APPROVED

REDACTED

AN ARD-CHÚIRT
THE HIGH COURT

[2024] IEHC 575

Record No. 2022/632JR

BETWEEN/

C

APPLICANT

-AND-

THE PANEL OF THE DISCIPLINARY COMMITTEE OF THE TEACHING COUNCIL

FIRST NAMED RESPONDENT

-AND-

THE DIRECTOR OF THE TEACHING COUNCIL

SECOND NAMED RESPONDENT

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 28th day of June 2024

INTRODUCTION

Preliminary

1. This application for judicial review seeks to challenge the decision dated 21st June 2022 of a panel of the disciplinary committee of the Teaching Council[1] at a preliminary hearing, to deem screenshots of information from a mobile telephone messaging application admissible as evidence to a statutory investigation carried out by it.

2. The First Named Respondent comprises a panel of the disciplinary committee of the Teaching Council ("the panel") and the Second Named Respondent comprises the Director of the Council ("the Director").

3. The Applicant seeks *inter alia* to quash the decision of the panel dated 21st June 2022 to permit the Director to adduce in evidence at an inquiry, screenshots of information allegedly taken unlawfully from the Applicant's mobile messaging application ("the screenshots") by the Applicant's former partner and/or evidence garnered from any unauthorised and/or non-consensual access to the Applicant's social media account. The inquiry is due to take place at a later date pursuant to Part 5 of the Teaching Council Act 2001 as amended ("the 2001 Act").

4. In summary, four allegations of professional misconduct and a contravention of the relevant Code of Conduct were made against the Applicant to the effect that while employed: (i) on every day during a defined period, the Applicant sent and received at

[1] The Teaching Council is also referred to in this judgment as "the Council".

least one photograph and/or video via a mobile messaging application to a third party whom the Applicant had taught in fifth and sixth year, and who was in the process of completing the Leaving Certificate examinations; and/or (ii) on every day during a defined period, the Applicant sent and received at least one photograph and/or video via a mobile messaging application to and from a third party, whom the Applicant had taught in fifth and sixth year, and who was awaiting the results of the Leaving Certificate examinations; and/or (iii) on a date unknown in a specified month, the Applicant had a sexual encounter with a third party, whom the Applicant had taught in fifth and sixth year, and who had just sat the Leaving Certificate examinations in a defined month and year; and/or (iv) during the summer of a defined year, the Applicant engaged in a romantic relationship with a third party whom the Applicant taught in fifth and sixth year.

5. At a preliminary hearing held on 1st February 2022, the panel was informed that the Applicant intended to object to the admissibility of the screenshots which the Director intended to adduce at the inquiry.

6. The parties agreed that the panel should rule on this issue in advance of the commencement of the inquiry and could do so without oral evidence and on the basis of agreed facts. These agreed facts are, subject to further redaction, referred to later in this judgment.

7. A further preliminary hearing took place on 31st May 2022 on the admissibility of the evidence in question and consequential directions were made. As stated, the panel gave its decision on 21st June 2022 to allow the screenshots to be admitted in

evidence, and it is that decision which the Applicant seeks to impugn in this application for judicial review.

8. At the hearing before me, the Applicant was represented by Eileen Barrington SC and Eoghan Cole SC. The Respondents were represented by Remy Farrell SC and Eoghan O'Sullivan BL.

SUMMARY OF AGREED FACTS

9. The facts agreed for the purpose of the panel's preliminary ruling on the question of the admissibility of the screenshots were as follows:[2]

(a) The Applicant has been in employment since 2014. In a defined two year period, the Applicant taught Fifth and Sixth Years, including a student who sat the Leaving Certificate in the month of June of a certain year. On a named month and year, the Applicant informed the Principal of the school that their relationship with their partner had ended and took some leave.

(b) On a named month and year, two teaching colleagues informed the Principal of certain allegations that had been made to them by the Applicant's former partner regarding the Applicant's alleged relationship with a third party former student. They also stated that the Applicant, when contacted, had stated to the two teaching colleagues, the Applicant's acceptance of having had a sexual encounter with the said third party on a date prior to the Leaving Certificate results having

[2] These have been further redacted for the purposes of this judgment.

issued. The Applicant's former partner met with the principal and repeated the allegation that the Applicant had had an affair with the third party and alleged that there had been communication between the Applicant and the third party on social media while the third party was being taught by the Applicant. The Applicant's former partner produced mobile telephone screenshots which allegedly showed that there had been daily interactions between the Applicant and the third party over the course of a number of successive days.

(c) The principal met with the Applicant to discuss these allegations. The Applicant explained that they had met the third party in a public house while on a night out and that they had spent the night together in a hotel room and had a 'once-off' sexual encounter and that there had been no contact since. The Applicant stated that the Applicant's former partner's allegation that the Applicant had been in contact with the third party for a number of months on a named social media platform was untrue, and stated that at no stage had there been communication on social media.

(d) During the Board of Management's investigation into these issues, the Applicant accepted that there had been a sexual encounter (the month and year was given) between the Applicant and the third party and that this had been a once-off encounter. In relation to the alleged screenshots of the alleged social media contact between them, the Applicant *inter alia* suggested that these could have been sent from a fake account, stating again in a written response to the report prepared by the Board, *inter alia*, that the Applicant never had any contact with the third party on the named social media platform, that any person could set up

such an account using a surname, that nothing was verified using proof of identity, that the screenshots did not contain the Applicant's name anywhere in the picture, that there was no proof to say this was the Applicant's account or that the screenshots in question were taken from the Applicant's account, the Applicant's name was nowhere to be seen and that anyone could have set up this account using the username in question.

(e) The principal made a complaint to the Council on a defined date and enclosed the screenshots which had been provided by the Applicant's former partner. The Applicant provided observations and comments, through their solicitor, in response to the complaint and maintained *inter alia* that the social media screenshots had not emanated from the Applicant's account, that they must have been fabricated by the Applicant's former partner, that there was no evidence that the messages were sent by the Applicant, nor that they were sent to a present or former student, that no names appeared in the messages and repeated the denial of the Applicant having had any contact, by social media or otherwise, with any present or former students and had stated on a number of occasions that no such contact took place.

(f) In response to production summonses which had been directed by the panel to the Applicant and various third parties, the Applicant's solicitors confirmed that the Applicant did not have access to either of the email accounts, which the Applicant said were dormant and/or obsolete for a number of years; that the Applicant had deleted a named social media account application in 2018 and that this material sought could not be retrieved (which was confirmed by the social media

company); and that the Applicant had changed mobile phone provider and did not have access to phone records in the relevant period. In response to a production summons sent to the Applicant's previous mobile phone provider, it confirmed that it only retained records of this type for two years and so it did not have any records in respect of the relevant period.

(g) The Applicant's response to the production summonses through the Applicant's solicitors has not been challenged or impugned in any way.

(h) In relation to the circumstances surrounding the screenshots being obtained, when out with some friends, the Applicant's former partner received a notification on their phone alerting that a messaging application ("app") had been accessed by another device, which the former partner recognised as the Applicant's phone. The former partner then logged out of this messaging app account and tried to log into the Applicant's messaging app account using a generic password that the Applicant used. The Applicant's former partner allegedly did gain access to the Applicant's messaging app account using that password.

(i) The Applicant's former partner had no permission or consent, express or implied, to access the Applicant's account at any stage.

(j) The materials sought to be introduced in evidence were allegedly garnered by the Applicant's former partner by accessing the Applicant's social media account without the Applicant's permission or consent. The Applicant's former partner contends that they were generated by the Applicant using a social media account

and then accessed by the Applicant's former partner in the manner described, without the Applicant's permission or consent, whereas the Applicant contends that they were not generated by the Applicant but instead were generated by another person, believed by the Applicant to be the Applicant's former partner, on foot of the former partner having accessed the Applicant's social media account without the Applicant's permission or consent.

10. The agreed facts fed into the notice of inquiry, where the four allegations were set out. The legal adviser to the Council advised that a preliminary hearing as to the admissibility of the screenshots should be held.

11. As referred to earlier, on 31st May 2022, a lengthy hearing took place on the question of admissibility. The approach the panel adopted was set out in its decision dated 21st June 2022. First, it asked whether there was a rule of law which excludes evidence obtained in breach of a constitutional right in all cases in the context of an inquiry held under the 2001 Act; second, if the answer to that question was '*no*', it asked what test should be applied to determine the admissibility of evidence and in applying that test to the agreed facts, would the evidence be admissible?

12. Thus, this challenge by way of application for judicial review to the panel's decision dated 21st June 2022 must be seen in *the context* of what the parties to this challenge agreed they were asking the panel to decide in the first place. This is helpfully set out in the document referred to earlier which set out the agreed facts, for the purpose of the ruling, and was styled '*Statement of Agreed Facts for the purposes of Ruling on the Admissibility of Certain Evidence*', where the '*Introduction*' part states as follows:

"*(1) At a preliminary hearing held on 1 February 2022, the panel of the Disciplinary Committee convened to hear this inquiry under section 43 of the Act (the "Panel") was told that* [the Applicant] *intended to object to the admissibility of certain evidence which the Director of the Teaching Council (the "Director") intended to adduce at inquiry, specifically* [messaging app] *screenshots. Both the Director and* [the Applicant] *agreed that it made logistical sense for the Panel to rule on this issue in advance of the commencement of the inquiry. In addition, both the Director and* [the Applicant] *agreed that the legal issue being raised in relation to the admissibility of the screenshots could be adjudicated upon without the necessity for oral evidence; in other words, on the basis of agreed facts.*

(2) The Panel was satisfied that it was appropriate to convene a preliminary hearing for the purposes of ruling on the admissibility of the evidence in question".

13. To enable it to rule on the issue, at the preliminary hearing on 1st February 2022, the panel gave directions to the parties which included the preparation of a Statement of Agreed Facts and the furnishing of written submissions addressing matters of law.

14. It must be emphasised, notwithstanding the manner in which the Applicant has sought to characterise what was submitted to be the central question posed on behalf of the Applicant, the jurisdiction which I exercise in this application for judicial review is a supervisory discretionary jurisdiction, pursuant to the provisions of Order 84 of the

Rules of the Superior Courts 1986 (as amended) ("RSC 1986"). That jurisdiction is not an appellate jurisdiction, and nor is it a consultative case stated.

SUMMARY OF THE APPLICANT'S CASE

15. The central arguments made on behalf of the Applicant in seeking to challenge the panel's decision dated 21st June 2022, can be briefly stated as follows:

(a) First, it is contended that the exclusionary rule formulated (or perhaps more accurately, reformulated) in *The People (DPP) v JC* [2015] IESC 31; [2017] 1 I.R. 417 ("*JC*") applied to the panel's decision of 21st June 2022;

(b) Second, and in the alternative, it is contended that, if *JC* did not apply, then "*the balancing test*" articulated by Kingsmill Moore J. in *The People (DPP) v O'Brien* [1965] I.R. 142 ("*O'Brien*") (which, it is argued on behalf of the Applicant, was applied by Fennelly J. in *Kennedy v Law Society of Ireland (No. 3)* [2001] IESC 103; [2002] 2 I.R. 458 ("*Kennedy No. 3*") and which the Applicant contends was initially agreed to on behalf of the Respondents to apply to the preliminary question as to the admissibility of the screenshots), applied to the panel's decision of 21st June 2022; and,

(c) Third, it is submitted that the panel erred in law in its actual application of the balancing test articulated by Kingsmill Moore J. in *O'Brien* and as set out in its decision of 21st June 2022.

THE DECISION OF THE PANEL DATED 21ST JUNE 2022

16. In its decision dated 21st June 2022, the panel decided that the appropriate test to be applied was that articulated by Fennelly J. in *Kennedy No. 3,* stating that it was "*persuaded by the Director's submission that the Kennedy test, cited by Fennelly J. and set out above, is the test required to be applied. The question then is one of the appropriate balance between on the one hand, having relevant probative evidence before the Panel conducting an Inquiry into allegations which, if proved, give rise to potentially significant public protection issues and, on the other hand, avoiding the unfairness of failing to protect a teacher from an abuse of power such that the admission of the evidence would be unfair.*"

17. The structure of the panel's decision dated 21st June 2022 and signed by the Chairperson was as follows: the '*Background*' was set out; the '*Issues and the panel's approach*' was set out; the '*Submissions*' on behalf of the Applicant and then the Director were summarised; the '*Findings*' of the panel were then set out under the following sub-headings "*An automatic exclusionary rule ?*" and "*The Appropriate Test*"; the decision was then set out under the sub-heading '*Applying the test and conclusion*'.

18. Under the sub-heading '*Applying the test and conclusion*', the panel first deals with the arguments in favour of excluding the screenshots:

> "*Among the arguments in favour of exclusion in terms of the potential unfairness to the teacher, the breach… constitutional and other rights to privacy remains an important consideration. It may well be*

relevant that the breach was committed by [an] *ex-partner and not the Teaching Council but this would be small consolation to* [the Applicant] *since it would be the Director of the Teaching Council who, (having obtained the evidence appropriately notwithstanding the fact that it was procured initially by* [the Applicant's] *ex-partner in breach of* [the Applicant's] *constitutional and other rights), would be presenting it at the Inquiry. The Applicant's personal and professional good name stands to be significantly harmed if there is an adverse finding so the process must be fair and this is particularly relevant to rulings on the admissibility of evidence.*"

19. The decision of 21st June 2022 then sets out the arguments in favour of admitting the evidence:

"*The arguments in favour of admitting the evidence begin with the suggested adverse effect on the process of excluding the evidence. The Teaching Council conducts these Inquiries as an important part of its regulatory remit. It does so with particular regard to the need to protect the public, particularly children and vulnerable persons, a consideration it is required by statute to have regard to. This remit means protecting the public not only against wrongdoing of teachers of the kind alleged. It also refers to the need to promote and maintain the trust which the public have in teachers and the way in which they are regulated. In this context the exclusion of relevant probative evidence from the Inquiry process should only happen if justice cannot be achieved in any other way.*

Also relevant is the nature of the allegations in this case which are particularly serious. It is alleged that there was an improper relationship and activity between a teacher and a young person whom [the Applicant] *taught for at least part of the period in question. If adverse findings are made, they have the potential to be judged at the higher end of the spectrum of seriousness. In this context, if relevant probative evidence exists, substantial grounds would be required to justify its exclusion*".

20. The decision of 21st June 2022 then sets out its conclusion:

"*Having weighed these competing considerations the Panel is firmly of the view that the evidence should be admitted and rules accordingly. Its weight in the context of all the evidence can be fairly considered in the course of the Inquiry. The onus of proof remains on the Director and must be discharged to the beyond reasonable doubt standard before any adverse finding can be made on any allegation. This and all of the other rights to which* [the Applicant] *is entitled in defending* [themselves] *remain intact*".

21. The decision is then signed by the Chairperson and dated.

22. The Applicant contends, in particular, that the panel's conclusion that "*the exclusion of relevant probative evidence from the Inquiry process should only happen if justice cannot be achieved in any other way*" is unclear and does not inexorably flow from the application of any of the tests referred to in the caselaw.

23. It is further contended on behalf of the Applicant that the panel's following conclusion is in error. The panel stated that if adverse findings are made in the context of the serious allegations in this case, *viz.*, an alleged improper relationship and activity between a teacher and a young person who allegedly was taught for at least part of the period in question, such findings have the potential to be judged at the higher end of the spectrum of seriousness and, accordingly, if relevant probative evidence exists, substantial grounds would be required to be established by the Applicant to justify its exclusion. It was submitted on behalf of the Applicant that it was a misapplication of the balancing test to suggest that the Applicant would have to establish substantial grounds to justify the exclusion of the evidence in question.

24. Since the decision of the Supreme Court in *Kennedy v Ireland* [1987] I.R. 587, Article 40.3.1° of the Constitution has been interpreted as providing for a derived personal right to privacy. It is not absolute and may be outweighed by the exigencies of the common good, including the public interest in the investigation of serious crime[3]. The Applicant maintains that, notwithstanding that it is a circumscribed derived constitutional right, the context of these proceedings concerns an alleged breach of the Applicant's right to privacy in correspondence or communications.

SUMMARY OF THE RESPONDENTS' POSITION

25. In brief, it is submitted on behalf of the Respondent that: (i) I should not entertain the Applicant's challenge to an evidential ruling during an extant statutory inquiry; (ii)

[3] See *People (DPP) v Wilson* [2017] IESC 54; [2019] 1 I.R. 96.

notwithstanding that an inquiry (rather than a trial) is being conducted, the Applicant's reliance on *JC* and *O'Brien* is misplaced, given that there is no suggestion of impropriety or illegality on the part of the Respondents in the exercise of their statutory powers to gather evidence; and (iii) the decision of the panel to exercise its discretion in favour of admitting the screenshots into evidence, notwithstanding the alleged manner in which they were obtained by the Applicant's partner, was reasonable in all of the circumstances.

ASSESSMENT & DECISION

26. On 24th October 2022, this court (Meenan J.) granted the Applicant leave to apply for judicial review for a number of reliefs, (including declaratory relief), and primarily for an order of *certiorari* quashing the panel's decision dated 21st June 2022 to permit the director to adduce in evidence at the Inquiry into the Applicant's fitness to teach, pursuant to Part 5 of the 2001 Act, screenshots allegedly taken from the Applicant's messaging app account and/or evidence garnered from any unauthorised and/or non-consensual access to the Applicant's messaging app account.

27. The Applicant's Amended Statement of Grounds dated 1st November 2022 also *inter alia* sought that this judicial review application be held *in camera*. The respondents adopted a neutral position to that application. For the reasons set out in *C v P* [2024] IEHC 54, I acceded to that application on 31st January 2024.

28. The Amended Statement of Grounds and the Statement of Opposition, to paraphrase the Supreme Court (Baker J.) in *Casey v Minister for Housing* [2021] IESC 42, "*sets*

the parameters and fixed the issues in dispute between the parties and those to be determined by the court".

29. The following reference to "*Unlawful Evidence*" was defined in the Amended Statement of Grounds dated 1st November 2022 as including the screenshots.

30. In summary, at paragraph 7.1 of its Statement of Grounds dated 1st November 2022, it is stated that "*the test to be applied is that as described by the Supreme Court in The People (DPP) v JC [2017] 1 IR 417, leading to the inevitable exclusion of the Unlawful Evidence.*" At paragraph 7.2 of its Statement of Grounds dated 1st November 2022 it is stated that "[i]*n the alternative, in the event that the appropriate test is as described by Fennelly J in Kennedy v Law Society of Ireland [2002] 2 IR 58, then its correct application leads to the exclusion of the Unlawful Evidence*." At paragraph 7.3 of the Statement of Grounds, it is stated that "[t]*he Panel accordingly failed to apply the correct test, and, in the alternative, applied the test selected by them as the correct test, incorrectly.*"

31. At paragraph 8 of the Statement of Grounds, it is stated that "[t]*he Unlawful Evidence was procured in breach of the Applicant's constitutional right to privacy, which is protected by Article 40.3 of the Constitution as an unenumerated personal right of the Applicant and was, as a result, inadmissible in the circumstances.*"

32. At paragraphs 9 and 10 of the Amended Statement of Grounds, the Applicant states *inter alia* that '*The Unlawful Evidence*' was procured in breach of the Applicant's rights to privacy as protected by Articles 6 and/or 8 of the European Convention on

Human Rights ("the Convention") and that pursuant to *inter alia* section 3 of the European Convention on Human Rights Act 2003, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the provisions of the Convention. The Applicant contends that "[i]*n the application of this duty, the Unlawful Evidence should have been deemed inadmissible in the circumstances.*"

33. At paragraph 11 of the Amended Statement of Grounds, the decision of the panel to admit the screenshots is sought to be impugned on irrationality grounds.

34. At paragraph 12 of the Amended Statement of Grounds, it is alleged that screenshots were unlawfully obtained by the Applicant's former partner in breach of the Applicant's constitutional and Convention rights, and that the director has no right or legal basis to have received the '*Unlawful Evidence*', and/or to retain it, and/or to seek to adduce it in evidence before the panel.

35. The constant thread running through the (Amended) Statement of Grounds is the contention that the panel erred in not *excluding* the screenshots, or the '*Unlawful Evidence*'.

36. The Applicant's alternative grounds are set out in the five bullet points in paragraph 13 of the Amended Statement of Grounds, where it is contended that if the panel enjoyed a discretion to admit the '*Unlawful Evidence*', it exercised that discretion in an unlawful manner and that the matter should be remitted back to the panel. The five bullet points in this paragraph allege as follows: (i) the panel failed to consider

whether the Director had discharged the burden of demonstrating that the '*Unlawful Evidence*' should be admitted; (ii) the panel wrongly considered that the remit of the Council justified the admission of the '*Unlawful Evidence*' or afforded too much weight to this consideration; (iii) the panel wrongly considered that the nature of the allegations justified the admission of the '*Unlawful Evidence*', or afforded too much weight to this consideration; (iv) the panel wrongly concluded that if relevant probative evidence existed, substantial grounds would be required to justify its exclusion in the circumstances; (v) the panel wrongly failed to consider the fairness of the admission of the '*Unlawful Evidence*' from the Applicant's perspective.

37. The Statement of Opposition dated 10th January 2023 states, *inter alia*, that the panel was correct to decide that the *JC* test did not apply and that it enjoyed a broader discretion in view of the nature of the proceedings and that having identified the correct test to be applied, by reference to the decision in *Kennedy (No.3)*, the panel proceeded to apply that test in a reasonable and reasoned manner. It further states that the panel was entitled to have regard to the nature of the proceedings, the functions of the Council as provided for in the 2001 Act and the nature of the allegations when weighing the competing interests at play. The Statement of Opposition further sets out that the statutory inquiry under the 2001 Act affords the Applicant fair procedures and that the director bears the burden of proving the allegations beyond a reasonable doubt.

38. In addition to denying that the panel's decision was irrational, the Statement of Opposition dated 10th January 2023 states the following at paragraphs 3 and 5:

> "*(3) While the Respondents acknowledge that, on the Second Respondent's case* [*i.e.*, the Director], *the evidence in question was obtained without the Applicant's consent or permission, it is denied that this fact renders the evidence inadmissible in the circumstances and having regard to the nature of the proceedings.*"
>
> "*(5) Without prejudice to the foregoing, the Respondents will maintain that this Honourable Court should not entertain a challenge to an evidential ruling made by the First Respondent* [*i.e.*, the panel] *by way of judicial review during the currency of a fitness to teach inquiry*".

39. For the following reasons, I do not believe that the Applicant is entitled to an order of *certiorari* by way of an application for judicial review quashing the decision of the panel dated 21st June 2022 permitting the admission of the screenshots in question and nor is the Applicant entitled to the related declaratory or injunctive relief sought.

The statutory context

40. First, I consider that the attempt via the prism or vehicle of a challenge by way of judicial review to quash the panel's decision of 21st June 2022 to deem the screenshots admissible in the context of the ongoing statutory inquiry and seek declarations (for example at (D)(2) of the Statement of Grounds, that the screenshots "*were obtained in breach of the Applicant's constitutional rights* <u>*and accordingly should not be admitted into evidence*</u>",[4] and at (D)(3) of the Statement of Grounds that the screenshots "*were*

[4] Underlining added.

obtained in breach of the Applicant's rights under and protected by the European Convention on Human Rights *and accordingly the Respondents are under a duty not to admit same into evidence*")[5] is contrary to the true intention of the Oireachtas in enacting the 2001 Act which can be gleaned from an examination of it various provisions which prescribe the statutory inquiry which is at issue in this case.

41. In this regard, the applicable principles of statutory interpretation are those set down by the Supreme Court (Murray J.) in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] 2 I.L.R.M. 313 and in *A, B & C v Minister for Foreign Affairs and Trade* [2023] IESC 10 at paragraph 73. In those cases, the Supreme Court determined that "*language, context and purpose*" were potentially involved in every exercise in statutory interpretation with "*none ever operating to the complete exclusion of the other.*"

42. In these cases, the Supreme Court indicated that whilst the first consideration was the language used in the provision or provisions under consideration, the words used in that section "*must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute*."

43. In further paraphrasing the judgments of the Supreme Court in *Heather Hill* and *A, B & C*, the ascertainment of the meaning of the relevant provisions of the 2001 Act dealing with the statutory inquiry in this case is by reference to their "*language, place,*

[5] Underlining added.

function and context" with the "*plain and ordinary meaning of the language being the predominant factor*" in identifying the effect of the provisions but the others always being potentially relevant to "*elucidating, expanding, contracting or contextualising the apparent meaning of those words.*"

44. Further, I agree with Mr. Cole SC (for the Applicant) both as a matter of principle and having regard to the facts of this case, the circumstances in which it was agreed between the parties (which are referred to earlier in this judgment) that the panel would hear submissions and make a decision on the admissibility question, does not in any way estop or prevent the Respondents from opposing this application for judicial review on the grounds which they have raised. I would add that nor does it constitute any kind of acquiescence or acknowledgement that in the event that the panel's ruling on the preliminary question of admissibility went against the Applicant, there would necessarily be an inexorable and inevitable challenge to that decision by way of judicial review. Equally, I agree with Mr. Farrell SC that the Applicant passed the first threshold test of presenting an arguable or stateable case in obtaining a grant of leave to apply for judicial review, albeit that this is a low threshold.

45. A similar and overlapping issue in this regard is the preliminary objection raised on behalf of the Respondents that the decision of the panel in this case *at this time* was not itself capable of being challenged by way of an application for judicial review and reference was made by both parties to authorities, including *Borges v The Fitness to Practise Committee of the Medical Council & Anor* [2004] IESC 9; [2004] 1 I.R. 103, *Phillips v The Medical Council* [1992] I.L.R.M. 469, and *AA v The Medical Council* [2001] IEHC 211; [2002] 3 I.R. 1.

46. As stated, it is preferable, in the first instance, to address this issue by reference to the provisions of the 2001 Act. Ultimately, however they are described, these are factors which inform the exercise of my supervisory discretion in this judicial review challenge and given the importance of the issue, I consider that the context, purpose and objective of the 2001 Act should be considered first.

47. The long title to legislation is a helpful guide to its interpretation. In this case, the long title to the 2001 Act states as follows:

> "*An Act to promote teaching as a profession; to promote the professional development of teachers; to maintain and improve the quality of teaching in the State; to provide for the establishment of standards, policies and procedures for the education and training of teachers and other matters relating to teachers and the teaching profession; to provide for the registration and regulation of teachers and to enhance professional standards and competence; for those purposes to establish a council to be known as an Chomhairle Mhuinteoireachta or, in the English language, the teaching council; to provide for the repeal of the Intermediate Education (Ireland) Act, 1914, and to provide for related matters*."

48. The statutory functions of the Council include conducting inquiries into and, where appropriate, imposing sanctions in relation to the fitness to teach of any registered teacher (section 7(2)(i) of the 2001 Act).

49. It is a central feature of a regulatory body, such as the Council, in the carrying out of its functions, including those in relation to discipline, to ensure public confidence in the conduct of its members. In giving effect to this aim, applicable legislative provisions provide for (a) the receipt of complaints, (b) the initial assessment of complaints by a committee of the regulatory body in question, and (c) if warranted, the further inquiry of such complaints by a disciplinary committee. In order to give effect to this regulatory function, such bodies are furnished with extensive powers to compel and receive evidence.

50. Here the panel itself is charged with inquiring into the fitness to teach of registered teachers where complaints are referred to it by the Investigating Committee. As mentioned, to enable it to perform that function, it enjoys wide-ranging powers to compel and receive evidence, as per section 43(13) of the 2001 Act.

51. Further, at a hearing of a complaint before the panel, the Director presents the evidence in support of the complaint, the testimony of witnesses attending the hearing is required to be given on oath and there is a full right to cross-examine witnesses and call evidence in defence and reply (section 43(11) of the 2001 Act).

52. The panel has the powers, rights and privileges vested in the High Court in respect of the enforcement and compellability of the attendance of witnesses and their examination on oath or otherwise and the compelling of the production of documents (section 43(14) of the 2001 Act). A witness before a panel is to be entitled to the same immunities and privileges as if they were a witness before the High Court (section 43(16) of the 2001 Act).

53. Where findings are made against a registered teacher following an inquiry and a sanction other than the most minor type of sanction is imposed, *i.e.*, advice, admonishment or censure, the teacher enjoys a right of appeal to the High Court, which may annul, confirm or vary the decision pursuant to section 44(3) of the 2001 Act. The appeal is a *de novo* re-hearing on the merits.

54. The 2001 Act provides, that in the event that the panel decides to impose a sanction (other than advise, admonish or censure), a person has twenty-one days to appeal the decision to the High Court and, as mentioned, the appeal is a *de novo* rehearing of the matter and, in addition, confirmation of such a sanction is also conditional on the approval of the High Court (as per the 2001 Act and arising from decisions such as *In re The Solicitors Act 1954* [1960] I.R. 239).

55. Accordingly, the legislative process prescribed under the 2001 Act affords the Applicant fair procedures at each stage of the decision-making process. The exercise of the Respondents' discretion is also subject to the corollary of the presumption of constitutionality (*McDonald v Bord na gCon (No.2)* [1965] I.R. 217) as outlined by the Supreme Court in *East Donegal Co-operative Livestock Mart Limited v The Attorney General* [1970] I.R. 317 at page 341 per Walsh J., *i.e.*, "*the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case*

any departure from those principles would be restrained and corrected by the Courts".

56. Having regard to the statutory intention of the 2001 Act, the correct approach, in my view, is to allow the process mandated by the Oireachtas to proceed in the matter intended which may (or may not) include, if the circumstances arise, a full *de novo* appeal and re-hearing to the High Court, in circumstances where the Respondent may (or may not) have excluded the social media evidence. While this also informs the discretionary factors involved in a judicial review application under the rubric of *adequate alternative remedies*, as I mentioned earlier, it is, in the first instance, a matter of statutory interpretation. I believe, therefore, that the reliefs sought at this juncture and by way of an application for judicial review is contrary to the intention of the Oireachtas in prescribing how these and other matters should be addressed.

57. In addition, as mentioned earlier, the seeking of declaratory relief *at this juncture* to the effect that the screenshots were obtained in breach of the Applicant's constitutional and conventional rights and accordingly "*should not be admitted into evidence*" or that the Respondents are "*under a duty not to admit the screenshots into evidence*", is in my view, inappropriate when the process prescribed by the 2001 Act is ongoing and in which the High Court has particular prescribed statutory roles. In addition, it falls foul of Carroll J.'s observation that judicial review does not exist to direct procedure in advance (*Phillips v Medical Council* [1992] I.L.R.M. 469 per Carroll J. at page 475).

58. Further, as referred to later in this judgment, the decision in *JC* related to the exercise of powers of State actors and not private third parties and illustrated the direct connection between the scope of the exercise of those coercive powers by those entities which comprise the *force publique* and the need for the exclusionary rule. The asymmetry of functions and powers between the criminal process, on the one hand, and the regulatory process, on the other hand (such as in this case, pursuant to the provisions of the 2001 Act), is exemplified by the fact that the procedures, for example, under section 43(14) of the 2001 Act, are available to both parties. In addition, the Council, in my view, could not be described as part of the *force publique* as that term is defined in the dissenting judgment of Hardiman J. in *JC*.[6]

No hearing, no findings & no sanction has occurred

59. Second, and related to the matters just discussed, given that no hearing has taken place at this juncture, no findings have been made and clearly no sanction has been contemplated.

60. Further, and by way of analogy, the granting of a remedy by way of judicial review at this juncture, arguably has the effect of circumventing a process prescribed by statute in a manner similar to where an applicant for judicial review can sometimes seek an order of prohibition in relation to an extant or ongoing process, a consequence which the Superior Courts have sought to avoid: see, for example, *PO'C v DPP* [2003] 3 I.R. 87, *Casey v DPP* [2015] IEHC 824 (Unreported, High Court, 21st December, 2015), *Nash v DPP* [2015] IESC 32, and *Nugent v The Property Services Regulatory Authority* [2021] IECA 250.

[6] *The People (The DPP) v JC* [2017] 1 I.R. 417 at page 461.

61. Again, by way of analogy, the seeking of remedies such as orders of prohibition, injunctive relief or stays on grounds, for example, such as alleged delay or unfairness are, in many cases, refused because the cause of complaint can be addressed within the extant trial process. For example, and accepting that it involved an analysis of the interlocutory process of seeking a stay in a judicial review application and the similarities and differences with an application for an interlocutory injunction by way of judicial review, the decision of the Supreme Court in *Okunade v Minister for Justice & Ors* [2012] IESC 49; [2012] 3 I.R. 152 referred *inter alia* to the public interest in giving effect to decisions which are *prima facie* valid, as well as the minimisation of the risk of injustice. Similar underlying considerations apply to the exercise of my supervisory discretionary jurisdiction in this application for judicial review and, for example, the assessment of the availability of adequate alternative remedies raises similar issues to the process of divining the true meaning of statutory provisions, as discussed earlier in the context of the provisions of the 2001 Act.

Alleged breach by a third party

62. Third, the context in which this application for judicial review arises is that set out in the 'Statement of Agreed Facts' referred to earlier, which, on the Applicant's case, invokes the Applicant's constitutional right to privacy and the alleged breach of those rights by the Applicant's former partner. The Respondents maintain, however, that this is an important distinction in terms of its presentation of the evidence and that the actions of a third party, *i.e.*, the Applicant's former partner, should not be visited upon it and does not contaminate the probative value of that evidence. Further, it is argued that the regulatory and disciplinary functions of the Council are very different to that

engaged in by State actors in the prosecution of crime where the concept of punishment is a central consideration. An important point of difference between the parties is the Applicant's submission that the exclusionary rules are mainly aimed at the vindication of constitutional rights, rather than directing the proper behaviour of State actors when exercising coercive power.

63. In *The People (DPP) v Gold* [2021] IECA 160, after a 28-day trial between May and June 2019, the appellant was convicted of counts involving money laundering, deception, having custody or control of a false instrument and using a false instrument.

64. On 31st July 2019, the appellant was sentenced to a term of seven and a half years imprisonment on each of the money laundering counts, and to terms of three years imprisonment on the deception counts with all sentences to run concurrently and he appealed against that conviction. One of the many aspects of the case concerned the fact that the prosecution had adduced evidence at trial of digital audio files found on a laptop, taken during a lawful search of the home of a third party. The recording was of what appeared to be a telephone conversation, though there were indications that the conversation had taken place on an internet platform rather than on a traditional telephone line. The prosecution contended that those engaged in the recorded conversation were the appellant and another person. One of the grounds of appeal contended that the trial judge had erred in law by admitting evidence of voice recordings where it was accepted by the prosecution that the recordings had been made illegally by a third party, in circumstances where neither party to the conversations were aware that the conversations were being recorded.

65. Accordingly, the Appellant argued that the trial judge had erred by not applying the exclusionary rule (as set out in *JC*) when adjudicating on the admissibility of the recording of the conversation on the laptop in circumstances where it was contended that the prosecution could not establish that the recording itself had been obtained lawfully by whoever had intercepted the conversation in the first place. As described *inter alia* by Birmingham P. at paragraph 14 of the judgment "[t]*he issue arises as to whether the exclusionary rule relating to unlawful or prohibited or unconstitutional acts extends beyond actions taken by agencies of the State*".

66. Birmingham P. set out the key aspect of the appellant's appeal on this ground. For example, the appellant submitted that whether or not the Postal and Telecommunications Services Act 1983 (as amended) applied, it was contended that the interception was prohibited under the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 and, therefore, "*the exclusionary rule, as it emerged from cases such as DPP v O'Brien [1965] I.R. 142 and DPP v Kenny [1990] 2 I.R. 110 and as reformulated more recently in The People (DPP) v JC [2015] IESC 31, should be applied. At one level, the appellant appears willing to accept that this would represent a new departure, but says that the focus is and should be on the breach of constitutional rights and individual rights rather than on the identity of the actors responsible for the breach. In response to the argument by the Director that the exclusionary rule deals only with breaches of rights by agencies of the State, the appellant says that if that view was to be accepted, it would have the effect of promoting the use of vigilante groups, or sting operations, with those involved in such*

activity then presenting the fruits of their actions to the Gardaí. In what might seem a flight of fancy, or at least a flight to a factual context far removed from the present case, there was reference to the engagement of mercenaries in war zones".

67. After quoting the above extract, Birmingham P., at paragraph 16 of the judgment, described the issues in the case as follows:

> "*The starting point for consideration of this issue has to be that the laptop on which the audio file was located was taken possession of during the course of a lawful search of the home of SR. Also to be noted is that there is no suggestion that any agent of the State had any involvement whatsoever in the creation of the recording. On the other side of the coin, the recording was of potentially significant probative value, involving detailed discussions between the participants in relation to criminal activity. That, in circumstances where the prosecution case was that one of the individuals involved in the conversation was the appellant, though that was something that was denied by him. In a situation where the recording is created without any State involvement, and where there was not even a suggestion that the State was complicit in unconstitutional actions taken by a private party to introduce evidence, it seems to us that the judge's approach to the issue was the appropriate one. As acknowledged on behalf of the Director, that is not to say that evidence generated by a third party will always be admissible; that will depend on the circumstances of the case, but certainly, in our view, there is no rule of automatic exclusion. In this case, the judge approached the issue*

on the basis that he had a discretion to exercise and addressed the factors that he had to consider in deciding how to exercise that discretion. We are satisfied that his approach was the correct one and that the decision to admit the evidence was a proper decision. Accordingly, we dismiss this ground of appeal".

68. On behalf of the Applicant, it is submitted that *The People (DPP) v Gold* is insufficient as a basis to suggest that the exclusionary rule does not apply and it is sought to distinguish the judgment in *DPP v Gold* in three ways: first, it is contended that the starting point is that the laptop in that case was taken during 'a lawful search', whereas the position here begins with an alleged illegality in the accessing of the Applicant's messages; second, is submitted that the consideration given to the authorities by the court was not as extensive as the earlier authorities and, therefore, does not consider sufficiently the totality of the case law or the logic of the exclusionary rule and the journey from the exclusionary rule to the balancing exercise; and third, it is submitted that court was not required to observe the scope of the notion of *force publique* and that, as a matter of principle, the deterrent logic should apply equally to disciplinary bodies, as it does to State actors.

69. Notwithstanding these submissions on behalf of the Applicant which seek to distinguish the decision of the Court of Appeal in *The People (DPP) v Gold*, the decision of the Court of Appeal makes it clear that there is no rule of automatic exclusion of evidence procured unlawfully by a third party and different considerations apply in a scenario where the evidence in question was created without any State involvement and where there was no suggestion that the State was complicit

in any alleged unconstitutional actions taken by a private party to introduce evidence. Therefore, the exclusionary rule does not 'automatically' apply to private or third-party illegality.

The raison d'être of the exclusionary rule

70. Fourth, the majority of this hearing before me was taken up with a discussion of the caselaw which ultimately resulted in the decision of the Supreme Court in *JC* in relation to the exclusionary rule.

71. To recap, in the Applicant's Statement of Grounds (paragraph 7.1), it is contended that had the panel applied *JC*, it would have resulted in "*the inevitable exclusion of the Unlawful Evidence*", *i.e.*, the screenshots.

72. In the alternative, the Applicant's Statement of Grounds (at paragraph 7.2) states that in the event of the appropriate test being that as described by Fennelly J. in *Kennedy (No.3)*, "*then its correct application leads to the exclusion of the Unlawful Evidence*" *i.e.*, the screenshots.

73. These points are brought together in the Statement of Grounds (at paragraph 7.3) as follows: "[t]*he Panel accordingly failed to apply the correct test, and, in the alternative, applied the test selected by them as the correct test, incorrectly*."

74. In considering these matters, it apposite, in the first instance, to recall the observations of the Supreme Court (Charleton J.) in *The People (DPP) v Quirke* [2023] IESC 20, [2023] 1 I.L.R.M. 445 (at paragraph 32) that "[w]*hile case decisions are binding*

precedent, legal rulings within judgments are specific to fact. Thus, if analysed similarly to statutory provisions, a risk arises of using words specific to the actual situation in which they are applied in a general sense to which these may not be intended. Hence, the actual ratio of The People (DPP) v JC [2017] 1 IR 417 is inescapably the clarification and overturning of Kenny".[7]

75. It is important to bear in mind these observations of Charleton J. when considering the extensive case law cited by the parties in this judicial review application. Apart from *The People (DPP) v Gold*, for example, many of cases were not concerned with alleged third party unlawfulness and it merits repeating that Article 38 of the Constitution provided an important contextual background in many of the seminal authorities which have examined the exclusionary rule. The decision in *The People (AG) v O'Brien* [1965] I.R. 142, for example, was predicated on Article 38.1 of the Constitution. It also has to be recalled that the decision in *Kennedy (No.3)* was written at a time prior to *JC*, when *Kenny* still applied.

76. The Applicant is, in my view, incorrect in contending that the application of the exclusionary rule, as formulated in *JC*, would result in "*the inevitable exclusion*" *of* the screenshots in this case.

77. The exclusionary rule is not a discrete maxim developed solely as a shield for defendants in a criminal, civil or, as with the situation here, a regulatory context. As a matter of general principle, the *raison d'être* for the exclusionary rule has higher constitutional purposes which includes the integrity of the administration of justice,

[7] *The People (Director of Public Prosecutions) v Kenny* [1990] 2 I.R. 110.

the need to encourage State actors (or agents) when exercising a coercive legal power to act in compliance with the law, or to dissuade those State actors from breaching the law, and the constitutional obligation to protect and vindicate the rights of individuals.[8]

78. It is not correct, in my view, to seek to separate the last of those objectives – *i.e.*, the constitutional obligation to protect and vindicate the rights of individuals – from its broader constitutional context in maintaining the integrity of the administration of justice. Understandably (from their perspective), that is essentially what Ms. Barrington SC and Mr. Cole SC urge upon me because they cannot, arising from the particular statutory context of this claim for judicial review, clothe the circumstances of this case in a scenario which approximates to State actors exercising a coercive legal power.

79. Having regard to the fact that the question of the admissibility of evidence is a separate issue consequent on, but separate from, the question of the lawfulness of how evidence was obtained, in addition to the fact that the question of admissibility of evidence includes, but encompasses wider concerns than those of an accused, the exclusionary rule formulated in *JC* is not an absolute rule of exclusion so that the obtaining of evidence unconstitutionally does not result in automatic exclusion as contended for by the Applicant in the Statement of Grounds.

[8] See *The Criminal Assets Bureau v Murphy* [2018] IESC 12; [2018] 3 I.R. 640 per O'Malley J. at paragraph 121; *DPP v Smyth* [2024] IESC 22 per Collins J. at paragraph 107.

80. In *JC*, the exclusionary test is set out against the context of the coercive State powers which stands in contrast to the regulatory framework at issue in this application for judicial review. The scope and extent of police powers and the prosecution tools are balanced by the presumption of innocence and the burden and standard of proof. The Supreme Court (particularly in the judgments of O'Donnell, Clarke and MacMenamin JJ.), was moving away from a rule of absolute exclusion and engaged in a balancing exercise of competing tensions. An alleged third party breach as in this case, for example, is of less significance than a State actor in the context of bringing the administration of justice into disrepute. The court held that a central function of the administration of justice (whether civil or criminal) is fact and truth finding, and anything that detracted from the courts' capacity to find out what in fact had occurred, detracted from the truth finding function of the administration of the justice. While the challenge was to find a dividing line between the extremes of a technical and excusable breach on the one hand, and a deliberate breach on the other, O'Donnell J. (as he then was) stated his view that *there was* "*neither authority nor constitutional justification for an absolute rule or near absolute rule of exclusion*".

81. In a similar vein, Clarke J. (as he then was) distinguished between police misconduct and those of others and drew a distinction between police powers and 'non-voluntary evidence gathering' with the former activities being highly circumscribed. In addition, Clarke J. observed that "[t]*o admit evidence in certain circumstances, even though it was not properly gathered, does not excuse or lawfully excuse any breach of rights concerned. It simply recognises that the evidence remains, notwithstanding the manner in which it was gathered, probative and cogent*".

82. Central to the Applicant's principal and alternative grounds is that the exclusionary rule is engaged because of alleged *third party* unlawful behaviour, *i.e.*, the manner in which the screenshots were allegedly obtained by the Applicant's former partner. O'Malley J. in *CAB v Murphy* (at paragraph 130), and Charleton J. in *DPP v Quirke* confirmed that the *JC* exclusionary rule applies in both civil and criminal proceedings involving State actors and agents engaged in coercive power (the *force publique*). Notwithstanding the submissions made on behalf of the Applicant, this does not apply to the functions of the Council under the 2001 Act and referred to earlier in this judgment. In *CAB v Murphy* [2018] 3 I.R. 640, O'Malley J. (at paragraph 10) thought it preferable "*to confine consideration of the issue to litigation involving the State and to illegality and breach of rights arising from the actions of State agents*" because the case involved "*the use of the coercive powers conferred upon elements of the force publique*", observing as follows:

> "*The factors that may properly influence the court's approach to the matter will not often arise in purely private litigation and indeed it seems clear that there are few recorded cases where it has. Since private parties normally lack such legally coercive powers, a case where one party seeks to secure an advantage over the other by the use of means which violate the rights of that other will, it seems likely, involve considerations of the criminal law and/or the law of tort. To deal with these issues in the context of the instant proceedings would be to engage in an undesirable level of hypothetical discussion*".

83. This observation is predicated upon an analysis of the 'coercive powers' of the State and whether or not a fair trial can be guaranteed. The above qualification from

O'Malley J. would suggest that 'third party' illegality should be treated on a different basis from situations which involve the coercive powers of the State. After having reviewed many of the leading authorities in the criminal, competition and administrative sanction contexts, O'Malley J. emphasised the use of the exclusionary rule in the context of State actors and *inter alia* observed at paragraph 125 of her judgment that "[i]*t will have been seen that, at different times and dealing with different issues, individual judges have laid greater or lesser emphasis on particular aspects of those rights and values. However the common themes are the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the constitutional obligation to protect and vindicate the rights of individuals. These are all concepts of high constitutional importance. Each of them, or a combination thereof, has been seen as sufficient to ground a principle that is capable of denying to the State or its agents the benefit of a violation of rights carried out in the course of the exercise of a coercive legal power.*"

84. O'Malley J.'s reference at paragraph 126 of her judgment to "[t]*hese rights and values are not confined to criminal trials and their effect is not confined to the exclusion of evidence*" cannot be construed by way of a submission on behalf of the Applicant that the law, as it has developed in relation to criminal trials simply applies *mutatis mutandis* in all of the administrative sanction contexts. In the case before her, for example, O'Malley J. expressed the view that the decision in *JC* was not an exact fit to a proceeds of crime (CAB) case without further adaption, pointing out at paragraph 133 of her judgment "*that the constitutional values primarily under consideration will be the integrity of the administration of justice and the need to ensure compliance with the law by agents of the State*." When this is applied to the case before me – and

the actions of a third party in relation to phone messages alleged involving the Applicant – whilst the integrity of the administration of justice maybe a transferrable objective it is difficult to see how "*the need to ensure compliance with the law by agents of the State*" has any application at all to the Applicant's circumstances.

85. The issue in the case before me does not approximate to that considered by the Supreme Court in *JC* or *Murphy* and therefore, the test developed in those cases cannot be applied in the manner submitted on behalf of the Applicant. In her judgment in *Murphy*, for example, O'Malley J. stated at paragraph 134 that in keeping with the analysis in *JC*, the court should refuse the order sought by the CAB if the evidence established that the asset was seized in such circumstances that the court would be lending its process to action on the part of a State agent or agents involving a deliberate and conscious breach of constitutional rights in the sense clarified by the Supreme Court in *JC* and that "[a] *reckless or grossly negligent breach of the constitutional rights of the respondent should create a discretion but with a presumption in favour of refusal of the order.*"

86. Therefore, in considering the alleged illegality of a private or third party (*i.e.*, an extraneous illegality), such as that at issue in the application before me, the key question is whether the evidence in question is so damaging to the integrity of the process that it should be excluded and that this would be the exception rather than the rule.

87. The element of 'dissuasion' of State actors which forms an important aspect of the exclusionary rule is absent in this context where the regulatory authority, in carrying

out this balancing exercise, has to adapt the question of whether the procurement of the evidence in question was informed (or attended) by such illegality (amounting to intentional illegality) to the particular facts of different circumstances, in assessing whether or not that evidence should be excluded.

88. Further, as Fennelly J. also observed in *Kennedy No.3*, it is necessary to have particular regard to the regulatory scheme of which the investigation and report form a part and in this case, that would include the statutory objectives of the Council, which I set out at the beginning of this judgment.

89. While Fennelly J. in *Kennedy (No.3)* referred, by analogy, to the approach outlined by Kingsmill Moore J. in *O'Brien* to the use of illegally obtained evidence in criminal cases, he did not believe, in the absence of evidence of deliberate and knowing abuse, that it inhibited "*a professional disciplinary body from relying on evidence, which could have been lawfully acquired but was in fact gathered as a consequence of a decision rendered invalid by the contemporaneous pursuit of an unauthorised purpose*". The decisions in *Kennedy (No.3)* and *O'Brien* are not, however, coterminous. The decision in *Kennedy No.3* is concerned with bringing the system or process into disrepute, *i.e.*, the integrity of the process which only arises as a matter of exceptionality. Fennelly J. referenced *O'Brien* and the application of the 'balancing test' of Kingsmill Moore J. in highlighting the improper purpose of the Law Society and the deliberate and knowing misbehaviour by the statutory body when exercising its statutory power to gather evidence.

90. Similarly, the Supreme Court (Charleton J.) in *BS & RS v The Refugee Appeals Tribunal* [2019] IESC 32 observed as follows at paragraphs 5 and 6 of the judgment, in relation to what was an inquisitorial inquiry in a refugee case and adopted an interpretation of *Kennedy (No.3)*, which approximates to a test which relates to the integrity of the process:

> "*(5) Alien to such a collaborative process would be the application of manoeuvres designed to catch either party out. What, further, ought to be remembered in this context is that there is no exclusion of evidence in consequence of any accidental or unthinking illegality even in the context of a civil trial. Any such rule as to the exclusion of the "fruit of the poisonous tree", as Frankfurter J. termed the products of illegal searches and seizures in Nardone v United States 308 US 338 (1939), applied only as a discipline against the law being broken in the investigation of crimes. The law, in any event, as to criminal trials has now moved on from the absolutist position first arrived at in The People (DPP) v Kenny [1990] 2 IR 110 whereby an unthinking error as to, for example, a name or address on a search warrant but an entry in good faith into the home of the accused would render an arrest there unlawful and the exclusion of any evidence as to anything found there. Under that rule, as it formerly existed, there was no balancing exercise as between the apparent innocence or triviality of the legal breach by the investigating authorities and the seriousness of the charge or the compelling nature of what was found. Thus, for a period of 25 years from 1990 to 2015 where there was a wrong house number on a search warrant and where the police were, for instance,*

investigating child pornography, an entry on foot of that warrant which discovered compelling evidence on computers seized at the accused's home would be concealed from the jury trying the case. That absolutist rule has now gone. Under the current law, a balance must be struck; The People (Director of Public Prosecutions) v JC [2017] 1 I.R. 417.

(6) In Kennedy v Law Society of Ireland (No 3) [2002] 2 IR 458, an issue was raised as to the validity of an investigation before the Solicitors Disciplinary Tribunal and a plea for exclusion of evidence was consequently made should the investigation be ruled improper. While the exclusion of evidence resulting from an inadvertent breach of the law had never been part of civil trials, nonetheless there might be extreme circumstances of egregious and knowing infringement of rights which might render the admission of evidence repellent to the good administration of justice. Any such ruling would be necessarily rare since it is impossible to imagine a pursuit for justice which does not have regard to the truth as the foundation for any ruling which affects the rights of litigants. In that regard, the remarks of Fennelly J at 490 are pertinent:

> *"I turn then to the illegality attendant on the investigation. Here it is easier to find place for the application of the balancing test proposed by Kingsmill Moore J. He stressed the need to have regard to all the circumstances. He was essentially, however, considering the public interest just as was Finlay C.J. in The People*

(Director of Public Prosecutions) v Kenny [1990] 2 I.R. 110. Was the obtaining of the evidence, the admissibility of which is at issue attended with such circumstances of illegality that it would be unconscionable to allow the authority to use it? The questions which Kingsmill Moore J. posed to himself suggest that a comparatively serious case of intentional illegality has to be established. I agree that an element of deliberate and knowing misbehaviour must be shown, before evidence should be excluded. It is not possible to render unknown something already known. The courts should be slow to adopt any mechanical exclusionary rule which makes it easy to prevent disciplinary tribunals from receiving and hearing relevant and probative material. The balance should be struck between the rights of individuals and those professional bodies assigned the task of supervising their behaviour so as to give careful weight to two competing considerations: firstly, the test adopted should not unduly impede the latter types of body from performing their duty of protecting the public from professional misbehaviour; secondly, members of professional bod[ies] *should be protected from such clear abuse of power as would render it unfair that the evidence gathered as a result be received*".

91. Likewise in *Lohan v Solicitor's Disciplinary Tribunal & The Law Society* [2023] IECA 18 the Court of Appeal (Collins J., Costello J., Allen J.) stated as follows at paragraphs 47 and 48 in the judgment of Costello J:

> "*(47) In Kennedy v Law Society of Ireland (No. 3) [2002] 2 I.R. 458 the Supreme Court considered whether there could be such an analogy in the context of the application of the exclusionary rule of evidence in criminal proceedings to disciplinary proceedings under the Solicitors Acts. The invalidity of the appointment of the authorised person was established in that case. In Kennedy (No. 3) the applicant had argued that a consequence of the invalidity of the appointment was that the evidence obtained by the accountant and, in particular, a report made to the Law Society could not be used by the Tribunal. The argument was based on cases concerning the exclusion of unconstitutionally obtained evidence as against an accused person. Fennelly J., speaking for the Court, noted at page 479 that no authority was cited which applied this line of case law to invalid administrative acts. The appellant's submission in this case that the investigating accountants' affidavit sought to have been deemed inadmissible flies in the face of the reasoning in Kennedy (No.3). Fennelly J. stated at p. 489-490 of the report:*
>
> > *"The exclusionary rule is not based on concerns about relevance or probative value of the impugned evidence....The constitutional rights at issue are typically the right to liberty or the inviolability of the person or of a dwelling. In the investigation of crime, the law confers on*

> *the police extensive powers, not normally possessed by disciplinary or administrative tribunals, to encroach on such fundamental rights. I do not exclude the possibility that such a situation may, depending on the facts of the case, calling for the application of those principles in the sphere of administrative and in particular disciplinary hearings. But the scope for such situations to arise must necessarily be extremely limited. They do not, in my estimation, arise here. The excess of statutory powers was not a trivial one, but it occurred in the course of the conduct by the governing body of the profession of their supervisory role over solicitors. No comparison can be made with the illegal and hence unconstitutional detention of a suspect or an unauthorised search of his person or of his dwelling.* [The applicant] *has not identified any constitutional right of his which was affected by the investigation." (emphasis added)*

(48) To my mind it is clear that Fennelly J. rejected any analogy between the extensive powers of the police, not normally possessed by disciplinary tribunals such as the Law Society, to encroach on fundamental rights such as the inviolability of the person or the dwelling, and the far more limited rights enjoyed by disciplinary and regulatory authorities to attend at the premises of the professional concerned and to inspect their books of account. The superficial parallel between the entry of authorised persons of a solicitor's

premises to inspect the books of account and the entry and search of a premises by gardai on foot of a search warrant does not amount to anything like a meaningful equivalence in law. The suggestion to the contrary was rejected in Kennedy (No.3) and I too would reject it".

92. Under the sub-heading "*Admissibility of the evidence of the investigating accountants*" and before quoting from the extract of Fennelly J.'s judgment in *Kennedy (No.3)*, Costello J. added that she was satisfied that even if the investigating accountants were not properly appointed as authorised persons to inspect the accounts in question, at this practice, the Tribunal remained entitled to admit the report in the disciplinary proceedings, observing that "*in Kennedy (No. 3) the Supreme Court accepted the possibility of the application of an exclusionary rule of evidence to disciplinary proceedings but distinguished between the exercise of search and detention powers in criminal law and the exercise of statutory powers of supervision by a governing body over professionals. The court held that a comparatively serious case of intentional illegality had to be established.*"

93. The Applicant goes too far in suggesting that the comments of Fennelly J. in *Kennedy (No. 3)* should be interpreted as a total approximation with the test discussed in *O'Brien*. The reference to the possibility of an exclusionary rule being applied before a disciplinary or administrative tribunal in an appropriate set of circumstances was acknowledged to be "*extremely limited*" and was made in the context of the abuse of statutory powers of investigation by the Law Society itself. In doing so, Fennelly J. acknowledged an important distinction between the powers of statutory bodies required to supervise professionals compared to those enjoyed by the Gardaí, and that

"[t]*he excess of statutory powers was not a trivial one, but it occurred in the course of the conduct by the governing body of the profession of their supervisory role over solicitors. No comparison can be made with the illegal and hence unconstitutional detention of a suspect or an unauthorised search of his person or of his dwelling.*" Equally, the reference to *O'Brien* was in the context of deliberate misbehaviour on the part of the Law Society and for the balancing test to apply, "*an element of deliberate and knowing misbehaviour must be shown*." Further, as mentioned previously, as with many of the authorities discussed (with the exception of *DPP v Gold*), it did not concern alleged breaches by a third party and did not involve a breach of the plaintiff's constitutional rights, but rather, as stated, an illegality which explains the references to the judgment of Kingsmill Moore J. in *O'Brien*.

CONCLUSION

94. The authorities eschew the adoption of a mechanical approach to the exclusionary rule. *Kennedy (No.3)* is not, therefore, authority for the proposition that the *O'Brien* balancing test should be applied by disciplinary or administrative tribunals in all circumstances when faced with an application to exclude evidence on the grounds that it was obtained in circumstances of alleged unconstitutionality or illegality. As stated earlier, whilst *Kennedy (No.3)* (or the other authorities referred to with the exception of *DPP v Gold*) does not actually address circumstances of third-party illegality or unconstitutionality, the Director did, correctly in my view, refer the panel to *Kennedy (No.3)* during the preliminary application to offer guidance in relation to the types of considerations that ought to inform its decision to admit or exclude the screenshots at issue in this case. The decision in *Kennedy (No.3)* is of assistance in setting out the

basis in which an entity, such as the Council in this case, can address issues of admissibility.

95. In brief, the Council has to have regard to the integrity of the process and where something is going to bring the process into disrepute, that is the basis in which evidence may be excluded.

96. In emphasising that a mechanical application of the exclusionary rule which made it "*easy to prevent disciplinary tribunals from receiving and hearing relevant and probative material*" should be avoided, Fennelly J. in *Kennedy (No.3)* stated that "*a balance must be struck*" between the rights of individuals and those professional bodies assigned the task of supervising their behaviour so as to give careful weight to two competing considerations: firstly, the test adopted should not unduly impede the latter types of body from performing their duty of protecting the public from professional misbehaviour; and secondly, members of professional bodies should be protected from such a clear abuse of power, as would render it unfair that the evidence gathered as a result be received. In the earlier part of this judgment, I set out the main elements of the panel's decision of 21st June 2022 which the Applicant seeks to challenge in this application for judicial review. In my view, that decision correctly sought to strike the balance referred to by Fennelly J. in *Kennedy (No.3)*.

97. Ultimately, in this application for judicial review, the Applicant seeks an *a priori* finding by this court, in the context of an extant statutory inquiry (the substantive hearings of which have not commenced) excluding evidence procured by a third party in allegedly unlawful circumstances. For the reasons which I have set out in this

judgment, I am of the view that the Applicant is not entitled to the reliefs claimed in this application for judicial review. All of the procedural and substantive safeguards provided in the 2001 Act remain available to the Applicant.

98. Accordingly, I refuse this application for judicial review.

PROPOSED ORDER

99. I shall make an order refusing the Applicant the reliefs sought by way of an application for judicial review. I shall put the matter in for mention before me on Tuesday 8th October 2024 at 10:30 to address the question of costs and any ancillary or consequential matters which arise.