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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **11/1/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GC (A MINOR) BY HIS MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION OF THE MINISTER OF EDUCATION TO TURN DOWN DEVELOPMENT PROPSAL 452

Before: Morgan LCJ, Deeny LJ and Treacy LJ

MORGAN LCJ

[1] I have had the opportunity to read in draft the judgment of Treacy LJ. I recognise the care and attention which has been given to the issues in this case by him and by the learned trial judge, Keegan J. I consider that this case raises an issue of some importance concerning the circumstances in which the court should interfere with the decision making process in this area of regulated social policy. For the reasons that I will give I also consider that the Minister was entitled to make the decision that he made broadly for the reasons he gave.

The Scheme

[2] Gaelscoil an Lonnain is a Voluntary Maintained Irish Medium Primary School situated in the Lower Falls area of Belfast. The Development Proposal ("DP") to relocate the school to the former St Comgall's Primary School site with effect from 1 September 2017 was made by the Board of Governors under Article 14(2) of the Education and Libraries (Northern Ireland) Order 1986 ("the 1986 Order"). Article 14 sets out a scheme for consultation and decision-making:

(i) The Board must provide a copy of the proposal to the Education Authority which is required to express its view thereon;

(ii) The Board must consult with the teachers employed at the school and the parents of the registered pupils at the school;

(iii) Prior to submitting the proposal to the Department of Education ("the Department") the Authority must consult the trustees and managers of any other school which would in its opinion be affected by the proposal;

(iv) The Board after submitting the proposal to the Department:

(a) must furnish to the trustees and managers of every school which would in the opinion of the Authority be affected such particulars as are sufficient to show the manner in which the school would be affected;

(b) must forthwith publish by advertisement in one or more newspaper circulating in the area affected by the proposal a notice stating the nature of the proposal, that it had been submitted to the Department, that a copy could be inspected at a specified place and that objections to the proposal could be made to the Department within two months of the date specified in the advertisement;

(c) must furnish to any person on application a copy of the proposal on payment of a reasonable sum.

There were no objections to the proposal which was supported by other Irish medium schools.

[3] Article 89 of the Education (Northern Ireland) Order 1998 ("the 1998 Order") imposes a duty on the Department to encourage and facilitate the development of Irish medium education. The Department is empowered to pay grants to anybody appearing to it to have as an objective the encouragement or promotion of Irish medium education. In fulfilment of those statutory provisions the Department has established Comhairle na Gaelscolaiochta ("CnaG") to promote for the benefit of the public the development of all aspects of Irish-medium education and Iontaobhas na Gaelscolaiochta ("InaG"), a trust fund for the furtherance of education through the medium of Irish language in schools. Article 89 also provides that the approval of the Department to a proposal under Article 14 of the 1986 Order to establish a new Irish speaking voluntary school may be granted upon such terms and conditions as the Department may determine.

[4] Article 100 of the 1986 Order provides the Department with power to issue directions on foot of which the Department issued Circular Number 2014/21 ("the Guidance") containing guidance on the DP process in the context of area planning on 26 September 2014. The Guidance was directed in particular to Principals and Boards of Governors of grant aided schools and CnaG. It required all those submitting a DP to have regard to the content of the circular. It described area planning as a complex, multifaceted and ongoing process through which a network

of viable and sustainable schools would be developed. It required the proposer to provide robust and verifiable evidence which clearly demonstrated how the proposal was aligned to the relevant area plan and how it would support the implementation of those priorities and policies.

[5] The circular indicated that the identification of need in the area planning context was the first phase in the DP process. In planning to bring forward any proposals for change, sufficient time should be built into the process to allow for full and meaningful consultation to identify the need, gather the evidence and make the case for change. The proposal should align with the area planning process and draw from the evidence used to develop the area plan support for the case for change.

[6] In the case of DP proposals from Irish medium schools the Guidance stressed the importance of CnaG assisting in the consultation process and the engagement with the area planning process. It was crucial that the views of the Board of Governors included an assessment of how the DP supported or failed to support the implementation of the area plan. The Guidance also suggested additional consultation with non-teaching staff and on some occasions parents of children not yet of school age. It is of some importance in this case that CnaG played its full role in accordance with the Guidance and prepared the DP for the Board of Governors as stated by Mr Ó'Flannagáin in his second affidavit.

[7] The Guidance specifically dealt with the process for the ministerial decision and stated that the statutory obligations for Irish medium schools under Article 89 had to be taken into account. The Minister's decision concluded the process. In the event of the proposal being turned down a proposer may pursue approval for the proposal through the publication of another DP. The Department could not review the decision unless incorrect information had been used in reaching the decision and there was no appeal process within the legislation. If the proposer believed the decision was incorrect the only option was to commence the necessary process to publish another proposal indicating the additional new information that made the case for change.

[8] The relevant area plan was published by the Belfast Education and Library Board ("the Board") on 30 June 2014. It had been prepared as a result of engagement and consultation with various school sectors, managing authorities and schools. It noted that five of the eight Irish medium primary schools in the Belfast area were below the minimum enrolment threshold of 140 for primary schools in an urban area. The Sustainable Schools Policy ("SSP") had identified that as the required enrolment to provide a quality educational experience which was sustainable in the longer term. That policy also applied to Irish medium schools. The area plan also indicated that there was to be a review of Irish medium education to identify how best to encourage and facilitate continued and sustainable growth of the sector, ensuring the highest quality educational outcomes for pupils.

[9] Of particular relevance to this application, the area plan noted that the number of pupils attending Irish medium primary schools in Belfast had increased substantially in the period from 1990/91 to 2006/07 but thereafter had declined

slightly. There were five Irish medium schools in West Belfast which between them had 398 unfilled places. The enrolments in Gaelscoil na Mona and Gaelscoil an Lonnain were below the minimum threshold of 140 pupils for an urban primary school. No proposals had been identified to resolve these issues and further meetings were to be convened to develop realistic solutions to the issues detailed. A schedule in the area plan showing proposals for future provision indicated, in respect of Gaelscoil an Lonnain, a local area solution, including closure and amalgamation, to be explored with other schools in the cluster.

[10] This mixture of statute, policy and supplementary guidance provides a typical framework against which the decision maker is required to address the matter in issue. The statute establishes the opportunity to seek a DP and the process of consultation that must be followed in relation to it. The Sustainable Schools Policy ("SSP") addresses the elements required for a quality sustainable educational experience. That is supplemented from a procedural point of view by the Guidance which repeats much of what is required by the statute but enhances the process of consultation.

[11] The Guidance indicates at paragraph 5.4 that the proposer of a DP should seek to provide robust and verifiable evidence which clearly demonstrates how the proposal is aligned to the relevant area plan and how it would support the implementation of those priorities and policies. Although the relevant area plan in this case was that issued by the Board on 30 June 2014 the first area of concern is that there is no reference at all in the learned trial judge's judgment to it. The judge does, however, refer to a draft dated 19 March 2013 which is in terms virtually identical to the area plan as propounded in June 2014. It is notable, however, that the judge made no reference to the schedule which showed the approach to future provision for the school as set out at the end of paragraph [9] above.

[12] The starting point for the assessment of the lawfulness of the Minister's decision is to examine to what extent it complies with the published policy and guidance. The Minister is, of course, entitled to depart from his published policy or guidance but if he does so he should explain the reasons which justify such departure. Secondly, where, as here, the statutory scheme is supported by detailed procedural guidance and administrative arrangements the court is entitled to supplement those arrangements but in doing so should consider the comprehensiveness of the code, the degree of deviation required and the overall fairness of the procedures required (see De Smith's Judicial Review 8th edn. 7-015).

[13] There were two other pieces of work which were ongoing in relation to Gaelscoil an Lonnain which are of some relevance to the issues in the appeal. On 1 September 2015 the then Minister, Mr O'Dowd, conducted a review of capital viability status for Irish medium primary schools. A positive recommendation was generally dependent upon whether or not the school could demonstrate enrolment levels suggesting that the school could become a sustainable primary school with an enrolment of 140 pupils. Both InaG and CnaG made submissions contending that although it was not possible for the school to achieve those thresholds at the current site because of its size which limited pupil numbers to 71 and its unsuitable

accommodation both felt that relocation to a new site would enable the school to develop and become sustainable. The Minister concluded that the potential impact of any future relocation could not be accurately assessed. In light of very low enrolments, closely located alternate Irish medium provision, the recent regression in the quality of education provision and current poor accommodation the long term sustainability of Gaelscoil an Lonnain was questionable. Capital viability status was refused on 1 September 2015.

[14] The second piece of work concerned preparation for the next area planning period from 2017 until 2020. In May 2016 CnaG prepared a draft report seeking to set the framework for proper area planning and strategic development of the Irish medium sector throughout Northern Ireland at all levels. This was obviously a very wide ranging document making the case for the prospect of increasing levels of pupil intake in Irish medium schools. The document was not, therefore, specific to primary education nor to the Belfast Education and Library Board Area. A copy of this draft was provided to the Department in connection with the ongoing development of the next area plan on 15 June 2016, two days before the Minister made his decision. It was not submitted in connection with the DP and the only specific reference to Gaelscoil an Lonnain was a short report indicating that the building was unfit for use as a modern school building and that the growth of the school had been severely hampered by the unfit for purpose premises. The report acknowledged the framework set by the SSP but emphasised that the policy supported provision for growth associated with the Irish medium sector and put forward various estimates of the likely growth in the sector.

The application and its assessment

[15] The school's DP was published on 21 January 2016. As indicated at paragraph [6] above CnaG worked closely with the school in the preparation of the DP. There was no dispute about the fact that the facilities at the school were significantly below standard. The issue was how that was to be addressed. The capital viability review some five months earlier had raised significant issues about the sustainability of the school and the corresponding impact upon the quality of the educational experience of the children. It was clear, therefore, that the sustainability of the school in the proposed location was a critical issue in the consideration of the DP. Both the school and CnaG would have been well aware of that from the outcome of the capital viability process some months before.

[16] The sustainability issue was addressed in the area planning section of the proposal. This highlighted the school's close cooperation with CnaG in the preparation of the report. It referred to an untapped reservoir of pupils from the neighbouring areas and suggested that relocation of the school to the site approximately 400 yards city bound would secure its sustainability. In order to achieve sustainability it was necessary to relocate. The present site was inadequate. That again was not in dispute.

[17] The DP noted that the nearest providers of Irish medium primary education were Gaelscoil na Bhfal, approximately half a mile away, and Bunscoil an Tsleibhe

Duibh, approximately a mile away. It was asserted that Gaelscoil na Bhfal was a fully sustainable school with a full intake every year serving the Upper Falls whereas Gaelscoil an Lonnain served the Lower Falls. Similarly it was maintained that Bunscoil an Tsleibhe Duibh served the greater Ballymurphy area and was a fully sustainable school with a full intake for P1 and the preschool year. The proposal asserted that both of the schools were often oversubscribed. Further reference was made to other schools within a two-mile radius.

[18] The DP indicated there were currently 54 pupils enrolled at Gaelscoil an Lonnain and asserted that the school had witnessed a substantial growth in enrolment figures indicative of local demand for Irish medium education. The statistical information demonstrated that between the year 2011/12 and 2015/16 the actual enrolment in the school had risen steadily from 41 to 54. Eleven pupils were enrolled for P1 for September 2015 and it was anticipated that the 13 children enrolled in preschool would follow into P1 in September 2016.

[19] The case for change presented by the school was critically examined by the Irish Medium and Integrated Education Team within the Department and its conclusions were incorporated in the submission made to the Minister upon which he relied on coming to his conclusion. The approved maximum admission number for P1 pupils at the school was 20 pupils. Between 2006/7 and 2009/10 the admission number varied between 10 and 15. In 2010/11 and 2011/12 the admission number to P1 was respectively 3 and 5. Thereafter the admission number was between 9 and 13 broadly in line with the earlier period. The total number of pupils in the school between 2006/7 and 2009/10 varied between 44 and 52. Between 2012/13 and 2015/16 the total number of pupils varied between 44 and 54. These were again broadly comparable. The Department concluded, therefore, that the intakes and enrolments showed no sign of the substantial growth in enrolment figures indicative of local demand claimed by the school and did not support the school's vision of a sustainable long-term enrolment which aligned with the recommended policy threshold for an urban primary school of 140 pupils. The submission to the Minister noted the duty to encourage and facilitate Irish medium education but argued that this should be done in the context of a framework of sustainable schools securing the educational well-being of the pupils involved.

[20] The submission to the Minister noted that it was proposed that Gaelscoil an Lonnain should be the anchor tenant for a commercial development at the St Comgall's site. The proposal was for accommodation within the development comprising 4 classrooms which would provide facilities for 86 to 115 pupils, falling below the SSP recommended enrolment threshold. That raised a question about whether the project was an interim rather than a long-term solution and whether it might necessitate a further move for the school to premises that could accommodate a larger number of pupils. Such a prospect was inconsistent with the identification of the school as an anchor tenant.

[21] The submission then turned to the position of the other schools. Although the two nearest schools were described as often oversubscribed they currently had 183 unfilled places between them. The latest figures available demonstrated that neither

was oversubscribed. Each was less than 25 pupils above the minimum enrolment threshold and if Gaelscoil an Lonnain posed an attractive prospect for parents there was a risk that all three schools could dip below this level.

[22] In terms of the overall area planning position it was noted that there were a substantial number of unfilled places between the eight Irish medium primary schools in Belfast. Five of the eight schools were under the 140 pupil threshold recommended in the SSP for a viable and sustainable urban primary school. In 2015/16 the eight schools offered a total of 218 year one places and admitted 182 pupils resulting in 36 unfilled year one places. Six of the eight schools were under subscribed with year one first preference applications and did not fill to the year one admission numbers.

[23] The submission concluded that there was insufficient statistical research evidence to support the belief that the relocation of the school would result in a new cohort of pupils which would bolster the school's future enrolment. The proposed solution was an interim solution at best and there remained unresolved issues regarding Gaelscoil an Lonnain's sustainability and long-term viability as well as the need for an area planning solution to future proof Irish medium primary provision in Belfast generally. In those circumstances the school's position as an anchor tenant for the regeneration project was concerning.

[24] In view of the unresolved sustainability and long-term viability concerns at the school and in relation to Irish medium primary provision in Belfast generally the recommendation was to look more strategically at the future design of Irish medium primary provision in the area in the context of the emerging area plan for 2017/20. This proposal was described as a single school solution rather than an area solution to strategically plan Irish medium primary education to maximise the benefits for pupils. The Minister agreed and turned the proposal down.

[25] Subsequent to the notification of the Minister's decision on 20 June 2016 CnaG wrote to the Minister on 14 July 2016 setting out its statistical basis for the view that Irish medium primary education was likely to grow substantially in south and west Belfast thereby supporting the view that Gaelscoil an Lonnain could achieve sustainability if it moved to more suitable premises. The letter looks at demographic trends within the West and South Belfast areas and identifies enrolments in various schools. It is clear from even a cursory look at the figures that there are considerable variations in the class sizes of the different schools with a trend towards lower numbers in the more senior years. CnaG requested that the Minister should review his decision in light of this correspondence. The Minister replied that decisions on DPs are final as set out in the Guidance which had been drawn to the attention of the proposer and CnaG and could only be overturned as a result of successful challenge through judicial review.

The Judge's assessment

[26] The learned trial judge started off her consideration by asserting that the Minister had an unstructured discretion to come to a decision bounded only by common law fairness. I have set out at paragraphs [2]–[11] the comprehensive

process of consultation and the detailed policy framework within which the Minister was required to act. I consider that the analysis of the Minister's discretion required acknowledgement of the suite of procedural and substantive policy matters against which the Minister was obliged to make his decision.

[27] The judge concluded that CnaG had been side-lined in the decision-making process in the circumstances pertaining to the case. In fact, CnaG had prepared the DP on behalf of Gaelscoil an Lonnain as was asserted in the second paragraph of the second affidavit of Mr Ó'Flannagáin. The evidential case for the future sustainability of the school contained within the DP was advanced by CnaG and was based on an analysis of enrolment trends at the school and the evidence of need established by reference to the similar trends at the nearest schools. The judge made no reference to CnaG's role in the preparation of the DP. Far from being side-lined in the DP process CnaG was at the heart of the application process on behalf of the Board of Governors.

[28] There is no criticism contained within the judgment of the assessment on the basis of the available material that there were unresolved sustainability and long-term viability concerns at the school and in relation to Irish medium primary provision in Belfast generally. The learned trial judge concluded, however, that there was procedural unfairness in failing to take into account the draft report prepared in May 2016 and submitted by CnaG on 15 June 2016. It is common case that this report was not submitted in connection with the DP, even though CnaG knew that the decision on DP 452 was outstanding, but was a draft for discussion in connection with the development of the area planning context and the Irish medium sector's proposed development plan for the period from 2017 to 2020.

[29] It was a draft of a different character from the DP which had been prepared to advocate for a framework for proper area planning and strategic development of the Irish medium sector throughout the North of Ireland at all levels over the coming years. It is striking that even the subsequent letter of 14 July 2016 from CnaG relates to the wider issue of the development of the Irish medium sector in West and South Belfast rather than focusing on the particular circumstances pertaining in the area of the proposed DP. The wider issue will obviously require very extensive consultation with all of the interested schools and stakeholders in Irish medium primary education and other stakeholders in the delivery of sustainable schools. That is an exercise which cannot and should not be undertaken in the course of examining a single school's DP.

[30] As part of her reasoning the learned trial judge could not understand why the views of CnaG could not have been taken into account before the decision if the Minister's view was that CnaG should be engaged working forward. I do not accept that there is any contradiction in this. It was clearly entirely proper that CnaG should be centrally involved in working with the Department in the preparation of the area plan and development strategy for Irish medium education. That involvement was properly identified by the Minister in his decision.

[31] The learned trial judge also concluded that the Minister ought to have departed from the terms of the Circular and reopened the decision on the DP because of the letter of 14 July 2016. That conclusion may have been influenced by a misapprehension as to the direct involvement of CnaG in the preparation of the original DP. In any event it is necessary to bear in mind that both the Board of Governors and CnaG were recipients of the Circular and were plainly aware of the very limited circumstances in which a decision could be reviewed. Secondly, this is a decision which can be revisited by way of a further application. In light of the opportunity to revisit this issue and the detailed guidance given as to the circumstances in which a review could be reopened there was nothing unfair in the Minister complying with the procedural regime set out.

[32] I entirely accept that the learned trial judge was entirely correct to recognise that there is a duty of procedural fairness governing the exercise of statutory power. As the judge said that flows from Bank Mellat v Her Majesty's Treasury No 2 [2013] UKSC 39. It is for the court to determine what is fair. In this case, however, the analysis set out above demonstrates that the statutory procedures enabled all of the interested parties to understand the issues in play and make appropriate submissions in respect of them. The development of the 2017-20 area plan may provide further opportunities for the school but there was nothing unfair about allowing that process to engage with all of the relevant stakeholders leading to an assessment by the Department. On the material submitted in respect of the DP it was open to the Minister to accept the recommendation in the submission. I consider that there was no proper basis for rewriting the procedural mechanisms in this case. For those reasons the submission about pre-warning of the Minister's decision did not arise.

[33] The learned trial judge said that she could not identify any cost-based analysis for the decision but she did not suggest that this rendered the decision unlawful. In any event there is a reference to the arrangements for the payment of rent and it is clear that costs played no adverse part in the decision-making. The decision-making was centred on sustainability and viability.

[34] The learned trial judge also took issue with the concern expressed by the Minister about the relocated school being an anchor tenant for a commercial development requiring some £7 million of public money. It was not, of course, for the Minister to make a judgment as to whether the capital investment should be made. Once he accepted the concerns about the sustainability and viability of the school on the proposed premises he was, however, entitled to recognise the contradiction between the uncertainty surrounding the proposed premises and the role of those premises as an anchor tenant. The concern went no further than that.

[35] Further, the learned trial judge asserted that there had been a failure to satisfy the duty under Article 89 of the 1998 Order. That may have been influenced by her earlier conclusions in respect of the unfairness of the process. Once that unfairness is removed it is difficult to see what the basis for this conclusion can be. Everyone agreed that the existing premises were unsuitable. The issue was the identification of the appropriate remedy. CnaG suggested that emerging Irish medium schools were

caught in a catch 22 situation where they were unable to expand because of limited or unsuitable premises. The only answer provided by the DP was a transfer to another site. No other remedy was considered in the DP.

[36] The interests of the pupils demanded, however, a reasonable prospect of a viable and sustainable school environment. The Minister concluded that the remedy was not to transfer an unsustainable school to a different site but rather to seek to achieve a quality education for the pupils in a sustainable and viable primary school environment. The purpose of the liaison with CnaG was to work through the existing area plan governance structures and processes to encourage and facilitate the strategic development of sustainable Irish medium primary provision in Belfast in the 2017-20 period. Such work was designed to achieve the objectives of Article 89 for the Irish medium sector.

[37] Submissions were advanced by the respondent on the basis of the failure to refer to the Child Poverty Strategy and a complaint under Article 8 of the Convention. In my view these add nothing new to this case. The unsatisfactory circumstances of the school need to be addressed but it does not follow that a new site for the school must be found. The Minister's conclusion was that the proposal did not resolve the sustainability and long term viability concerns at the school and a proposal addressing those concerns was what was needed. In the Minister's view the proposal did not satisfy the interests of the pupils would be best served by being provided with a quality educational experience.

Conclusion

[38] For the reasons given I accept that the Minister's decision was one that he was entitled to make and I would allow the appeal.

TREACY LJ

Introduction

[1] This is an appeal from the judgment of Mrs Justice Keegan given on 13 October 2017 by which she quashed the decision of then Education Minister Peter Weir to refuse Development Proposal 452 in relation to Gaelscoil an Lonnain ("the school"). The school had proposed to relocate from its present address to the site of the former St Comgall's Primary School in the nearby Divis area ("the new site").

[2] There is also a cross-appeal by the applicant contending that the Court's decision should be affirmed on the original grounds and also on additional grounds.

Factual Background

[3] In 1999 the school was established as an independent school serving the lower Falls Road area, an area characterised by high levels of social and economic deprivation. The school provides education to its pupils through the medium of the Irish language. It has not yet achieved sustainability. As Keegan J notes in her judgment:

> 'I was told that the school has a maximum intake of pupils of 71. .....The requisite number of pupils for a sustainable school is 140.'

[4] The building within which this school operates was first opened in 1901 and is widely recognised as not being fit for purpose. It has multiple and serious limitations in relation to both the internal and the external spaces. For example, the main play space in which the 5 year old applicant plays during his break times is at the front of the school. It has gates that open onto a busy main road. These gates are the only entrance into the premises and are regularly opened by visitors during play times. There is no internal play area or school hall due to the lack of space. The classrooms for the very young children have no sinks making it impossible to engage in water play or painting activities with them. There is no storage space for large equipment and there is no space for a cloakroom or a changing area. Toilet facilities are restricted and there are no facilities for disabled pupils or staff. These are just some of the litany of inadequacies which affect this old school building.

[5] As a result of the many limitations of their building the Board of Governors of the school formulated the development proposal ("DP") at issue in this case. The proposal is that the school should relocate to rented premises nearby. The proposed new site is part of a regeneration scheme in the Divis area, and the proposal is that the school would be the anchor tenant in this new scheme, obtaining floor space for a number of classrooms there.

[6] The Education Authority ("EA") supported the proposal. In response to the question:

> "In the context of planning on an area basis - what is the EA's view of the proposal..?'

It replied:

> "The EA would support the proposal. The proposal was discussed and agreement given to publish at the EA Education Committee..... meeting on 14 January 2016.

The EA then submitted the DP to the Department with a note of its support attached.

[7] Comhairle na Gaelscolaíochta ("CnaG") had extensive input into the DP. CnaG is a body which was set up by the Department of Education ("DE") in 2000 to promote, facilitate and encourage Irish-medium Education. It also advises the Department in relation to compliance with its duty to facilitate development of Irish Medium Education (the "Article 89 duty"]. At paragraph 11 of her judgment Keegan J notes the following about the role and purpose of CnaG:

> 'A further important player in this case is CnaG, a sectoral body tasked by the Department of Education to assist in relation to the policy of promoting and monitoring the issue of Irish Medium education within this sector. I note paragraph 18 of McKee's Application [2011] NIQB 98 which highlights the role of CnaG. This was a challenge in relation to transport in the context of Irish Medium education but the following point is of general application:
>
> > '[18] The respondent's position is that a number of steps, outlined in its affidavit evidence, provide concrete evidence of the appropriate discharge of the Article 89 duty. These include, inter alia, the establishment of CnaG ....'" [Paragraph 11].

[8] The DP makes it clear that CnaG was a supporter of this development. It says:

> 'The school has been working closely with CnaG and the Falls Community Council (Proprietors of the former St Comgall's PS site) to realise the relocation of the school...'

[9] The Education and Training Inspectorate ("ETI") also supported the DP, chiefly on grounds of the educational benefits it could deliver for the children

affected. Its response to the proposal noted that the children might benefit from an environment more conducive to high quality learning and greater opportunity for the use of the outdoor play areas to enrich the curriculum, and other similar educational benefits.

[10] The Irish Medium and Integrated Education Team ("IMIE Team") is an internal team working within the DE. Its response acknowledged that: '*the school's current accommodation is not fit for purpose*'. Nevertheless, it concluded that it was not in the best interests of the sector or of the pupils to proceed with this medium to long-term relocation because of unresolved concerns about the sustainability and long term viability of the school.

[11] The Investment and Infrastructure Directorate gave input in the form of advice about various infrastructural matters but did not make any recommendation in relation to the DP.

[12] The DE has provided a useful chronology of events leading up to the decision which gave rise to this case. The salient parts of that chronology may be summarised and supplemented as follows:

> "In 2005 the school achieved grant aided status as an 'other maintained' co-educational Irish medium primary school."
>
> 17 April 2015: The DE sought CnaG's input into a review of Irish-medium primary schools that had not yet achieved capital viability.
>
> September 2015: Applicant commenced Primary 1 in the school.
>
> September 2015: Consultation with parents on relocation.
>
> October 2015: Consultation with staff on relocation.
>
> 14 January 2016: The EA's Education Committee met and agreed to support DP452.
>
> 29 January 2016: DP452 was published by the EA.

29 January 2016: Commencement of 2 months statutory objection period.

2 February 2016: Email from DE to various directorates and teams seeking input into the review by 22 February 2016. [It is not clear whether CnaG received such an e-mail.]

24 February 2016: Draft revised DP guidance discussed at an Area Planning Steering group meeting attended by CnaG.

29 March 2016: End of statutory objection period. During the consultation period no letters of objection against were received by the DE.

13 June 2016: DE submission to the Minister having received input from various bodies.

15 June 2016: CnaG emailed DE its draft Irish Medium Sector Development Plan. The DE took the view that this document "had no official standing', and it is correct that the document was drafted in a different, though closely related, context. The document contained significant detail about the difficulties faced by IM schools in general and by the school at the centre of DP in particular. This document, from the sectoral advisor in relation to IME and on compliance with Article 89, was not forwarded to the Minister who was just about to make a decision related to the school.

17 June 2016: Decision made to refuse the DP by the Minister.

20 June 2016: Letters to the school, the Education Authority and CnaG communicating the decision.

27 June 2016: The applicant's mother wrote to the Minister asking him to reconsider the turning down of the proposal.

4 July 2016: Pre-action Protocol Letter.

14 July 2016: A letter was sent from CnaG to the Minister asking him to reconsider his position.

20 July 2016: A letter from DE to CnaG advising that a Pre-action Protocol letter had been received and it would therefore be inappropriate to respond to specific points raised until the judicial review process has concluded.

22 July 2016: Letter from DE to applicant's mother (replying to the letter of 27 June 2016) confirming that a pre-action protocol letter had been received and it would be inappropriate to engage directly until the judicial process had concluded.

16 September 2016: The applicant lodged his application for leave to apply for judicial review."

Statutory Framework

[13] The statutory framework governing this appeal is as follows:

Article 14 of The Education and Libraries (Northern Ireland) Order 1986 ("the 1986 Order") contains the following provisions in relation to primary and secondary education:

"14.—(1) Where the Authority proposes—

(a) to establish a new controlled school, other than a controlled integrated school;

(b) to have an existing school recognised as a controlled school, other than a controlled integrated school;

(c) to discontinue a controlled school;

(d) to make a significant change in the character or size of a controlled school;

(e) to make any other change in a controlled school which would have a significant effect on another grant-aided school,

the Authority shall submit the proposal to the Department."

[14] Further provisions are provided within this part of the Order for consultation and in particular at (5B) it states as follows:

> "(5B) Before a proposal concerning any school is submitted to the Department by the Authority under paragraph (1), (2) or (3), the Authority shall consult the trustees and managers (or representatives of them) of any other school which would, in the opinion of the Authority, be affected by the proposal.
>
> (6) A board, after submitting a proposal to the Department under paragraph (1), (2) or (3), shall—
>
> (a) forthwith furnish to the trustees and managers of every school which would, in the opinion of the Authority, be affected by the proposal such particulars of the proposal as are sufficient to show the manner in which the school would be affected;
>
> (b) forthwith publish by advertisement in one or more newspapers circulating in the area affected by the proposal a notice stating the nature of the proposal, that the proposal has been submitted to the Department, that a copy of the proposal can be inspected at a specified place and that objections to the proposal can be made to the Department within two months of the date specified in the advertisement, being the date on which the advertisement first appears;
>
> (c) furnish to any person, on application, a copy of the proposal on payment of such reasonable sum as the Authority may determine.
>
> (7) Subject to Article 15(3), the Department, after considering any objections to a proposal made to it within the time specified in the notice under paragraph (6)(b), may, after making such modification, if any, in the proposal as, after consultation with the Authority or person making the proposal and, in a case to which paragraph (2)(i) applies, the Council for Catholic Maintained Schools, it considers necessary or expedient,

approve the proposal and inform the Authority or person accordingly."

[15] Article 89 of the Education (Northern Ireland) Order 1998 ("the 1998 Order") reads as follows:

> "Irish Medium Education
>
> 89.—(1) It shall be the duty of the Department to encourage and facilitate the development of Irish-medium education.
>
> (2) The Department may, subject to such conditions as it thinks fit, pay grants to anybody appearing to the Department to have as an objective the encouragement or promotion of Irish-medium education.
>
> (3) The approval of the Department to a proposal under Article 14 of the 1986 Order to establish a new Irish speaking voluntary school may be granted upon such terms and conditions as the Department may determine.
>
> (4) In this article "Irish-medium education" means education provided in an Irish speaking school."

[16] Article 15 of the 1986 Order reads as follows:

> "Establishment and recognition of grant-aided schools
>
> 15.—(1) Where the Department approves a proposal to establish a controlled or voluntary school, the Authority or other person by whom the proposed school is to be established shall, unless the Department otherwise determines, submit to the Department in such form and in such manner as the Department may from time to time direct, specifications and plans for the school premises and the Department, on being satisfied that the school premises will conform to the standards specified … under Article 18 with or without such exemption from those standards as the Department may grant under that Article, may approve the specifications and plans.
>
> (2) Where the proposal, specifications and plans for a new school have been approved by the Department, the Authority or persons by whom the proposed school is to

be established shall not give effect to the proposal otherwise than in accordance with the specifications and plans as so approved.

(3) The Department shall not approve under Article 14(7) a proposal for the establishment of a new voluntary school or the recognition of an existing school as a voluntary school unless the school is to become a maintained school or unless it is to become a grammar school in relation to which an agreement with the Department under paragraph 1(1) of Schedule 6 is in force.

(4) Where the Department approves a proposal for the recognition of an existing school as a controlled or voluntary school, the Department may grant such recognition upon such terms and subject to such conditions as it may determine."

[17] The Education and Libraries (Northern Ireland) Order 1986

"**Pupils to be educated in accordance with wishes of their parents**

44. In the exercise and performance of all powers and duties conferred or imposed on them by the Education Orders, the Department and boards shall have regard to the general principle that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils shall be educated in accordance with the wishes of their parents."

Grounds of Appeal

[18] The DE's grounds of appeal may be summarised as follows. That Keegan J erred in law:

(i) In concluding that there had been an insufficiency of inquiry and or procedural unfairness in the case on the ground that Comhairle na Gaelscoliaochta ("CnaG") material was not taken into account which should have been taken into account.

(ii) In finding that there was an obligation to give advance notice or pre-warning of a likely adverse decision on the proposal.

(iii) In finding that the Minister should have conducted a post decision review.

(iv) In finding that a valid challenge had been made out in terms of the consideration of irrelevant material (paras 62-64) both in finding that cost and the viability of another project at St Comgall's were irrelevant considerations, and in failing thereafter to assess the materiality of any alleged error.

(v) In finding that the Minister was in breach of the duty imposed by Article 89 of the 1998 Order.

The Parties' Arguments

Ground 1 - Insufficient Enquiry

[19] The DE's Notice of Appeal focuses on Keegan J's conclusions in para [54] of her judgment that "some consultation [with CnaG] would have been desirable in the case" and at para [56] where she said that CnaG "had been sidelined in the decision making process".

[20] The DE asserts that these conclusions fail to take into account that "CnaG did have the opportunity to respond to the DP during the statutory two month period but chose not to, and failed to, do so."

[21] The DE referred the court to the case law relating to the issue of insufficient enquiry and set out a summary of the applicable legal principles provided by the Divisional Court in R (Plantagenet Alliance) v Secretary of State for Justice [2014] EWHC 1662 (QB) which states:

> ".. The following principles can be gleaned from the authorities:
>
> 1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> 2. Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and

intensity of inquiry to be undertaken (R (Khatun) v Newham LBC [2004] EWCA Civ 55, [2005] B 37 at para 35, [2004] LGR 696, per Laws LJ).

3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in R (Bayani) v Kensington and Chelsea Royal LBC (1990) 22 HLR 406).

4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City Council (1989) 21 HLR 301; cited with approval by Laws LJ in (R (Khatun) v Newham LBC (supra) at para 35).

5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (R (London Borough of Southwark) v Secretary of State for Education (supra) at p 323D).

6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (R (Venables) v Secretary of State for the Home Department [1998] AC 407 at 466G, [1997] 3 All ER 97, [1997] 3 WLR 23)."

[22] The DE asserted:

"In the context of the present appeal, these principles make it clear that ' the Minister was perfectly entitled to conclude that he had sufficient information before him to make the impugned decision."

Respondent's Argument re Ground 1

[23] The respondent submitted that Keegan J followed the case law from both the High Court in this jurisdiction (KE's Application [2016] NIQB 9) and the English Court of Appeal (R (Khatun) v Newham LBC [2004] EWCA Civ 55) in applying a Wednesbury test to the sufficiency of enquiry ground. In the event, Keegan J found that there had been insufficient enquiry and granted Judicial Review on this basis. The respondent supports Keegan J's conclusion.

[24] The respondent then made a series of points asserting that the same conclusion might also have been reached on the additional ground that the court is not limited to Wednesbury review of the decision-maker's level of enquiry, but also has an independent duty to determine for itself what level of enquiry is necessary to satisfy the requirements of procedural fairness in any case.

[25] In response the DE contended that subject only to *Wednesbury* challenge, it is for the DE to decide upon the manner and intensity of the inquiry to be undertaken and the court should not intervene only because it considers that further inquiry might have been sensible or desirable. The test is whether any reasonable decision maker possessed of the same material could suppose that the inquiries made were sufficient. The DE asserted that the Minister's enquiries were sufficient in terms of the *Wednesbury* test.

Ground 2: The 'Pre-warning' issue

The Department's submissions:

[26] The DE noted that the judge ultimately found no unlawfulness in this respect on the facts of this case but found that it would have been better to give some pre-warning on the two issues which drove the decision namely sustainability and the St Comgalls' project.

[27] The DE is concerned that this finding may have implications for future procedure and it denies that there is a requirement in any case, having drafted a final submission for consideration by the Minister, to revert to interested parties again for further input.

Respondent's Submissions on Ground 2

[28] The respondent submitted that the Minister was in fact required by law, and particularly by the requirement for procedural fairness, to give pre-warning of the

two grounds upon which the DP in the present case was refused. Its main arguments put forward in support of this contention may be summarised as follows:

- Because the issue of pre-warning is an aspect of procedural fairness the court's function is to determine for itself what fairness required. If the court considers that further steps were necessary for a fair procedure (*"it would have been better to give some pre warning"*), the court's function is to require those further steps to be taken. The court's power to require this is derived from its historic jurisdiction over matters of procedural justice (per Lord Woolf MR in Coughlan).

- It is *because* the Minister's discretion was wide and unstructured that pre-warning was necessary. Since there are so many factors which the Minister can consider it is difficult for the proposer of any project to address every factor in comprehensive detail from the outset. Therefore when a Minister identifies specific factors which could lead to a refusal, fair procedure may require that he notifies the proposer of his specific concerns to enable the proposer to respond.

- In conclusion, the respondent submits that Judicial Review could have been granted on the additional ground that, in the particular circumstances of this case, it was procedurally unfair not to give pre-warning of the issues which ultimately led to refusal.

Ground 3 - The learned judge erred in law in finding that the Minister should have conducted a post decision review and that his reply was "too rigid" in this regard (paragraph 61)

[29] The DE submitted that the final determination in a DP takes place at the end of a fixed statutory process including a two-stage consultation process. Thereafter, the Minister takes a decision as to whether to grant the proposal or not which is legally binding and determines the process. The limited circumstances in which a review might be appropriate are set out in the DP circular as acknowledged by the judge at paragraph 61 of the judgment.

[30] The DE acknowledges that it did receive correspondence from CnaG some four weeks after the decision had been made and states that it "considered the

submissions then being made by the applicant" but "remained satisfied that the decision taken was lawful, reasonable and accorded with relevant policy. There was no good reason to formally review the decision simply because CnaG, who had omitted to respond during the ongoing process pre-dating the decision, elected to make belated representations after the process had concluded.

Respondent's submissions on Ground 3

[31] The respondent made two main points on this issue. First, it acknowledged that the Circular sets out some circumstances in which a review might be appropriate but noted that these 'permitted circumstances' in the Circular are not derived from legislation and must therefore have another source. It submitted that they could only be derived from the Common Law requirement for procedural fairness which is designed to supplement statutory schemes whenever gaps arise which are potentially unfair. It argued that since the permitted circumstances are derived from the overarching common law requirement of procedural fairness that same principle must also be capable of supplementing the statutory scheme in other ways- for example if circumstances should arise which did not fall within the circumstances permitted by the circular but which might nevertheless cause unfairness in the case in hand.

[32] Secondly the respondent notes the argument that the DE 'having considered the submissions then being made by the applicant remained satisfied that the decision taken was lawful, reasonable and accorded with relevant policy.' It pointed out that insofar as this argument suggests that the Minister substantively considered the information in the letter of 14 July 2016, this is not correct. Rather, the Minister adopted the position that the information had not been provided during the two month objection period and as therefore did not engage with the substance of the letter. In all these circumstances the respondent submitted that judge's decision on this issue was correct.

Ground 4

[33] This ground is framed as follows in the DE's Notice of Appeal:

> "The learned judge erred in law in finding that a valid challenge had been made out in terms of the consideration of irrelevant material (paragraphs 62 – 64) both in finding that cost and the viability of another project at St Comgall's were irrelevant considerations and in failing thereafter to assess the materiality of any

alleged error contrary to the principles set out in *Department of Education v Cunningham (a minor)* [2016] NICA 12."

[34] The DE's complaint is therefore directed at Keegan J's treatment of both the issue of the costs associated with the proposed relocation, and her treatment of questions related to the viability of the proposed new site. In support of this ground the DE makes one global submission namely that "overall' the submission made by departmental staff to the Minister demonstrates a comprehensive review of all relevant matters including the case for change made in support of the proposal. It asserts that 'no irrelevant considerations were taken into account' and that the 'manner in which the issues of cost and viability were noted is clear from the Submission and cannot be criticised.'

[35] The DE noted that Keegan J was concerned that she was unable to identify "*the cost based analysis for the Minister's decision, taking into account the pros and cons of this project in the long and short term*". It submitted that the implication that a full costs based analysis was required overstates the relevance of the cost issue and the extent of dispute between the parties on that issue.

[36] Dealing with all the matters coming within the rubric of Ground 4 the DE asserted that the actual costs associated with the rental of the proposed new premises was never a central concern. Of more pressing importance was the fact that the approval of the DP would simply lead to the relocation of a presently non-viable school to a location where it would continue to fail to reach the sustainability thresholds.

[37] Finally, in relation to this ground the DE argued that once Keegan J had formed the view, that a consideration had erroneously been left out of or taken into account she was obliged as a matter of law to consider the 'second question', namely whether the error was material or not. It asserts that 'the failure to even consider that issue renders the judgment unsustainable.'

Respondent's submissions on Ground 4 (Cost)

[38] The respondent treats Ground 4 as covering two separate issues namely the issue of cost and what may be described as the 'new site issues'. On the matter of cost it notes Keegan J's concern that she could not identify the cost based analysis for the Minister's decision and her decision to grant judicial review on the basis that the Minister had failed to take into account the relevant consideration of the cost of the relocation. The respondent stresses that this is a finding of the trial Judge and as such, in accordance with the approach in DB v Chief Constable of the PSNI [2017] 7, this court should be reticent about reversing the decision of Keegan J on this issue. In any event, the respondent submitted that Keegan J's decision was "undoubtedly correct".

[39] The respondent notes that the DE seeks to categorise cost as of "secondary" or "peripheral" significance" and argues that any suggestion that cost was of secondary significance is simply wrong. The fact that there was no cost to relocation does not render the issue of cost "secondary" or "peripheral". Rather, this is an extremely weighty factor in favour of relocation. ..." It asserts that this is so "irrespective of concerns about long-term sustainability cited as a reason for refusal." It concludes that Keegan J's decision was correct and that the "failure to conduct a cost based analysis, taking into account the pros and cons of relocation in both the long and short term, undoubtedly constituted a failure to take into account a highly relevant consideration which weighed strongly in favour of relocation."

[40] In relation to the second element of Ground 4 [the new site issues] the respondent asserts that**:**

> "The Appellant took into account the appropriateness of Government investing in the St Comgall's regeneration project on the basis of occupancy by a school ... particularly where significant concerns exist about its future sustainability."

[41] It states that Keegan J granted Judicial Review on this ground at para [64] of her judgment where she stated:

> ".... I cannot see how the Minister could rationally take the course that he did. He was effectively wearing two hats. This is a significant matter yet the affidavit evidence provided by the respondent does not deal with this point at all save a bland assertion that the Minister did not take

> into account irrelevant considerations. I am satisfied that this ground succeeds."

[42] It asserted that the DE has added nothing further to its original 'bland assertion that no irrelevant considerations were taken into account' and the further assertion that the "manner in which the issues of cost and viability were noted is clear from the Submission and cannot be criticised". Given that this is where the argument rests the respondent submits that the DE's argument on this ground of appeal must fail.

Ground 5 – Breach of the Article 89 Duty

DE's Submissions

[43] The DE submitted that the learned judge erred in law in finding that the Minister was in breach of the duty imposed under Article 89 of the 1998 Order and in particular in equating her finding of a connection between "the current school situation and the facilitation and development of Irish Medium education" with a failure to encourage and facilitate the development of Irish-medium education contrary to Article 89 and a finding that the issue had not been considered in substance despite, in particular, the clearly referenced consideration of the duty in the contemporaneous materials (paragraph 67).

[44] The DE referred to the case of In Re Colma McKee (Colaiste Feirste) [2011] NIQB 98 and asserted that this case:

> "Does not require the Department to operate any positive bias in favour of proposals for development ...but rather permits the Department to "*facilitate and encourage the IM post-primary sector in ways that it need not for other sectors by taking positive steps or removing obstacles*". The error identified in the *Colaiste Feirste* case was that the court found that the Department did not appear to appreciate that it could take steps or remove obstacles in the case of the IM sector that it need not for other sectors, not that it was obliged to do so."

[45] The DE stated that the application of the Article 89 duty must also take cognisance of the wider policy framework. In particular, the discharge of the Article 89 duty must be balanced with the DE's duty pursuant to Article 44 of the 1986 Order to avoid unreasonable public expenditure in responding to parental views

about the education of their children. It asserts that the 'Article 89 duty is clearly acknowledged in the Submission and was taken into account (See, in particular, Cover Page at "Statutory Duty Implications" and "Recommendations", internal paragraphs 2.1, 6.1 – 6.2, 8.1, 9.1 – 9.2 and 9.4). The duty is to encourage and facilitate. The statute is not prescriptive as to method. It is a matter for the DE how it does so. The Minister must, in considering a development proposal, also have regard to the policy framework on sustainable schools. That a particular decision might - to some degree - encourage and facilitate IM education is not decisive on its own. It still remains possible in any particular case that there will be better means to encourage IM education, whether those ways are yet identified or not, than the proposal before the DE. It is perfectly consistent with the Article 89 duty to turn down the proposal and request further work to encourage and facilitate the strategic development of sustainable IM primary provision in the area. That is what the Minister did in this case (see section 9 of the DP). Such a decision is not inconsistent or contrary to the statutory duty but rather is consonant with it."

Respondent's Submissions on Ground 5

[46] The respondent emphasized Keegan J's finding at para [67] of her judgment that:

> "It must be discernible from a decision that an issue such as this has been considered in substance. The applicant's case is encapsulated in what is described as a "catch 22" situation, that the school cannot expand within the current premises to meet the sustainability targets. There is a clear connection between the current school situation and the facilitation and development of Irish Medium education. I consider that this is a valid argument and as it is not properly addressed in the decision making process I cannot be satisfied that the Article 89 duty is discharged."

[47] It reminds this court that the above paragraph contains a finding of the first instance judge which, following the approach in DB, we should be reticent about reversing. It asserts that the "catch-22" situation which is faced by many Irish-medium schools was made explicitly clear to the DE by CnaG in their response to the DE's review of Irish-medium primary schools (sent to the DE on 22 June 2015). CnaG further made clear that this problem, which is a problem across the IM sector, specifically affects Gaelscoil an Lonnáin (Trial Bundle, p328k-328n). As recognised by Keegan J, the Minister failed to address this issue in his consideration. The Appellant offers no explanation for this failure and simply states that "*the duty had properly been taken into account as is clear from the particular parts of the submission identified above (and indeed the submission read as a whole).*" None of the parts of the submission cited nor any other part of the submission engages with or considers the fundamental "catch-22" problem. This is a clear breach of Article 89.

[48] The respondent complained that the Minister's decision ultimately recommended that *"officials should liaise with CnaG and the EA to ensure that they work together through the existing Area Planning Governance structures and processes to encourage and facilitate the strategic development of sustainable IM primary provision in Belfast in line with the statutory duty.*" This recommendation fails to appreciate that this is precisely what had already happened. CnaG had identified a fundamental problem for the Irish-medium sector (the catch-22 described at p328j generally and noted specifically in relation to Gaelscoil an Lonnáin, particularly at p328n). CnaG had worked through the Area Planning structures and had identified relocation as the way to address this issue. Despite this, the Minister failed to engage with this issue when he then refused relocation. It is this failure which Keegan J identified as a breach of Article 89 of the 1998 Order. The respondent submits that Keegan J's decision is entirely correct.

Discussion

[49] The parties' arguments in the present appeal re-visit the issue of sufficiency of enquiry**.** The DE takes particular issue with Keegan J's statements at para 54 that '*some consultation with CnaG would have been desirable in the case*' and at para 56 that "*I consider that CnaG should not have been sidelined in the decision- making process*."

[50] The DE's response to these comments focus on the fact that CnaG did have an opportunity to make its input during the statutory two month period for the making of objections 'but chose not to, and failed to, do so'.

[51] That there was a missed opportunity for CnaG to use a standard mechanism to convey its input is recognised by Keegan J at para [56] of her judgment:

> "I have some sympathy with these points and I can detect some complacency or perhaps naivety on CnaG's part".

[52] Having noted the foregoing she stated: "*However, given the wide discretion in this case the more important it must be to have all the relevant materials to enable the proper exercise of the discretion. This is really the nub of the issue."* I am in agreement with her focus on this important point of substance in this case and in the conclusion she expressed.

[53] The context here includes the importance of what was at stake in terms of the quality of the education that could be offered to the pupils of the school, the decision on whether to accept or reject the DP, the role of CnaG as a sectoral body established by the DE to promote, facilitate and encourage IME, its role in advising the DE in

relation to its compliance with the Article 89 duty, and its particular knowledge of matters relevant to the taking of a properly informed decision.

[54] In the present case Keegan J looked at the statutory framework and considered the historical administrative practices surrounding the making of representations by CnaG. She notes that '*historically CnaG were consulted*.' She notes that changes were made to the administrative mechanisms governing the consultation process. She notes that '*(t)here is no real explanation as to why the process changed*'. She notes that even after the administrative changes took effect '*there were two occasions when CnaG were mistakenly contacted.*' Ms Durkin for the DE described these contacts as an 'administrative error'. The judge comments "*this is a rather curious situation.... but in any event the status of CnaG is recognised*'. She enlarges upon the special status of CnaG at paragraph[53] where she says: '*CnaG is a sectoral body directly engaged by and connected to the Department of Education in this sphere to ensure the appropriate discharge of the Article 89 duty*'. She concludes '*that some consultation with CnaG would have been desirable in this case*' and that the effective failure to achieve a desirable consultation with an interested party with the particular standing of CnaG '*falls to be considered under the umbrella of sufficiency of enquiry*'.

[55] She refers to Secretary of State for Education and Science v Tameside [1977] AC 1014 and Lord Diplock's statement:

> "The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly."

[56] She reminds herself '*that the court should not intervene simply because it considers that further enquiries would have been sensible*', but she is guided by her recognition of the centrality of a well-informed decision maker, especially in cases where the discretion they exercise is wide and unstructured by the statute conferring it: 'given the wide discretion in this case the more important it must be to have all relevant material to enable a proper exercise of discretion. That is really the nub of the issue.' In the end she decides 'that CnaG should not have been side lined in the decision making process in the circumstances pertaining in this case'.

[57] The 'circumstances' which appear to have influenced her decision include the following:

> "It is clear that information from CnaG was already available to the Department, in particular their view about the 'catch 22' position many young Irish Medium

> schools faced and their view that a move of premises would assist Gaelscoil an Lonnain. CnaG was also involved in a parallel process with the Department since 2015. The Minister knew that CnaG was engaged in the sustainability debate and their draft report was e-mailed to Ms Durkin on 15 June 2016**. That is just as the decision is taken and five days before it is communicated.**" (emphasis added).

[58] Also important was the materiality of the information CnaG had to convey:

> "In my view the content provided by CnaG and summarised in the 14 July letter is highly relevant material which would inform the decision maker ... To my mind this material should have been considered by the Minister to enable him to have possession of all relevant information in order to reach a rational conclusion. As such I consider that there was procedural unfairness of substantive effect."

[59] Keegan J also has regard to the content of the decision that the Minister ultimately produced:

> "In my view it is also significant that after the decision the respondent avers to the Minister's view was that CnaG should be engaged working forward. I cannot understand why the views of CnaG could not have been taken into account before this decision if they are so clearly involved in the out workings of it."

[60] In my judgment Keegan J had full regard to the breadth of the Minister's discretion in this case. She reached her conclusion solely on the ground that the facts of the case indicate that the Minister was effectively 'blind-sided' by not having the vitally material input from CnaG made available to him, in full, when making his determination. As a result of that deficit in the available materials he did, as Keegan J found, reach a decision which 'side-lined CnaG in the decision-making process.' This was unlawful as it meant he reached his decision without having informed himself sufficiently about all relevant considerations. I agree with the decision of Keegan J to quash a decision reached in this way on the ground that there was insufficiency of enquiry.

[61] In its cross-appeal the respondent-applicant raised the argument that the court should have gone beyond the application of the *Wednesbury* principle to the facts of the case and could/should have decided for itself what enquiries the decision maker needed to make in order to satisfy the common law 'sufficiency of enquiry ' principle. They say:

> "That Judicial Review could have alternatively been granted on the basis that the court must decide for itself whether sufficient enquiry was undertaken. It is submitted that the issue of sufficiency of inquiry raises a question which a judge must answer "yea or nay" and is not subject to a Wednesbury test."

[62] I consider that in some cases a court may find itself obliged to substitute its own view of what constitutes sufficiency of enquiry rather than simply applying the *Wednesbury* test to the decision maker's view of what those enquiries needed to be. Some support for this approach might be thought to emerge from the decision of the Supreme Court in R (Osborne) & Ors [2013] UKSC 61**.** On the facts of this case I would have allowed the cross-appeal on the basis that, as a matter of objective fairness, the inquiry made was plainly insufficient.

Ground 2

[63] The point at issue in Ground 2 is Keegan J's comment at para [60] that:

> "I consider that it would have been better to give some pre warning on the two issues which drove the decision namely sustainability and the St Comgalls' project. However, I cannot say that in this case where the Ministerial discretion is wide and unstructured that this was required by law."

[64] The DE is exercised by the risk that this statement may create a situation where future proposers of development plans could object if they are not pre-warned of the reasons for rejection of their plans, and that this part of the judgment might therefore inadvertently extend the consultation process surrounding such applications. The DE 'denies that there is a requirement **in any case,** having drafted a final submission for consideration by the Minister, to revert to interested parties again for further input" (emphasis added), and effectively seeks the imprimatur of this court for that position.

[65] I note Keegan J's measured consideration of the pre-warning issue in the present case and her suggestion that whilst a pre-warning of likely grounds for refusal of the DP '*would have been better*' than no warning on the facts of this case, yet ' *I cannot say that in this case where the Ministerial discretion is wide and unstructured that this was required by law.*' I consider that the learned judge's conclusion that, on the facts of this case, there was in fact no breach of the rules on procedural fairness

related to the need for pre-warnings is enough to settle this point for the purposes of this case.

[66] For its part the respondent's cross-appeal seeks a ruling that Keegan J's approach in the current case was wrong. It asserts that the facts of the case *required* the learned judge to apply an objective standard of procedural fairness rather than simply applying the *Wednesbury* test to the question of what 'fairness' required in the case. It asserts: ' [i]f the court considers that further steps were necessary for a fair procedure (*"it would have been better to give some pre warning"*), the court's function is to **require those further steps to be taken**...' (emphasis added).

[67] Such an approach is too limiting. It is useful for judges to be able to give guidance on what may be better- or best-practice for government departments seeking to deliver their functions in legally compliant ways without being compelled to strike down their every action on the basis that it does not comply with an 'objective formulation' of the 'ideal standard' of procedural perfection. The decision-making process may be capable of improvement *without* being so bad that it causes actual unfairness. Judges should have room to say that in any case which warrants such a comment. They should also be free to suggest approaches whereby the level of fairness could be improved in future similar cases. This is the territory Keegan J's ruling inhabits and, in compliance with the guidance in DB, this court does not propose to upset her decision on this issue.

Ground 3

[68] In Ground 3 the DE complains that the learned judge erred in law in finding that the Minister should have conducted a post decision review and that his reply was "too rigid" in this regard. The DE, takes the stance that the final determination in a DP takes place at the end of a fixed statutory process. Thereafter, the Minister takes a decision as to whether to grant the proposal or not which is legally binding and determines the process. The limited circumstances in which a review might be appropriate are set out in the DP circular.

[69] The learned judge in her ruling acknowledges that this is the normal process:

> "I can understand that there is a circular dealing with review which states that decisions will not be reviewed save in limited circumstances …".

[70] She also acknowledges that:

> "The Minister is not compelled to review by virtue of law or policy."

[71] In the end however, she continues to be guided by her grasp of the centrality of the need for a well-informed decision maker, and her consideration that, as CnaG had been established to discharge an important advisory function and as it was drawing the Minister's attention to documentation containing advice that bore directly upon the decision the Minister had to make, then it really was incumbent upon that Minister to hear what his own sectoral advisor had to say. As the learned judge observes:

> "However, the principles of common law fairness must also apply. In particular whenever CnaG had prepared a representation to the Minister which contained substantial detail it seems to me that it was incumbent on the Minister to consider that this was information relevant to the decision-making by way of a review. I say this as CnaG is a statutory sectoral body specially tasked to look at the Irish Medium sector schooling and by implication the Article 89 duty. It seems to me that the Minister's reply was too rigid in this regard."

[72] I agree with her reasons for rejecting the argument based on the alleged lateness of CnaG's input:

> "There is also a criticism that the letter was four weeks after the decision and so because it was late the Minister was entitled to disregard it. I do not accept this argument in the circumstances of this case and particularly as CnaG had already sent their draft report to Ms Durkin on 15 June."

[73] There is nothing to criticise in this approach and I consider that Keegan J's conclusion that the Minister's approach to the request for a review was indeed, in all the circumstances of this case, 'too rigid.'

Ground 4

[74] Ground 4 contests the learned judge's findings in relation to whether the Minister failed to take account of relevant matters or took account of matters which were not relevant to the decision he had to make.

[75] The main sections of the judgment which are in issue are set out below.

> "[62] I also consider that a valid challenge was made in terms of the consideration of irrelevant material or the lack of consideration of relevant material. I have already decided in favour of the applicant in relation to the views of CnaG being a relevant matter left out of account. There are two other matters raised under this limb of challenge. Firstly, there is in the issue of cost and then there is the issue of the St Comgalls project.
>
> [63] In relation to cost, the proposal was effectively for a new leasing arrangement. It was accepted that the rental figure was not substantially different. ....I accept that there was some factual dispute about these issues. However, my main concern is that I could not identify the cost based analysis for the Minister's decision, taking into account the pros and cons of this project in the long and short term.
>
> [64] The argument was also made that the Minister took into account an irrelevant consideration namely the viability of another project at St Comgalls.... Essentially, I cannot see how the Minister could rationally take the course that he did. He was effectively wearing two hats. This is a significant matter yet the affidavit evidence provided by the respondent does not deal with this point at all save a bland assertion that the Minister did not take into account irrelevant considerations. I am satisfied that this ground succeeds."

[76] On the question of the cost of the proposed development the approach of the DE has been to suggest that this was a minor issue in the context of the Minister's

decision and in the context of the issues between the parties. It suggests that Keegan J's expectation that there should be a cost based analysis of the DP 'overstates the relevance of the issue and the extent of dispute between the parties on the cost issue.'

[77] The issue of cost is, self-evidently, always a critical matter in reaching any decision which involves the allocation of scarce public resources. That is especially the case when it is one of the factors that is expressly mentioned in the legislative framework which sets the context for the decision to be made as is the case here – see Article 44 of 1986 Order. This provision directs the DE to have regard to 'the avoidance of unreasonable public expenditure' when discharging its duties in relation to educating pupils in accordance with the wishes of their parents.

[78] The cost of any DP is always an important factor which cannot but influence any decision-maker involved in the allocation of public funds and, since it was broadly agreed that this DP was effectively cost-neutral from the perspective of the DE, we agree with the applicant's argument that cost was 'an extremely weighty factor in favour of relocation'. In these circumstances there was no error in Keegan J's expectation that there should have been a ' cost based analysis for the Minister's decision, taking into account the pros and cons of this project in the long and short term.' Moreover, the fact that the learned judge did not make any explicit reference to the materiality of the cost issue in her judgment does not 'render... the judgment unsustainable' as the DE asserts. It is, or ought to be, self-evident that a failure by a decision-maker to correctly weigh one of the statutory considerations which bears upon the decision he has to make is always a matter of central materiality . Any such failure will always bring the resulting decision into the ambit of potentially flawed decisions susceptible to judicial review. Judges cannot be expected to mention such self-evident materiality in every judgment they give in order to protect that judgment from being condemned as 'unsustainable'.

[79] The second factor which comes within the ambit of Ground 4 is the question of the 'new site issues'. The applicant's argument was essentially that the Minister's refusal of the DP on the basis of concerns about the future sustainability of the St Comgall's project rendered the refusal 'irrational' in the sense that that it was taken while having regard to an irrelevant consideration.

[80] On this point it seems the judge said:

> "Essentially, I cannot see how the Minister could rationally take the course that he did. He was effectively wearing two hats. This is a significant matter yet the affidavit evidence provided by the respondent does not

> deal with this point at all save a bland assertion that the Minister did not take into account irrelevant considerations. I am satisfied that this ground succeeds."

[81] Effectively the learned judge found that the applicant's argument noted at para [79] above was a reasonable argument and that the evidence presented on behalf of the Minister was insufficient to satisfy her that the decision was *not* tainted by irrationality as the applicant alleged. On this basis there was no conclusion she could reach on the point, other than she was not satisfied that he had not had regard to the irrelevant new site issues. For this reason she declared herself satisfied that this ground succeeds. The DE complains that the judge did not consider the 'materiality' of the irrelevant factor but it is clear from the terms of her judgment that she weighed materiality before reaching her conclusion: '**This is a significant matter** yet the affidavit evidence provided by the respondent does not deal with this point at all save a bland assertion that the Minister did not take into account irrelevant considerations' **[emphasis added].**

[82] This is a finding by the first instance judge who had read all the evidence presented to her and who had the opportunity to pose follow up questions to the parties during the hearing. On the basis of the material and arguments presented she was satisfied that this ground must succeed. I am not persuaded that any basis has been established for overturning this conclusion.

Ground 5

[83] In Ground 5 the DE contests the judge's finding that that the Minister was in breach of the duty imposed by Article 89 of the 1998 Order. It complains that the judge was wrong to equate her finding of a connection between "the current school situation and the facilitation and development of Irish Medium education" with a failure to encourage and facilitate the development of IME contrary to Article 89. It states that this equation 'failed to recognise that the … improvement of a single IM school does not automatically equate to the facilitation and development of the sector as a whole …'

[84] These arguments must be considered in the context of the terms of the statutory duty. Article 89 provides:

> "It shall be the duty of the Department to encourage and facilitate the development of Irish-medium education.

> Article 89(4) defines 'Irish-medium education' as 'education provided in an Irish speaking school."

[85] This article imposes a clear, specific and unequivocal duty on the DE 'to encourage and facilitate the development of Irish-medium education', which is defined as 'education provided in an Irish speaking **school'** – not as 'education provided in the Irish Medium Sector' The Article 89 duty is a duty which applies as much at the granular level of the individual Irish speaking school, as it does at other levels of educational provision. This means that when a Minister is making a decision which affects an Irish speaking school or schools he is free to consider the application of the duty to the circumstances of an individual school if that is a level relevant to the decision he has to make. Also, Keegan J's finding of a connection between "the current school situation and the facilitation and development of Irish Medium education" is a perfectly viable legal conclusion to reach. The DE's complaint that this conclusion ' failed to recognise that the .... improvement of the situation of a single Irish Medium school does not automatically equate to the facilitation and development of the sector as a whole...' is misconceived. The terms of the Article 89 duty do not require facilitation and development of the entire IME sector in every case. Compliance with the duty may arise, as in this case, if the decision facilitates and develops the IM education provided in just one school.

[86] The DE argued that the application of the Article 89 duty must also take cognisance of the wider policy framework. In particular, the discharge of the Article 89 duty must be balanced with the DE's duty pursuant to Article 44 of the 1986 Order to avoid unreasonable public expenditure in responding to parental views about the education of their children. I fail to see how the DE can viably emphasise the importance of the cost factor in it arguments in relation to ground 5 of its appeal whilst simultaneously minimizing the relevance of cost in relation to ground 4 above. In any event, on the facts of the present case the cost of approving the DP is not materially different to the cost of refusing it and therefore, had the cost issue been properly weighed by the Minister, it ought rationally to have been a factor of some weight in favour of the DP. On the facts of the present case therefore, the cost consideration which is relevant under Article 44 cannot be regarded as a constraint upon, or a counterweight to, the DE's duty to encourage and facilitate the IM education provided at the school.

[87] The DE argues that the Minister must, in considering a development proposal, also have regard to the policy framework on sustainable schools. This proposition is quite correct, and when considering a DP in relation to an IM school in particular the Minister must remember to include in his considerations the statutory duty to 'encourage and facilitate' IM education. Given that he has a specific duty to approach IM education in a manner compliant with his Article 89 duty the Minister must be careful to consider the effects of other legislative provisions and departmental policies through the lens of his specific Article 89 duty. He ought to be mindful of the risk that policies which may be appropriate and helpful within the

context of established schools in well-developed sectors may be inappropriate and unhelpful in relation to the small and struggling IM sector. He must be careful to scrutinize all educational policies of general application with a view to informing himself on whether or not they might have some unforeseen negative effect on the emerging IM sector which he might counteract by lawfully relaxing the demands of the general policy in a way which would encourage and facilitate the IM sector, compliant with Article 89.

[88] In the present case the general policy on the sustainability of schools did in fact operate in an unduly negative and constraining way when applied to the emerging young school at the centre of the case. The sustainability policy states that to achieve 'sustainable' status a school ought to have a minimum of 140 pupils. The maximum number of places available in Gaelscoil an Lonnain was 71 places and this is the fact which placed the school in the 'catch 22' situation to which CnaG tried to draw the Minister's attention. The impossibility of compliance with this policy requirement within its current school building was a major impetus for the school in making the DP in the first place, but these were the very factors which the Minister did not receive advice about because he failed to look at the submission of CnaG which explained this issue and refused to consider the substance of their post-decision appeal letter which summarized the same information. By taking the stance he did the Minister left himself in a position where he could not properly consider how best to discharge his Article 89 duty because he did not have a clear and detailed understanding of how the general policy framework and particularly the policy guidelines on sustainability were impacting on the IM sector in general and on Gaelscoil an Lonnain in particular. This being I concur with the finding of Keegan J on this issue also.

[89] In relation to the interplay between Article 89 and other applicable statutory provisions and policy guidelines the DE makes the following argument about the Article 89 duty:

> "The duty is to encourage and facilitate. The statute is not prescriptive as to method. It is a matter for the Department how it does so. The Minister must, in considering a development proposal, also have regard to the policy framework on sustainable schools. That a particular decision might - to some degree - encourage and facilitate IM education is not decisive on its own. It still remains possible in any particular case that there will be better means to encourage IM education, whether those ways are yet identified or not, than the proposal before the Department. It is perfectly consistent with the Article 89 duty to turn down the proposal and request further work to encourage and facilitate the strategic

> development of sustainable IM primary provision in the area. That is what the Minister did in this case (see section 9 of the DP). Such a decision is not inconsistent or contrary to the statutory duty but rather is consonant with it."

[90] It is clearly the case that a duty to 'encourage and facilitate' anything can usually apply at a range of levels. In the case of Article 89 it can (and does) apply at the level of the individual school, at an area level, and at a sectoral level within the region of Northern Ireland. In certain cases the outcome of a decision making process may differ according to the level upon which the decision maker focusses when making the decision. So in a contest between an individual school and a collection of schools within an area, it might be that the duty would be better vindicated by favouring the collection- even if it meant culling an individual school from the scene. In such a context resolution of how to discharge the duty may require the decision maker to be guided by which choice *best* delivers the benefit that implementation of his statutory duty is intended to confer. This is the situation which would apply if, for example, there were two competing and incompatible DPs before a Minister and his duty was to decide between those two options.

[91] The DE in the present case posits a different scenario. It says the fact '(t)hat a particular decision might - to some degree - encourage and facilitate IM education is not decisive on its own. It still remains possible in any particular case that there will be better means to encourage IM education, ***whether those ways are yet identified or not,*** than the proposal before the DE...' In other words the DE proposes that where there is an extant, fully fledged DP on the Minister's desk the approval of which will unquestionably ' encourage and facilitate IM education' at least in the school affected, and ***there is no extant alternative proposal*** capable of delivering the same or greater benefit under Article 89, the Minister is still free to refuse to deliver the benefit of Article 89 to the potential immediate beneficiary. In this scenario, the struggling school doomed (under current arrangements) never to achieve 'sustainable' status and the 5 year old applicant who cannot access water play in his infant years, are to be refused the benefit of a statutory duty designed to support and assist them in favour of... nothing else. This proposition is unsustainable. I take the view that to refuse a DP capable of delivering the Article 89 benefits when there is no extant alternative proposal offering at least equal or greater benefit would amount to a simple refusal to comply with the Article 89 duty. Such a decision may be legally justifiable on *other* grounds, for example if there were excessive public costs attached to the DP in question, but it would not be justifiable on the grounds posited in the DE's submission.

Conclusion

[92] In light of all the above I would affirm the judgment of Mrs Justice Keegan. To the extent set out at para 62 above I would also allow the cross-appeal.

DEENY LJ

[1] Treacy LJ has helpfully set out the background to this appeal in his judgment but I find that I cannot agree with his conclusions. I have read the judgment of Morgan LCJ in this matter and I agree with it. I adopt his reasoning but consider it appropriate to add some observations of my own.

[2] The core of the decision of the lower court to quash the decision of the Minister to turn down the development proposal on behalf of the Governors of Gaelscoil an Lonnain was based on a failure to make sufficiency of enquiry – see paragraph [54] of the judgment. I must respectfully say that this conclusion based on this heading is plainly wrong. The alleged failure of sufficiency of enquiry was to take into account a draft report from a body called Comhairle na Gaelscolaiochta ("CnaG") a body established by the Department of Education ("the Department") to assist with the development of Irish medium education. In fact that body had been materially involved in the preparation of the very development proposal that the Minister turned down. Furthermore, it had an opportunity during the period of public consultation on the proposal to make any further representations which had occurred to them to the Minister.

[3] What happened is that CnaG submitted a draft report only two days before the Minister ultimately made his decision and two days after the Department had made a 56 page submission to the Minister addressing the relevant issues. One notes the following.

(i) The CnaG further report was not specific to Gaelscoil an Lonnain but dealt with wider considerations.

(ii) It was expressly stated to be a draft report and not a final report.

(iii) It was well outside the statutory period for further representations about this development proposal.

(iv) CnaG had already actually contributed to the development proposal and had a further opportunity to do so.

[4] In the light of this it seems to me quintessentially a matter for the discretion of the Department as to whether they should take into account this belated draft document. It seems to me quite unfair to the Department to find a decision unlawful because they had opted not to take this document into account. It might well have been criticized if it had been put before the Minister for consideration. As the Court of Appeal in England held in *R(Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] B 37, the manner and intensity of inquiry to be undertaken is a matter for the public body, subject to *Wednesbury* unreasonableness.

[5] Approaching it in an alternative way, not regarded as insufficiency of enquiry but as a relevant consideration that ought to have been taken into account, I would agree that there was some relevant material in the report but still consider that a decision-maker with a discretion, as here as found, correctly, by the judge was entitled because of the belated, draft and generalised nature of the document to take the course of not bringing it to the Minister's attention.

[6] More broadly it is common case that this decision by the Minister and the development proposal to which it relates must be seen against the background of a very long iterative process. As long ago as 2006 the Independent Strategic Review of Education, chaired by Sir George Bain, recommended minimum enrolment thresholds for primary schools to ensure financial viability and quality of education. It is common case that there are many very small primary schools in Northern Ireland. This is understandable if they are serving a village in a rural area but much less understandable when they are in Belfast. The Department has a duty to look at development proposals to see whether they will contribute to long term quality of education. Moving one small school with a little more than a third of the recommended enrolment of 140 for primary schools from an unsatisfactory site to be "an anchor tenant" in a mixed commercial development is a proposal the Minister was entitled to very carefully and critically examine.

[7] With regard to the second ground I respectfully agree with Treacy LJ that the judge was right to hold that even if some kind of pre-warning might have been beneficial the absence of it here was not unlawful.

[8] The third ground which the judge did uphold against the Minister is dealt with by Treacy LJ at [68] to [73] of his judgment and by Morgan LCJ at [31]. I concur with the latter. The Minister declined to carry out a post decision review of his own decision. In doing so he was acting in accordance with the published Circular which gave to proposers of development proposals a right to ask for this. CnaG asked for it here but it was not a proposer. Furthermore, as the ministerial reply said, by the time CnaG wrote and asked for the proposal the judicial review proceedings had been foreshadowed by formal correspondence in accordance with the pre-action protocol. It seems to me plainly wrong to hold that it was not within the Minister's discretion to decline to hold a review on either of those bases.

[9] The learned trial judge dealt very briefly with some other grounds relied on by the original applicant. She did hold that grounds under Article 8 and the Child Poverty Strategy were not made out. I agree with those conclusions.

[10] She found against the Minister on the basis that, as set out at [67] of her judgment, she could not "be satisfied that the Article 89 duty is discharged". I must respectfully differ from the judge. The submission to the Minister makes express reference to the Article 89 duty at internal paragraphs 2.1, 6.1-6.2, 8.1, 9.1-9.2 and 9.4

of the recommendations. There is no question of it being overlooked. It was thoroughly addressed and discharged.

[11] The decision to refuse this particular proposal is not one contrary, in the view of the Department, to Irish medium education. Encouragement of this sector is not achieved by acceding to every individual application made. The Minister not only has the right but he has the duty to look at the overall provision of such education and to conclude that this particular proposal was not of assistance. Cogent reasons for rejecting the Development Proposals are set out the in the comprehensive Submission to the Minister.

[12] I therefore respectfully agree with Morgan LCJ in this matter and not with Treacy LJ.

[13] It is not entirely clear from [63] of the judgment whether the judge was making a finding against the Minister on the basis that she could not identify a "cost based analysis" in his decision. But she does not say where there is a statutory or regulatory or other requirement for a "cost based analysis". The issue of costs of relocation is addressed at various points in the submission to the Minister and, at earlier stages of the iteration of this process. It does not seem to me that in the absence of any express requirement for a "cost based analysis" that the extent to which it was considered by the Department amounts to something that was unlawful.

[14] The judge did expressly find against the Minister at [64] on the basis "that the Minister took into account an irrelevant consideration namely the viability of another project at St Comgalls". The particular Minister who made this decision, in succession to Minister O'Dowd's earlier refusal of an earlier application from the school, was aware of a question mark over the viability of this commercial development project into which the school wished to move, unusually, in the capacity of anchor tenant. The Minister was aware in his capacity as a Minister of relevant considerations about a project. Is it seriously to be suggested that he should not bear in mind that information which he properly has in considering a separate proposal about the same project? If it is relevant, as it appears to be, he has a duty to take it into account. It may be that in some areas of the law, such as employment, rightly or wrongly, persons may be enjoined to put relevant matters out of consideration. But a Minister has a duty to serve the public and to require him by law to ignore areas of uncertainty that he is aware of from work in one department in considering a proposal arising in another department seems to me a wholly untenable finding.

[15] Treacy LJ has referred to the recent decision of the Supreme Court *DB v Chief Constable of the Police Service of NI* [2017] NI 301. I carefully bear in mind the dicta of Lord Kerr set out in paragraphs [78] to [80] and the citation of authority therein. This does not seem to me a case which offends against those dicta.

[16] It does not seem that the recent judgment of this court in *Department of Education v Cunningham* [2016] NICA 12 was cited to the judge, nor of myself in *In Re SK (A Minor)* [2017] NIQB 9, although they were both decisions relating to school closures in Northern Ireland. I hope I may be permitted to quote from a short passage in the latter judgment:

> "[39] The approach of the courts to their judicial review role in respect of school closures has been the subject of several judgments in recent years, most recently the *Department of Education v Cunningham* [2016] NICA 12. I quote from the judgment of the court in the following paragraph:
>
> > '[70] In the planning context, where very substantial sums of money may be at stake it is advisable to maintain a precautionary approach. The same might be said of public procurement. The price of probity is eternal vigilance. A test of "substantial doubt", as formulated by Lord Brown on behalf of their Lordships is appropriate. No doubt that might also be appropriate in certain other situations. But this appeal is concerned principally with the allocation of resources: whether a very small school requiring enhanced subsidy be closed or could it be operated as an integrated school, where financial and economic considerations also play an important part.'
>
> [40] The approach of the courts to executive decisions of this kind free of any imputation of improper motives should respect the different roles of the executive and judiciary, leaving a proper margin of appreciation to the decision-maker."

[17] It seems to me that the judgment at first instance denies to the executive the discretion it enjoys in law in this matter. The Minister's decision was one he was entitled to make. The executive should not be discouraged from discharging its duty to make decisions for the public good by judicial review challenges based on tangential or flimsy factors. The process here was neither unfair nor unlawful. I hold in favour of the appellant.