled to note that there was no issue as to the nature of the behaviour. If there had been an issue as to the fact, or nature, or predictability of the behaviour, the committee would have been obliged to resolve it, and the decision quite properly disclosed that there was no such issue.

60. The difficulty with the reason given in the fifth bullet point was recognised in the respondents' opposition papers. The grounds of opposition appealed, generally, to the context of the issues raised by the appeal and the light of the other findings made, and pleaded in the alternative that if there was anything wrong with this reason, it did not taint the decision. Mr. Power, in the course of the hearing, was driven back to arguing that it was "*not the most directly relevant finding*", and could be severed from the first four reasons.

61. What it set out at the fifth bullet point of the decision under review is stated to be a reason for not upholding the appeal. Inferentially, I suppose, it conveys an acceptance by the appeals committee that the board has full confidence in the principal's management and administration of the school, but it does not disclose that the committee has applied itself to that question.

62. In the list of issues taken into account by the committee in arriving at its decision, the committee noted the conflict in the submissions as to the quality of accommodation and general resourcing of the ASD and OT accommodation in the school, the human and material resources in the school generally, the training of the teachers, and the effectiveness and quality of the school's evaluation in understanding and ameliorating the triggers for the applicant's behaviour but it did not address or attempt to resolve that conflict. In the grounds of opposition and supporting affidavits, the respondents seek to make the case that having regard to the agreed and incontrovertible facts, it was unnecessary to resolve the conflict.

63. The issue before a s. 29 appeals committee, as identified by Charleton J. in *City of Waterford VEC* is whether the behaviour of the pupil, taken within the proper context, warrants the expulsion. Among the factors to be taken into account are the attempts by the school at diverting, correcting or checking the behaviour. In a case such as this, where the cause of the challenging behaviour is disability, there may be a tension between the requirement to take these factors into account and the requirement to disregard the resources of the school.

64. In fighting her son's proposed exclusion from school, the case made by the mother was very critical of the school, the management and the staff. The thrust of the mother's case was that more could and should have been done. The school engaged with the mother's case, arguing that all that could have been done had been done. On the authority of *City of Waterford VEC*, the focus is to be on the behaviour of the student and the effect of that behaviour on the school. Certainly, the behaviour is to be looked at in the proper context, which in the case of a child with a disability will include the disability and the capacity of the child to control or modify the behaviour. A consideration of the context does not, however, extend to an enquiry into the quality of the services available

in the school or any alleged responsibility of the school for the behaviour, or any alleged contribution to the problem by reference to any alleged deficiency in the services provided. The focus on the enquiry must be on the behaviour of the pupil, the effect of that behaviour on the school, and the likelihood of repetition. In the case of a child with a significant disability, there will be no issue as to the responsibility of the child. Neither, in my view, it is relevant to consider the cause of behaviour that is assessed to be a risk to health and safety in the school.

65. While the focus of the mother's case was, mistakenly, on whether more could or should have been done for her son, I think that it also raised the issue as to whether there was anything that might be done to divert, correct or anticipate the applicant's aggressive outbursts. That this was an issue which the committee should have looked at.

66. There plainly was, as the decision acknowledged, a sharp conflict in the submissions as to a range of issues. The committee might have resolved those conflicts one way or the other or it might have taken the view that it did not need to resolve the conflict, but it did neither. I do not see how the fact of the conflict could have been a material consideration in coming to a decision, and it seems to me that the committee's statement that it had taken the conflict into account necessarily conveys that it did not take the view that it was unnecessary to resolve it.

67. The respondents and notice party, in the grounds of opposition and in argument, seek to make the case that the decision was based on the behavioural difficulties of the applicant and that there was no legal requirement to adjudicate on the other issues raised. In my view there are two problems with this approach. In the first place, the decision on its face says that the committee took into account the fact of the conflict. That conveys that the committee thought that the fact of the conflict was relevant. Secondly, the committee did not resolve the conflict and the decision did not say that it was not necessary to do so. It seems to me that the argument which the respondents would now advance, that it was unnecessary to resolve that conflict to decide the appeal, is an attempt to introduce a new reason for the decision, which falls foul of the *Ermakov* principle.

68. The focus of the grounds of opposition and argument is that the exclusion was warranted by an application of the guidance given by Charleton J. in *City of Waterford VEC*. That was undoubtedly the issue before the appeals committee, but the written decision of 10th June, 2019 does not show that the committee understood that that was the issue, or decided it.

69. Having given in the five bullet points which I have analysed the reasons for its decision, the appeals committee went on to list four issues which it had taken into account in arriving at its decision. Mr. McDonagh suggests that the decision is based on a template which, by reference to the appeal committee decision quoted in *S.C. (A minor),* rather appears to be so. In principle, I see nothing wrong with templates which direct the attention of administrative decision makers to the legal principles and tests to be applied and to issues which are likely to arise, but a recital of the correct test will not save a

decision which does not show that it has been applied. For the reasons given, I do not believe that the recital in the decision under review clearly identifies what the correct approach to the appeal was.

70. I referred earlier in my judgment to the principles (a) that the decision-making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factor which might be advanced and (b) that the reasons must disclose the essential rationale on foot of which the decision is taken.

71. Mr. McDonagh argues that the list of issues taken into account is non-exhaustive, so that the applicant has no way of knowing what other issues affected the decision. Mr. Power accepts that the wording of the decision is "*unhappy*". It seems to me that the applicant's criticism is well-founded and that a template, if such it is, that calls for a non-exhaustive list of factors which have been taken into consideration is a siren which will inevitably bring the decision maker onto the rocks. If it were possible, it would be impermissible for the court to speculate as to what issues other than those stated might have been taken into account; what issues among, or in addition to, those listed might have been clarified during the hearing; or what details, mentioned or not mentioned in the decision, might have been elicited from the parties during the hearing. The decision leaves open the possibility of all three.

72. The applicant argues that the committee took into account the fact of the conflict between the parties as to the resources available in the school, the resources made available to the applicant, and the quality of the evaluation in understanding and ameliorating the behavioural triggers. The fact of those conflicts, it is said, was irrelevant and to have taken the conflict into account was irrational. The respondents counter that the decision simply notes that the arguments were made, and that those arguments did not alter the decision.

73. Again, it seems to me that the applicant is correct. The decision did not simply note that arguments were made, it noted that conflicting arguments were made, and it says that the conflict was taken into account in reaching the decision. Specifically, it does not say that the committee took the view that the issues were irrelevant to the decision it had to make, or that it was not necessary to resolve the conflict to reach a decision.

Conclusions

74. In substance and in terms the decision of the appeals committee of 10th June, 2019 was that the decision of the board of management to permanently exclude the applicant was reasonable. That was the wrong test. The committee ought to have considered and decided whether, in its view, the exclusion of the applicant from school was warranted.

75. The list of issues taken into account was stated to be non-exhaustive. This necessarily conveyed that other issues had been taken into account. This has the effect that it is impossible to say what considerations the committee took into account, or that the committee did not take irrelevant considerations into account.

76. The fact that the board of management had full confidence in the principal was an irrelevant consideration.

77. The fact that there was a conflict between the mother and the school as to the quality and availability of resources and the ability of the school to understand, anticipate and ameliorate the applicant's behaviour was not a relevant consideration.

78. The respondents might have decided that it was unnecessary to resolve some or all of the contested issues: but it did not.

79. The respondents are not entitled, in answer to an application by way of judicial review, to make the case that it was unnecessary to resolve the conflict or otherwise to supplement the reasons given in their written decision.

80. For these reasons I am satisfied that the decision of the second to fourth respondents of 10th June, 2019 must be quashed and the applicant's appeal remitted to be heard by a newly constituted committee in accordance with law.