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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 13/10/2017

IN 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**

**AND IN THE MATTER OF A DECISION OF THE MINISTER OF EDUCATION
TO TURN DOWN DEVELOPMENT PROPOSAL 452**

KEEGAN J

Introduction

[1] This is a challenge to a decision of the Education Minister Mr Peter Weir MLA, ("the Minister") communicated on 17 June 2016 to refuse development proposal 452 for the relocation of Gaelscoil an Lonnain to the former St Comgall's Primary School site with effect from 1 September 2017 or as soon as possible thereafter.

[2] Ms Doherty QC appeared with Mr McGowan on behalf of the applicant. Dr McGleenan QC appeared with Mr McAteer BL on behalf of the respondent. I am grateful to both sets of counsel for their written and oral submissions.

[3] Leave was granted in this case by Colton J on 16 November 2016. Anonymity was also ordered by the court and agreed by all parties given that the applicant in this case is a child.

[4] The amended Order 53 Statement seeks the following relief:

- (a) An Order of Certiorari quashing the decision of the Minister of Education.
- (b) An Order of Mandamus compelling the Minister of Education either:
 - (i) to reconsider the decision; or

- (ii) to approve the said development proposal 452 and further relief.
- (c) Such other relief as the Court may deem appropriate.

[5] The grounds for the challenge are set out in the Order 53 Statement but these were marshalled by Ms Doherty at the hearing into the following five categories:

- (i) The first ground of challenge raised by Ms Doherty was that the decision of the Minister was reached in a manner which renders it procedurally unfair. Ms Doherty argued that there were three limbs to this. Firstly, she said that there was no information given in advance to relevant parties of the gist of the adverse information against the proposal. Secondly, she argued that there was insufficiency of inquiry. Thirdly, she said that the Minister misdirected himself regarding a review of the decision.
- (ii) The second ground of challenge was that the decision breached Article 89 of the Education (Northern Ireland) Order 1998 in relation to the promotion of Irish Medium Education.
- (iii) The third ground was that the decision failed to take into account the Child Poverty Strategy.
- (iv) The fourth ground was that the decision was reached on the basis of irrelevant considerations specifically the funding of the St Comgall's site. It was also argued that the decision failed to take into account a relevant consideration, namely cost effectiveness.
- (v) The fifth ground was that the decision engaged the Article 8 rights of the applicant and as such was in breach of the Article 8 rights of the applicant pursuant to the European Convention on Human Rights ("ECHR").

[6] The key organisations which I refer to and the acronyms which I use throughout this judgment are as follows:

- Gaelscoil an Lonnain – the applicant's Irish-medium primary school
- Educational Authority ("EA") - non-departmental body established by the Education Act (Northern Ireland) 2014 to replace the previous Education and Library Boards.
- Department of Education ("DE")
- Comhairle na Gaelscolaíochta ("CnaG") – established by the Department of Education to promote for the benefit of the public the development of all aspects of Irish-medium education.

- Iontaobhas na Gaelscolaíochta (“InaG”) – trust fund established by the Department of Education for the furtherance of education through the medium of Irish language in schools.
- Education and Training Inspector (“ETI”) – a unitary inspectorate and part of the Department of Education providing independent inspection services and policy advice for DE.
- Irish-medium and Integrated Education Team (“IMIE”) – a group within the Department of Education.
- Investment and Infrastructure Directorate – a group within the Department of Education.
- Area Planning Policy Team (“APPT”) – a group with the Department of Education
- Falls Community Council (“FCC”) – the group which is regenerating the old St Comgall’s primary school site.

[7] In determining this application I have had the benefit of reading an affidavit of the applicant’s next friend dated 15 September 2016. I have also read affidavits filed by the applicant’s solicitor. I have read affidavits filed by interested parties, namely the principal of the relevant school, Ciara McBride who filed affidavits dated 15 November 2016 and 7 February 2017. I have also read four affidavits filed by Liam O’Flannagain of CnaG. These are dated 10 November 2016, 7 February 2017, 28 February 2017 and 5 April 2017. Finally, an affidavit was filed on behalf of the applicant by Pilib O’Ruanai of InaG. On behalf of the respondent I have read the affidavits of Jacqueline Durkin dated 18 September 2016, 20 January 2017 and 24 April 2017.

Background

[8] The school at issue in this case is Gaelscoil an Lonnain. This is an Irish Medium school situated in West Belfast. The school was established in 1999 and secured grant maintained status in 2005. It employs a principal, two full-time teachers and one part-time teacher. The school had been located on temporary sites until it obtained its current location in 2004. That current location is the site of a former school St Finnian’s, located in the Lower Falls area. This area is characterised by high levels of social and economic deprivation. The rate of children entitled to free school meals is 86%, the average school attendance in 2014/2015 was 92% and the children on the SEN Register 56%. I was told that the school has a maximum in-take of pupils of 71. There are currently approximately 54 pupils enrolled at the school. The requisite number of pupils for a sustainable school is 140.

[9] The inadequacy of the school building facilities being provided to the children was described in detail during the hearing. There are clearly issues with internal and external space, and other safety concerns. This part of the case was not seriously challenged however the respondent contended that there was an over emphasis on the inadequacies given the judicial review function.

[10] As a result of the physical limitations imposed on the school the development proposal that is at issue was formulated by the Board of Governors to move the school to other premises. It should be noted that the school's current premises at St Finian's is rented. I was told that this is rented at a figure which is broadly similar to the figure that would be required in rent for the new premises. The proposed new premises are part of a regeneration scheme in the area at St Comgall's and as part of the development proposal the school would be the anchor tenant in a multi-purpose building obtaining a floor space for a number of classrooms.

[11] In a case of this nature there are clearly statutory and policy issues which frame an application and set a context. The interested parties in this application are the child who has brought the application by his mother and next friend. The development proposal for the move of the school was brought by the Board of Governors at the school. 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 and InaG."

Statutory Framework

[12] 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.”

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."

Article 89 of the Education (Northern Ireland) Order 1998 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 any body 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."

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."

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."

Policy Context

[13] The report of the Independent Strategic Review of Education (the Bain Report) was published on 4 December 2016 following consultation with the education sector and other interests. This report was a comprehensive document dealing with the use of resources in education, the need for better strategic planning

of schools, and the need for improving, sharing and collaboration. The report included sixty one recommendations to address the challenges facing education and it also set out educational, social and economic markers for change. The central focus was of course the quality of children's education.

[14] This contextual background is important because the report examined carefully the issue of viability of schools as a central consideration for area planning. In particular it made two specific recommendations on these aspects as follows:

“The policy for sustainable schools should ensure that all schools are sustainable in terms of the quality of the educational experience of children enrolment trends, financial position, school leadership and management accessibility and the strength of their links to the community.

The Sustainable Schools Policy should ensure that regardless of the financial position of a school or the services it provides, it is not considered viable if the quality and breadth of the education it provides is less than satisfactory.”

[15] The report recommended minimum enrolment thresholds for primary schools, post-primary schools and sixth forms as a basis for ensuring that all children have access to an educational experience that is at least satisfactory.

[16] Following from this a sustainable development strategy for Northern Ireland was published by the Office of the First Minister and Deputy First Minister in May 2006 recognising the need for changes in behaviours and practices across society to protect the environment. An implementation plan for sustainable development was published in November 2006. This strategy committed the Department of Education to a wide ranging set of actions to embed sustainable development in all aspects of education. The key target was to introduce formal education and sustainable development to the curriculum at key stages from 2017 and this has been achieved.

[17] Following from the Bain Review the Department of Education published a policy for sustainable schools. This comprehensive document has been opened to me and it picks up the themes from the Bain Report. In particular it states at paragraph 1.8:

“In advancing towards a vision of effective education the sector will want to:

- Ensure that the excellent quality of education available to some young people is made available to

all, in both urban and rural settings, in accessible, modern, fit for purpose accommodation.

- Improve outcomes for all but, in particular, to provide additional support to those who require it, including those children with special educational needs, to realise their full potential.
- Encourage schools to co-operate in sharing best practice to support children with special educational needs and those with other barriers to learning.
- Sustain, successful and viable schools, well led by their governors representing local stakeholders, principals and their staff, to be the centre of the education system, supported by effective administration and strategic direction.
- Encourage schools to become closely integrated with their wider community, with much better links to early years provision and to informal educational opportunities beyond the school.
- Implement a revised curriculum offering fresh opportunities, particularly to those for whom education is currently not working well enough.”

[18] This document clearly states that strong sustainable schools providing quality education and access to the full curriculum are central to the achievement of the educational vision. The issue of sustainability is an important thread throughout the document. Paragraph 2.14 refers to integrated and Irish-medium schools and states that:

“The Department of Education has statutory duties to encourage and facilitate integrated and Irish-medium education. DE also takes account of the fact that we are a signatory to the European Charter of regional and minority languages: Part 3 gives rise to certain obligations in respect of the teaching of, or through, Irish where there is sufficient demand. DE has a clear duty therefore to respond positively to parental demand for integrated and Irish-medium education. The Department considers individual proposals for funding of a new school against a number of factors, including educational standards, premises, intakes and enrolment viability, suitable alternative provision, religious balance for

integrated schools, objections to the proposal, public expenditure implications and impact on other schools, and decides on the merits of each case.

[19] The document then refers to area based planning and at paragraph 2.18 it states:

“In developing area based plans, a central consideration must be the need for schools which will be viable. The sustainable schools policy is therefore to help provide a framework to inform the preparation of area plans.

[20] Section 4 sets out enrolment thresholds for primary schools and at paragraph 4.7 it states that:

“The Bain report recommended that, as a minimum, an urban school should have 140 pupils (or an average of 20 pupils per year group). The minimum enrolment for rural areas should be 105 (an average of 15 pupils per year group) in recognition of population levels in rural areas. The criteria for investment in new primary schools are therefore in line with the recommended minimum thresholds and will continue to apply.”

[21] Paragraph 6 of this document sets out the sustainability criteria and six indicators are described namely:

- (a) Quality education experience.
- (b) Stable enrolment trends.
- (c) Sound financial position.
- (d) Strong leadership and management by Board of Governors and principals.
- (e) Accessibility.
- (f) Strong links with the community.

[22] Following from this policy document the issue of sustainable schools was taken forward in a draft area plan. I have been referred to the draft Belfast Education and Library Board (BELB) area plan for primary education which is dated 19 March 2013. The executive summary of this plan states that it is a draft area plan for primary education produced for public consultation. The aim of the plan is stated to be to facilitate the development of a network of viable and sustainable primary schools which can effectively deliver the Northern Ireland curriculum. The document refers to the fact at that stage that there were 88 primary schools

providing 33,632 places within the BELB area. It refers to the fact that there were 23,555 primary school pupils and 10,203 unfilled places. In relation to the Irish Medium sector the summary of issues points out that there were 537 unfilled places between the 8 Irish Medium schools. The plan states that the Board will continue to engage with the managing authorities of Irish Medium schools to develop options to address these issues.

[23] A further draft strategic area plan for school provision has now been produced by the EA as a consultation document dated 4 November 2016. It is entitled "Providing pathways". The Foreword written by Gavin Boyd, the Chief Executive, states as follows:

"I would emphasise that the core purpose of planning a network of sustainable schools is to ensure that all children and young people have access to educational choices which best meet their individual talents and abilities and which maximise the chances to reach his/her potential. Children and young people have a right to equitable access to the Northern Ireland curriculum and the full range of courses provided within the entitlement framework at post-primary level providing pathways is a strategic plan which identifies the key factors which inform area planning, the strategic themes which are central to the planning process and the issues we need to address in providing high quality education in fit for purpose schools in the future. This 3 year high level plan identifies priorities for action which will be taken through annual action plans. The plan refers to the Sustainable Schools Policy in detail."

[24] Running alongside the area plans I have also been referred to a capital review which took place in 2015. In particular there is a briefing document I have been referred to which is dated 11 August 2015 which refers to a review of the 7 Irish-Medium schools that have not met the capital viability criteria to assess their suitability for capital viability on a case by case basis. This included the Gaelscoil an Lonnain. The background to this review is stated to be that the Sustainable Schools Policy outlines minimum enrolment criteria for recurrent and capital funding. It states that 4 of the 7 schools have not met the criteria for capital funding have been in receipt of recurrent funding over 5 years and as such a review was required. It is important to note that comments in relation to this were sought from InaG and CnaG who both liaised with the schools in question.

[25] At paragraphs 31-37 of this document details are set out in relation to the Gaelscoil an Lonnain in particular the enrolments in that school and the enrolments by year group, the distance from other schools. Paragraph 35 states:

“The governors of the school are keen to explore plans to become part of St Comgall’s Development Project and relocate to a site at Divis Street. Whilst the new site is only around 300 metres away, the governors believe this would alter the school’s catchment more towards the city centre to serve the John Street/Hamill Street area and the old Divis area in the lower Falls.”

Paragraph 36 reads as follows:

“In their submissions, both InaG and CnaG recognise that sustainability or achieving the capital viability thresholds is not possible for the school on the current site particularly stressing the inadequate accommodation, which they feel is a disincentive for potential parents. However, both feel that relocation to the new site will enable the school to develop and become sustainable. InaG argues that Gaelscoil an Lonnain has demonstrated its durability since 1999 and that with additional support the school could carve out a niche for itself as an inner city school catering for its local area as well as parents working in Belfast City Centre.

The conclusion at paragraph 37 is as follows:

“Nonetheless, at the current time the potential impact of any future relocation cannot be accurately assessed. If relocation was deemed to potentially alter the schools catchment area, a development proposal would be required. Given the very low enrolments, closely located alternative Irish-medium provision, the recent regression and the quality of education provision and the current poor accommodation, the long-term sustainability of Gaelscoil an Lonnain is questionable. In this context it is recommended that you do not approve capital viability for Gaelscoil an Lonnain at this time.”

This proposal of the Department of Education was ultimately accepted and the Minister in office at the time decided not to approve capital viability for Gaelscoil an Lonnain on 1 September 2015. That is the context for the development proposal.

Context of the Development Proposal

[26] The chronology for this has been helpfully set out by Ms Doherty as follows:

17 April 2015	DE sought CnaG's input into a review of Irish-medium primary schools that had not yet achieved capital viability.
May 2015	Consultation with 4 other Irish-medium primary schools on relocation of Gaelscoil an Lonnain. All replied with no objections.
22 June 2015	CnaG provided input into the review of Irish-medium primary schools, including both general input and specific input re Gaelscoil an Lonnain.
September 2015	The applicant commenced Primary 1 in Gaelscoil an Lonnain.
September 2015	Conclusion of review of Irish-medium primary schools.
September 2015	Consultation with parents on relocation.
October 2015	Consultation with staff on relocation.
14 January 2016	Education Authority'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.
8 March 2016	Meeting with Gaelscoil an Lonnain representatives at Parliament Building regarding the development proposal.
29 March 2016	End of statutory objection period.
13 June 2016	Department of Education submission to the Minister having received input from various bodies.
15 June 2016	CnaG provided their draft area planning report to the DE.
20 June 2016	The Minister's decision was communicated to the school, the Education Authority and CnaG.
27 June 2016	The applicant's mother wrote to the Minister asking him to reconsider the turning down of the proposal. A reply was received declining this request.

- 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 commencing legal proceedings and it would therefore be inappropriate to respond to specific points raised until this judicial review process is concluded.
- 22 July 2016 Letter from DE to applicant's mother advising of the Pre-action Protocol and it would therefore be inappropriate to engage directly.
- 16 September 2016 The applicant filed an application for leave to apply for judicial review.

[27] It is clear from the above that prior to and during the various phases of the development proposal the DE and CnaG were engaged on issues relating to Irish Medium education planning. This was during 2015-2016 and the sequence is set out and traversed in the various affidavits. I highlight the following by way of example:

- By letter of 17 April 2015 the DE wrote to the Senior Area Planning Officer of CnaG stating:

"I am writing to advise that the Minister has agreed that the DE should carry out a review of the Irish Medium Primary Schools that have not yet achieved capital viability and to seek your input into that review."

This included Gaelscoil an Lonnain.

- CnaG sent a substantive response dated 22 June 2015 which includes the following in the section headed 'contextual conclusion':

"The reality is that many young Irish Medium schools find themselves in a catch 22 situation where they cannot secure capital investment in the buildings unless they can attract the pupil numbers and they cannot attract the larger pupil numbers, because they are not very physically attractive institutions in which to have children educated."

- As regards Gaelscoil an Lonnain the following also appears:

“It is our contention that should the issue of a school site and accommodation be favourably resolved we are confident that Gaelscoil an Lonnain will realise the next threshold for capital viability within the foreseeable future.”

- In relation to the Irish Medium Education Sectoral Plan for Area Planning Liam O’Flannigan e-mailed Jacqui Durkin and others on 15 June 2016 enclosing his first draft which is expressed as a work in progress. This is a substantial document dated May 2016. Gaelscoil an Lonnain is specifically mentioned in this report and reference is made to the inadequate facilities and that the growth of the school has been severely hampered by it being unfit for present purposes. The report also refers to enrolment trends and strategy for the promotion of Irish medium education.
- In the third affidavit of Ms Durkin at paragraph 16 she avers that:

“It is wrong of Mr O’Flannigan to suggest that CnaG’s comments about Gaelscoil an Lonnain contained within its area plan presented to the APLG represented its formal comments on DP 452 and should have been treated by the Department accordingly. A submission by CnaG to inform consideration of a proposal at its formative stage cannot be considered to equate to CnaG expressing support for a published proposal as part of the statutory DP process.”

The Development Proposal

[28] A departmental circular which was issued on 26 September 2014 sets out the process in relation to a development proposal. In particular it states that a proposal can be brought by a range of bodies including a Board of Governors or sectoral interests. There are four main phases namely identification of need in the area planning context, pre-publication, consultation and the statutory objection period. The Department’s role formally begins at stage four when it gathers together objections, and makes a recommendation to the Minister after which the decision concludes the process.

[29] In this case the development proposal was formulated by the Board of Governors. This was in accordance with the circular and I have seen the notification of it which allowed for a two month consultation period. It is important to note that during that time no objections were raised. The proposal was supported by other local schools. There is a comprehensive document setting out the background to the proposal, the rationale for the proposal, area planning, educational impact, resource implications, the implementation plan and the statutory consultation period. The document states that the EA would support the proposal. This document is

appended with Appendix 1 which sets out evidence of the consultation process during which none of the schools nearby raised any objections to the proposed development proposal.

[30] The next document which was part of the consideration is an input from the Education and Training Inspectorate. In this response the educational provision at the school is stated as being satisfactory. The response states that the ETI is monitoring currently the school's progress and addressing the areas for improvement identified in the inspection which included the need to:

- Develop further play based learning in the foundation stage.
- Review whole school planning to ensure more rigorous and consistent approach to learning and teaching in all aspects of literacy and develop a more robust process for monitoring and evaluating the children's learning experiences and attainments throughout the school in order to ensure progression and raise standards. It is important to note that the ETI state that the current school building does not meet well the learning needs of the children.

[31] The ETI recommendation is positive on the basis of the inspection evidence. The submission does note that the quality of education provided by the school in June 2015 had important areas for improvement. It therefore recommended that it is imperative that the school addresses effectively the areas identified at the time of the inspection relating to the children's achievements and standards, quality of provision and leadership and management of the needs of all of the children are to be met fully.

[32] The Irish Medium and Integrated Education Team also provided a comprehensive report which deals with issues of sustainability from paragraph [12] to [21]. The gravamen of this report is that the proposal was not supported in the short term. In particular from paragraph [19] to [20] and [21] the following is recorded:

“[19] In light of below enrolments; closely located and good quality alternative Irish Medium provision; and the recent regression in the quality of education provision, the long term sustainability of Gaelscoil an Lonnain is questionable.

[20] The proposed new site is only about 400 metres away. The Governors believe this would alter the school's catchment more towards the city centre to serve the John Street/Hamill Street area and the old Divis area in the Lower Falls and tap into a new reservoir of pupils. However, it is highly uncertain

that such a limited relocation would have a significant impact on the long term viability of the school. The impact of the move is at best unknown, particularly as the new accommodation will not be ready for some time and will not allow the school sufficient accommodation to expand to sustainable level of enrolments.

[21] It is, therefore, considered that an urgent review of the school in particular and Irish Medium provision in Belfast more widely should be carried out to ensure provision is viable and sustainable in the long term is required. This is in the best interests of both the pupils currently attending the school and the sector as a whole.”

[33] The Investment and Infrastructure Directorate’s input stated that there were currently no health and safety requests outstanding from the school. This submission raised some practical issues but overall it recommended that the development should be approved. As part of the submission papers there is a note of a meeting which took place between the Minister and community representatives on Tuesday 8 March 2016 at Parliament Buildings. In attendance were the Chair of the Board of Governors, a MLA and an MP and a member of the Falls Community Council. This minute records the support within the community for the proposal and notes that Gaelscoil an Lonnain is situated in one of the most socially deprived constituencies in the north of Ireland, with high levels of unemployment and low educational attainment.

[34] There follows a briefing to the Minister which is dated 13 June 2016 and this contains the recommendation to turn down the development proposal. The case in relation to that is set out in a comprehensive document authored by Lorraine Finlay. The recommendation at Section 9 is as follows:

“9(1) On balance DE concludes that in view of unresolved sustainability and long term viability concerns at Gaelscoil An Lonnain and in relation to Irish Medium primary provision in Belfast generally, the statutory duty in this case would be best served by looking more strategically at the future design of Irish Medium primary provision in the area, and reflecting this consideration within the EA’s 2017 to 2020 area plan for primary education.

9(2) DE considers that this proposal is a single school solution rather than an area solution to strategically plan IM primary education to maximise

the benefits for pupils and the impact of available resources. There is over supply of Irish Medium primary provision in the area and this proposal does nothing to protect the integrity of sector by addressing that fundamental issue or to provide assurance there will be a network of viable and sustainable IE schools to meet parental demand.

9(3) DE is also concerned about the appropriateness of Government (through the Executive Office and its management of the investment fund) investing in the St Comgall's Regeneration Project on the basis of occupancy by a school which is described as an anchor tenant particularly where significant concerns exist about its future sustainability."

The decision of the Minister

[35] The Minister ultimately accepted the recommendation of the Department and by correspondence to various interested parties of 20 June 2016 he explains his decision. I should say that the letter is written by Lorraine Finlay on his behalf. In essence the letter states that the Minister has decided to turn down the proposal due to "unresolved sustainability and long term viability concerns at Gaelscoil an Lonnain and Irish Medium primary provision generally in Belfast". The letter also highlights the Minister's concern about the appropriateness of Government investing in St Comgall's Regeneration Project on the basis of occupancy by this school which is described as an anchor tenant, particularly where significant concerns exist about its future sustainability. The Minister concluded that the statutory duty in this case would be best served by looking more strategically at the future design of Irish Medium primary provision in the area. Therefore, he explained that officials will liaise with Gaelscoil an Lonnain and the EA to ensure they work together through the existing area planning governance, structures and processes to encourage and facilitate the strategic development of sustainable Irish Medium primary provision in Belfast in line with the statutory duty. He states that these considerations should be within the EA's 2017 to 2020 area plan for primary education.

[36] At paragraph 25 of her first affidavit Ms Durkin also states the following:

"Having carefully considered the detail of this proposal, the Minister turned it down on 17 June 2016. In doing so he tasked his officials to liaise with CnaG and the EA to ensure they work together through existing Area Planning governance structures and processes to encourage and facilitate the strategic development of

sustainable Irish Medium primary provision in Belfast in line with the statutory duty.”

The request for a review

[37] Subsequent to the communication of this decision a letter dated 27 June 2016 was sent by the applicant requesting the Minister to reassess his decision. By letter of 22 July 2016 the Minister declined to take any action given that the pre-action protocol for judicial review had been received.

[38] A detailed letter was also sent dated 14 July 2016 by CnaG to the Minister. It is important to note that at the outset the author says that he thanks the Minister for the recent meeting which I assume is in relation to the parallel processes being undertaken in terms of the area sectoral plan that CnaG was involved in. But essentially this letter sets out CnaG’s position and asks the Minister to look again at the decision particularly given issues of sustainability which the CnaG letter takes issue with as presented by the IMIE submission.

[39] The reply to this correspondence is dated 20 July 2016. In it the Minister states that:

“I should explain that decisions on DPs are final, and can only be overturned as a result of a successful challenge through judicial review.”

The letter also refers to the fact that judicial review pre-protocol action has already taken place. Ultimately, the Minister did not review the decision and this is the impugned decision now under challenge.

Arguments of the parties

[40] The parties both presented comprehensive skeleton arguments which I have considered. In relation to the procedural limb of the challenge Ms Doherty initially made the case that all of the submissions to the Minister should have been disclosable prior to the decision being made. I questioned Ms Doherty about the strength of this point and she rightly in my view did not pursue that argument in reply. Instead she effectively said that the gist of the unfavourable submission should have been provided to the interested parties prior to the Minister making his decision and in that respect she relied on the case of McCallion & Others 2001 NI 401.

[41] Ms Doherty also submitted that CnaG were not actively sought out as part of the consultation process and there was insufficient inquiry. In relation to the Minister’s review, Ms Doherty argued that given the letter that had been sent there should have been a review of this case particularly on the basis of information provided by CnaG. She referred to a circular in relation to this which allows a

proposer to request a review if incorrect information has been provided. Ms Doherty accepted this did not apply to parties other than a proposer but she relied on a common law duty of fairness to review a decision as her foundation for this argument. Ms Doherty stressed the fact that the Article 89 duty is positive. She referred to various dicta of Treacy J in particular in the case of McKee in this respect and said that this had not been taken into account in this decision-making. In relation to the Child Poverty Strategy Ms Doherty contended that this was a part of an executive strategy and should clearly have been mentioned in decision-making.

[42] Ms Doherty did not make any oral submissions on the Article 8 point and realistically she did not press that argument. However, Ms Doherty did pursue an argument about the consideration of irrelevant criteria namely the situation at St Comgall's. She said that this was outwith the Minister's discretion because it was in relation to completely different premises and if there was a viability issue it should have been brought to the Executive. Finally, Ms Doherty pressed the point that there had not been a proper cost based analysis of this proposal. She said that the figures given were not set in stone and in any event that this was a cost neutral proposal because the rent would be the same. She stressed however that there would be a saving given maintenance costs because they were indicated at £125,000 currently at the old site.

[43] In essence Ms Doherty summarised that the children in this case including the applicant are currently being educated in a sub-standard facility and that the development proposal was not challenged during the consultation period by way of objection and that an important sectoral body had a different view on sustainability to the views put to the Minister and as such the decision should be quashed. Ms Doherty informed me that the school had to sign a new lease but that a break was provided for and that the school remained committed to the development proposal.

[44] Dr McGleenan QC, on behalf of the Department, began his submissions by stressing that the court has a supervisory function. He suggested that the submissions on behalf of the applicant frequently drifted into a consideration of the merits. Dr McGleenan rightly did not take any great issue with the inadequate physical nature of the premises but he stressed that in law there was nothing unlawful about the Minister's decision-making either procedurally or substantively. Dr McGleenan referred me to a number of authorities in this area namely Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 75 and R(Plantagenet Alliance) v Secretary of State for Justice 2014 EWHC 1662 QB. He argued that the Bloor Homes case provided a useful exposition of the ministerial discretion.

[45] Dr McGleenan submitted that looking at the facts on this case it was clear in the submissions that the Article 89 duty is at the forefront of the decision-maker's mind and the dicta of Treacy J in the relevant cases is even specifically mentioned. Dr McGleenan accepted that the Child Poverty Strategy while not specifically

referenced was clearly reflected in terms of the submissions and the meeting on 8 March which highlighted deprivation in this area. In relation to Article 8 of the ECHR Dr McGleenan queried whether this was engaged but if so he said that the interference was minimal and justified. In relation to St Comgall's he said that any Minister acting reasonably must take into account the issue of the financial circumstances of the new premises and it would be irrational not to. In relation to the costs issue Dr McGleenan said that the matter had been considered.

[46] On an overall view Dr McGleenan said that this decision was neither unlawful nor irrational. In essence he said that the decision was grounded in a strategic look at education in the context of a new area plan and effectively he was saying that the right course, if there is an issue with the decision-making, would be for an interested party to re-apply in that context. He stressed that it was the Board of Governors who proposed this development and in due course in the future there was nothing to stop CnaG from presenting a development proposal. However Dr McGleenan did not dispute the fact that CnaG have an important sectoral role in relation to this subject matter but he made the case that they had been part of a process leading up to this development proposal. He stressed that there was also a capital viability review running in tandem and they were preparing an area sectoral plan report. Dr McGleenan submitted that CnaG were not side-lined or in the dark. In short Dr McGleenan said sustainability was a part of this case, everyone knew that was the issue and as such the Minister reached a rational decision taking all of that into account. Dr McGleenan said there was no obligation on the Minister in this case to share the ministerial submissions or the gist of the decision in advance. He said that this case could be distinguished from McCallion.

Consideration

[47] In this case there was a broad acknowledgement that the school is operating in less than ideal circumstances. This obviously affects the children being educated. In addition the applicant also contends that this ongoing situation hinders the development of Irish Medium education. That is the backdrop to the development proposal which is at the centre of this case. However, this is not a merits review or an appeal of a planning refusal. I am not conducting a hearing about the inadequacy of the school building and where it should move to. I am exercising a supervisory function in relation to the lawfulness of the Minister's actions. The real issue is whether the Minister has reached a decision on the development proposal which is unlawful, unreasonable or irrational in some way.

[48] I acknowledge the dicta put to me from the Bloor Homes case which encapsulates the breadth of ministerial discretion in planning decisions. Articles 14 and 15 of the 1986 Order refer to the ministerial discretion in deciding whether a development proposal should be granted or not. There will be certain matters of judgment left for the Minister within the bounds of lawfulness, reasonableness and rationality. This is a case where the discretion is unstructured and, as there are not set criteria, the court should be careful not to trammel the Minister's discretion. In

particular I note the dicta of Laws LJ in K(Khatun) v Newham LBC [2004] EWCA Civ 55 case in relation to issues of weight and emphasis largely being within the provenance of the Minister's discretion.

[49] However, I also bear in mind the particular context of this case. There is a statutory duty contained within Article 89 of the Education Order which distinguishes this type of case from a classic planning decision. Article 89 sets out a positive statutory duty. The context of promoting education in the Irish language Medium finds its imprimatur in statute. Treacy J observed in McKee's Application [2011] NIQB 98 that this duty does not apply to other sectors and it is not merely aspirational. As I have said this duty has legislative force and is reiterated in policy. There is also the requirement placed upon the Department by virtue of Article 44 of the Education and Libraries Order to educate pupils in accordance with the wishes of parents within the parameters of reasonable public expenditure. In this case I also have regard to the policy considerations which originate in the Bain Report and have found focus in ensuing area plans.

[50] I remind myself of the general principles set out in Doody v Secretary of State for the Home Department and Others [1994] 1 AC 531 p560d/g. In that case Lord Mustill emphasised that the exercise of determining the requirements of fairness was "essentially an intuitive judgement".

[51] Gillen J's analysis of fairness demands at paragraph 40 of An application by Witness A, B, C, K and N 2017 NIQB 30 records the established view that;

"What fairness demands is dependent on the context of the decision and that has to be taken into account in all its aspects."

[52] The first port of call is the statutory regime which may specifically set out the procedural steps to be taken in any case. Where a statutory process is of itself insufficient the common law applies. The duty of fairness governing the exercise of a statutory power is a limitation on the exercise of discretion of the decision maker as Lord Sumption stated in Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) NO 2 [2013] UKSC 39. Of course the application of the principle will depend on the facts of each case. In Mellat the Supreme Court held that there was a duty to consult with a bank about an adverse order being made against it to allow effective representations to be made. In McCallion Kerr J held that there was a duty to provide some adverse material to claimants applying under the criminal injuries compensation scheme. Those cases have distinctive facts. In this case the Minister has an unstructured discretion and so the question is whether there has been a breach of common law fairness.

[53] The procedural challenge in this case was described variously as a failure of sufficient enquiry, a failure to consult, a failure to provide a gist in advance of an adverse decision and a failure to review. Reliance was principally placed upon the

letter sent by CnaG post decision to ground this argument. There was no issue taken in relation to the status of CnaG in these proceedings. In my view that is the correct approach as 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.

[54] In this case it is accepted that there was no statutory duty to consult CnaG. It is also accepted that CnaG did not present their information within the statutory process. I note from the second and third affidavits of Ms Durkin that historically CnaG were consulted about development proposals. She states that since current area planning changes there were two occasions when CnaG were mistakenly contacted. She describes that as an 'administrative error' but because views were sought there were included and referenced in the decision making process. There is no real explanation as to why the process changed but I am assuming that it was because CnaG's views were being heard through the various Area Planning Groups which Ms Durkin sets out in her first affidavit. This is rather curious situation and the affidavits point to some difficulties in operation but in any event the status of CnaG is recognised. I consider that some consultation would have been desirable in this case. In my view it falls to be considered under the umbrella of sufficiency of inquiry to which I now turn.

[55] In Plantagenet Alliance Gloster LJ states that this ground of challenge trammels procedural fairness and substantive challenge in terms of the decision maker reaching a rational conclusion, see paragraph 98(5). The duty stems from 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] I remind myself that the court should not intervene simply because it considers that further enquiries would have been sensible. However, 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. Dr McGleenan contended that CnaG could have come forward during the consultation period. A more general criticism can be implied that CnaG may have sat back and so they cannot complain after the event. I have some sympathy with these points and I can detect some complacency or perhaps naivety on CnaG's part. However, by the same token I consider that CnaG should not have been side lined in the decision making process in the circumstances pertaining in this case. 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.

[57] 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. This mirrors material in the May 2016 draft report which contained a detailed analysis of the core issue of sustainability. CnaG also made their position clear during the capital viability review in 2015. 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.

[58] 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. I acknowledge that the CnaG submissions were not formal comments on the development proposal. However, the respondent accepts that comments were made at a 'formative stage' of the proposal. The distinction is rather artificial given the material that was provided which clearly denoted support for a move of school premises. The respondent's position also impliedly accepts that express support for the proposal would have been material.

[59] I do not accept the argument that the actual submissions provided to the Minister should have been made available to interested parties pre-decision. Ms Doherty was unable to produce any authority in law in relation to this and that is unsurprising to me. There is however authority in relation to the gist of adverse decisions being presented to affected parties. I have read the McCallion decision which involves a different factual circumstance but is a useful indicator of the principle involved. The circumstances of each case will reflect the extent to which information is provided pre decision. However, the underlying consideration is fairness and what was described in Doody as "a perceptible trend towards an insistence on greater openness ... or transparency in the making of administrative decisions". As Kerr J explained in McCallion this is particularly apposite when an adverse decision has to be explained.

[60] 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. The applicant was able to present a comprehensive plan in the development proposal and as such on the facts of this case I cannot see that the applicant was actually prevented from making effective representations.

[61] I now turn to the question of whether or not the Minister should have conducted a review post decision. I can understand that there is a circular dealing with review which states that decisions will not be reviewed save in limited circumstances on an application by the proposer. Of course the parents and CnaG are not proposers. So the Minister is not compelled to review by virtue of law or policy. 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. 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.

[62] I also consider that a valid challenge was made in terms of the consideration of an 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. The applicant raised the fact that maintenance costs would reduce if the old premises were vacated. 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. This was a situation where the Minister had not returned to the Executive on that issue. I am persuaded by Ms Doherty's arguments in this regard. 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.

[65] I reject the ground of challenge in relation to the Child Poverty Strategy. In my view the issue of social deprivation was clearly on the agenda even if it was not specifically referenced.

[66] The argument in relation to Article 8 was not strongly advanced and it seems to me that it does not add to this case. This ground was not made out.

[67] Finally, I have considered the case made in relation to Article 89. The duty is expressly referenced in the submissions which were made to the Minister. However, to mention the duty is not equivalent to satisfying it. In my view 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.

Conclusion

[68] It follows that I do not consider that this decision can stand for a variety of reasons. The respondent contended that even if I were to find for the applicant, relief should be refused because a new application could be made by the school or indeed CnaG. I am not attracted by that argument as I am not prepared to allow this decision to remain in place. I also consider that relief should be granted as the situation is ongoing.

[69] Accordingly, the decision must be quashed. I will direct that the development proposal is reconsidered in light of this ruling.