AN CHÚIRT UACHTARACH
THE SUPREME COURT

O'Donnell C.J.
Woulfe J.
Hogan J.
Collins J.
Donnelly J.

S:AP:IE:2023:000032

[2024] IESC 11

BETWEEN

MD (A MINOR SUING BY HIS FATHER AND NEXT FRIEND MD)

Applicant

AND

BOARD OF MANAGEMENT OF A SECONDARY SCHOOL

Respondent

JUDGMENT of Mr. Justice Maurice Collins delivered on 10 April 2024

1. I agree with Hogan J that the order made by the High Court on 8 March 2023 ought not to have been made and that the School's appeal must be allowed. I write separately because the appeal raises important issues regarding the making of interim and

interlocutory orders in judicial review proceedings. For that purpose, I gratefully adopt the detailed factual narrative in my colleague's judgment.

2. An applicant for judicial review is not entitled to a stay or injunction as a matter of right.[1] Insofar as, in practice, there may previously have been an understanding or presumption that, once a public law measure was challenged, its implementation should be suspended, any such (mis)understanding was – or ought to have been – dispelled by this Court's decision in *Okunade v Minister for Justice* [2012] IESC 49, [2012] 3 IR 152. As *Okunade* explains, the entitlement of those conferred with statutory or other power or authority to make legally binding decisions is an important part of the structure of any legal order based on the rule of law and it follows that significant weight must be given to permitting measures that are *prima facie* valid to be "*carried out in a regular and orderly way*" (per Clarke J (as he then was), Denham CJ, Hardiman, Fennelly and O' Donnell JJ agreeing) at para 92. All due weight needs to be accorded to "*allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion*" (*ibid*). As the Court also made clear, there may be (and in many cases will be) compelling considerations going the other way. *Okunade*

[1] The position is different as regards applications for review of public procurement decisions under Order 84A RSC: see European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (SI 130/2010) (as amended). Such an application triggers the "*automatic suspension"* of the procurement decision concerned. That reflects EU law requirements. The automatic suspension may be set aside on the application of the respondent or other affected party and the 2010 Regulations (as amended) specifically provide for the approach to be taken by the court to such applications: see eg, the discussion in *Word Perfect Translation Services Ltd v Minister for Public Expenditure* [2021] IECA 305, [2022] 3 IR 764.. Notably, those Regulations make it clear that when an application to set aside is made, the onus is on the challenger to establish that the automatic suspension should remain in place. In my view, that approach accords with fundamental principles of fair procedure.

certainly does not exclude the making of a stay or injunction that suspends or otherwise affects the implementation of a *prima facie* valid administrative measure. But *Okunade* counsels that such orders must not be made reflexively or as a matter of routine.

3. That fundamental point is reinforced by this Court's decision in *Merck Sharp & Dohme v Clonmel Healthcare* [2019] IESC 65, [2020] 2 IR 1, per O' Donnell J (Clarke CJ, McKechnie, Dunne and O' Malley agreeing) at para 62.

4. Of course, public law measures differ widely in their scope and effect. Some are of general or near-general application: paradigm examples are enactments of the Oireachtas, regulations made under such enactments and public law decisions that affect a broad category of persons or a significant section of society or the economy (such as decisions made by regulators such as ComReg). At the other end of the spectrum, there are measures that affect – at least directly – only a specific individual or a limited number of individuals, such as the deportation orders at issue in *Okunade*. But in every such case the potential suspension of a presumptively valid public law measure engages considerations of the public interest that – at least generally – do not arise in private law injunction proceedings.

5. It follows that, where a court is asked to make an order having the effect of suspending or otherwise significantly affecting the due implementation of a presumptively valid public law measure – whether in the form of a stay or an injunction – it should do so only after carefully identifying and weighing all of the rights and interests engaged. That ordinarily requires that the decision-maker (and, potentially, third parties who

would be affected by the order sought) should be afforded an effective opportunity to be heard *before* any such order is made. While there may be circumstances of such urgency that an *ex parte* order is justified, any such order should be of limited duration only and the decision-maker (and/or affected third parties) must be have an opportunity to be heard before any further order is made.

6. Insofar as decisions of schools relating to the expulsion of students are said to be amenable to judicial review (and I shall explain in a moment precisely what is challenged by the Applicant here), they fall within the scope of *Okunade* and the orderly implementation of such decisions therefore has a significant value that must be recognised whenever a court is asked to make an order suspending such a decision.

7. None of this is novel and ought not to be controversial. Unfortunately, the procedures followed here departed significantly from these fundamental requirements.

8. The proceedings here arose from the Applicant's expulsion from the School or, more correctly perhaps – given that the proceedings commenced before any final expulsion decision was made – his apprehended expulsion. However, the proceedings did not challenge or seek to prevent his expulsion. The only "*decision*" challenged in the proceedings was what was described as "*the decision of [the School] of the 30th January 2023 … refusing to allow the Applicant remain in the school*" in the period following any final decision to expel him and pending the determination of his intended appeal pursuant to section 29 of the Education Act 1998 ("*the 1998 Act*"). That was the decision sought to be quashed (Statement of Grounds, para D2) and it was that decision

that was the subject of the declaration and interim stay order sought by the Applicant (Statement of Ground, paras D3 & D4).

9. It is not clear to me that the School could be said to have made any "*decision*" refusing to allow the Applicant to remain on 30 January 2023. As of that date, no final determination had been made regarding the expulsion of the Applicant. As I read it, the letter written by the Chairperson to the Applicant's solicitors of that date simply conveyed the Board's understanding that the section 29 procedures made no provision for a student to remain in school following a final determination by a board of management that the student should be expelled. On that basis, the letter continued, "*it would not be possible*" for the Board to accede to the request to allow the Applicant to remain in the School pending the outcome of any section 29 appeal process.

10. In other words, the School's position was that it had no discretion to permit the Applicant to remain following a final expulsion decision. That, the Applicant says, amounted to the School misdirecting itself as "*to its powers and discretion*" (Statement of Grounds, para E6). At the hearing of the appeal there was significant discussion on this point. It appears to me that the School had the better of the argument but it is not necessary to definitively resolve the issue.[2] The high-water mark of the Applicant's

[2] Thus section 29D of the 1998 Act provides that where an appeals committee allows an appeal under section 29(1)(a), it shall "*include a direction to the board to readmit the student and remove the expulsion from the record of the student*" (my emphasis). That appears to envisage the exclusion of the student in the period between the decision to expel and the decision of the appeals committee. The School also relied on the definition of student in section 2 as well as the provisions of section 9 which, it said, limited its functions to students enrolled in the school which, it said, the Applicant was not subsequent to his expulsion. The School's contention that, following his expulsion, the Applicant was no longer an enrolled student at the School does not appear to have been disputed.

argument was that the School was *entitled* to allow the Applicant to remain, not that it was *obliged* to do so. Yet, paradoxically, the effect of the order sought by the Applicant and made by the High Court was to *exclude* any decision-making power on the part of the School and *compel* it to allow the Applicant into the School despite having been expelled.

11. That order was, in my view, clearly mandatory in character. That characterisation is not affected by the fact that the order was sought and made prior to the final expulsion decision. The order was not directed at the maintenance of any existing *status quo*. The existing *status quo* was that the Applicant was an enrolled student in the School, entitled to attend it subject only to the powers of the School to suspend or expel him. The order was not directed to the maintenance of that position. It was to take effect only in the event that the Applicant was expelled and was intended to significantly alter the *status quo* that would then arise. If that point was reached – as of course it was – the Applicant would no longer have any entitlement to attend the School. He would be someone who, in the School's view, had engaged in misconduct sufficiently serious to warrant him being "*permanently excluded*." If and when the School decided to expel the Applicant, that would (and did) fundamentally alter his status and relationship with the School and in such circumstances requiring the School to accept him as a student and allow him onto School property involved the imposition of an new – and significant – obligation on it.

12. That the orders made by the High Court on 14 February 2023 and 22 March 2023 were each framed as orders *prohibiting* the School from *excluding* the Applicant should not

obscure the fact that the orders were mandatory in substance. An order in those terms amounted, in substance, to a positive obligation to admit the Applicant despite the fact that he had been expelled. Nor, in the absence of any challenge to the expulsion decision, could an order having such effect be said to be an order *staying* any decision made by the School, as the confused language of the order of 14 February 2023 suggests at one point. Even if it could be said that the School had made a decision to refuse the Applicant's request to remain in school if expelled, staying that decision would not, in itself, have given the Applicant any *entitlement* to attend the School following his expulsion.

13. On that basis, the order sought could properly have been granted only if the Applicant established that he had a "*strong case*", that is say one that was likely to succeed at trial: *Maha Lingam v HSE* [2005] IESC 89, (2006) 17 ELR 137, per Fennelly J at 140. Those principles apply equally to public law litigation and judicial review: see for example, the decisions of this Court in *Okunade v Minister for Justice* [2012] IESC 49, [2012] 3 IR 152 and *CC v Minister for Justice and Equality* [2016] IESC 48, [2016] 2 IR 680. Here, of course, there was never going to be a trial. The proceedings had no independent existence: they were simply a vehicle for seeking an order in aid of the section 29 appeal and the injunction was sought and granted for that purpose, as its language reflects. The proceedings would inevitably be overtaken by the decision on the statutory appeal. If the Applicant was granted the order sought, he would have no reason to bring the judicial review proceedings to trial (and has not in fact sought to do so). That was, in fact, a further and distinct ground for applying a "*strong case*" threshold: *Allied Irish Banks plc v. Diamond* [2011] IEHC 505, [2012] 3 IR 549, as well as *Okunade* at para

77-78 and *Merck Sharp & Dohme* at paras 37-38. Having regard to the nature and effect of the interim order sought by the Applicant here, it appears entirely appropriate to apply such a higher threshold, rather than the ordinary *Campus Oil* threshold of an arguable case/fair question to be tried.

14. In truth, it is difficult to discern from the papers how even that lower threshold could have been satisfied here. Many of the complaints set out in the Statement of Grounds and Verifying Affidavit appear to be directed at the decision to expel the Applicant even though, as I have explained, that decision was not challenged in these proceedings (that confusion or conflation was also a feature true of the submissions made to the High Court at the time of the application for leave and, indeed, it was also true of the arguments made by the Applicant in this appeal). It is said that the School failed to consider properly the request that the Applicant be allowed to remain in the School but it is difficult to see any foundation in the papers for the Applicant's assertion that the School had misdirected itself or had misunderstood the legal implications of its decision to expel the Applicant. The School's basic point was that section 29 of the 1998 Act did not make any provision for a student who had been the subject of a final decision to permanently exclude him or her from school to remain in school pending an appeal under that section. That is certainly a correct statement so far as section 29 is concerned The section *could* have provided that the bringing of an appeal would have the effect of suspending the expulsion decision or that, pending such appeal, the student could or should be permitted to remain in the school but there is nothing in the section to that effect.

15. That may not, in itself, exclude the argument that the School here was nonetheless *entitled* to allow the Applicant to remain, despite having made a final decision to expel him. However, nothing in the Applicant's papers appears to go beyond a bare assertion to that effect and no attempt was made to explain how that asserted position would fit with the provisions of the 1998 Act or how the School might properly conclude that the Applicant should be "*permanently excluded*" from the School by reason of his serious misconduct and at the same time decide that he should not, in fact, be excluded and should be permitted to remain. A further question arises as to whether a refusal to admit the Applicant in such circumstances would be amenable to judicial review at all given that, on the Applicant's case, the decision was one which was not governed by the 1998 Act and fell wholly outside its scope. Finally, and in any event, it is difficult to understand how any alleged failure on the part of the School to consider the Applicant's request to be *permitted* to remain could provide a basis for an order *compelling* the School to *accept* him, as opposed to an order directing it to (re)consider the request.

16. None of these matters are addressed in the Judgment of the High Court. Instead the Judge appears to have proceeded on the basis that, because leave to seek judicial review had been given, and because the School had not applied to set aside the leave order, consideration of the merits of the Applicant's case was effectively foreclosed (Judgment, paras 16-18), subject only to the court considering whether the evidence adduced by the School was such that the interim order would not been granted if that evidence had been before the court at leave stage (Judgment, para 27). In my view, that was not a correct approach.

17. The cumulative effect of the way that the proceedings progressed in the High Court is that an injunction significantly affecting the School, its staff and its students was granted *ex parte*, in its absence, and that injunction was then permitted to come into effect (albeit in varied form) without the School having any effective opportunity to be heard in opposition to it. Such a process was inconsistent with justice and fair procedures.

18. As regards the order made by Meenan J on 14 February 2023, the Judge was mistakenly informed by the Applicant that the section 24(1) standstill period was due to expire imminently, on 17 February 2023. In fact, that period was not due to expire until 2 March 2023. That was an unfortunate error. Had the Judge been informed of the correct position, it would have been evident to him that there was no basis for any interim order. In any event, the threshold for making any mandatory order against the School – as the interim order was in substance - was clearly not satisfied and it is also difficult to identify any irreparable harm to the Applicant even if his expulsion was permitted to take effect for a short period before an interlocutory hearing could take place. But in circumstances of apparent urgency, and presented with an application for an interim order framed as a stay or prohibitory injunction, it is understandable that Meenan J took the view that interim relief was appropriate. Even so, rather than making an order having effect pending the determination of any section 29 appeal (albeit subject to the School being given liberty to apply to have the order varied or removed), any interim order ought to have been for a specified and limited duration only, no more than was necessary to allow the Applicant to bring an application for an interlocutory order on notice to the School.

19. So much is clear from this Court's decision in *DK v Crowley* [2002] 2 IR 744. It concerned the constitutionality of the statutory regime for granting interim barring orders under the Domestic Violence Act 1996. Giving the judgment of the Court, Keane CJ characterised such orders as, in effect, mandatory injunctions which could be granted *ex parte*. Mandatory injunctions were, he noted, the exception rather than the rule in civil proceedings and it was "*even rarer for mandatory injunctions to be granted on an interim basis on the ex parte application of the plaintiff*" (at page 758). Furthermore, he continued, while an interim injunction may be granted *ex parte*, "*the courts have always been concerned to ensure that the interference thus effected with what may very well be a right which the defendant is entitled to exercise without such interference, is as limited in its duration as is practicable*" and thus any such injunction would not normally last beyond the next motion day and, in many cases, the court will abridge time for service of a notice of motion "*so as to ensure that the defendant is heard in a matter of days*" (759).

20. The difficulty in *DK v Crowley* was that the statute did not impose any time limit on the operation of an interim barring order, even when granted *ex parte*. The respondent could apply at any time to have an interim order discharged or varied but no reason had been advanced as to why the legislature should have imposed such a burden on the respondent nor had it been demonstrated that the statutory remedy would be undermined if an interim order were to be of limited duration only "*thus requiring the applicant, at the earliest practicable opportunity, to satisfy the court in the presence of the opposing party that the order was properly granted and should now be continued in force*" (760). On that basis, this Court concluded that, in failing to prescribe a fixed

period of relative short duration during which an interim barring order was to continue in force, the procedures prescribed by the 1996 Act deprived the respondents to such applications of the protection of the *audi alterem partem* principle in a manner and to an extent that was disproportionate, unreasonable and unnecessary (762).

21. There are, no doubt, particular features of the interim barring order regime under the 1996 Act that are not found here. For instance, the Court attached significance to the fact that breach of such an order was a criminal offence (759). The Court also gave weight to the potential impact of such an order in tilting the balance of family law litigation against the respondent (*ibid*). But these differences do not affect the underlying principle. The *ex parte* order made by Meenan J was mandatory in effect and, on any reasonable assessment, imposed a significant burden on the School (or would do so as soon as the School made a final decision to expel the Applicant). Here, as in *DK v Crowley*, fairness required that such an order should have been for a limited duration only, "*thus requiring the [Applicant], at the earliest practicable opportunity, to satisfy the court in the presence of the [School] that the order was properly granted and should now be continued in force*" (760).

22. I agree with Hogan J that Order 84 Rule 20(8) did not authorise the making of an interim *ex parte* order in the terms made by Meenan J here. In my view, no issue arises regarding the *vires* of Rule 20(8) and none was raised by the parties.

23. But, the Order having in fact been made in the terms in which it was, and the School having brought an application to set that order aside, the same basic principles of

procedural fairness required that the application should have been dealt with as if it was one for an interlocutory injunction, with the Applicant bearing the onus of establishing the criteria necessary to justify the granting of such an injunction, rather than the onus being on the School to establish why the interim order should be set aside.

24. Even in the absence of any express leave to do so, the School was entitled to seek to have the interim order made on 14 February 2023 set aside. In "*the interests of justice it is essential that an ex parte order may be reviewed and an opportunity given to the parties affected by it to present their side of the case*": *Voluntary Purchasing Group Inc v Insurco International Ltd* [1995] 2 ILRM 145, per McCracken J. The School was also entitled to apply to have the order granting the Applicant leave to seek judicial review set aside: see the decisions of this Court in *Adam v Minister for Justice* [2001] IESC 38, [2001] 3 IR 53 and *Gordon v DPP* [2002] IESC 47, [2002] 2 IR 369. But it was not under any obligation to challenge the grant of leave in order to make the case that the interim order should be set aside.

25. As the moving party in the application to set aside, it might be thought to follow that the onus lay on the School to persuade the High Court that the interim order should be set aside or discontinued. In my view, however, the imposition of such a burden on the School would be inconsistent with the principles articulated by this Court in *DK v Crowley*. That the interim order made *ex parte* on 14 February 2023 was – in error – framed in the terms it was could not have the effect of excluding or limiting the School's right to a fair hearing or give rise to any presumption that the order should be allowed to remain in place: see the observations of Hogan J in *Cornec v Morrice* [2012] IEHC

376, [2012] 1 IR 804, at 812-813 (orders made under section 1 of the Foreign Tribunals Evidence Act 1856), approved and applied by the Court of Appeal (per Hogan J; Finlay Geoghegan and Peart JJ agreeing) in *Albaniabeg Ambient Sh.pk. v Enel S.p.A* [2018] IECA 46, followed in *Donnelly v Vivier & Co Ltd* [2022] IECA 104 (orders for service out under Order 11 RSC).

26. The observations made by Keane CJ for this Court in *McDonell v Brady* [2001] 3 IR 588 support that approach. There the High Court had granted a stay on the proceedings of an Oireachtas Sub-Committee pending the outcome of a judicial review challenge. The Sub-Committee successfully applied to the High Court to have the stay discharged. The High Court approached the application on the basis that the onus was on the sub-committee to establish that the stay should be discharged and that was not challenged on appeal. Nevertheless, Keane CJ observed that "*it could plausibly [be] contended that, on the contrary, the onus rests on the applicant to satisfy the court, where it is challenged, that it should be kept in place*." There was, he noted, nothing in Order 84, Rules 20(7)(a) RSC that entitled an applicant for judicial review to a stay and there seemed to be "*no reason in logic why the applicant, where the grant of the stay is subsequently challenged should not be under an onus to satisfy the court that it is an appropriate case in which to grant such a stay*" (at 598).

27. *DK v Crowley* postdates *McDonell*. While it does not refer to it, it appears to me that the approach taken by the Court in *DK v Crowley* is entirely consistent with, and strongly reinforces, the observations of Keane CJ in *McDonnell*. What was Order 84 Rule 20(7)(a) RSC is now to be found, in modified form, in Order 84 Rule 20(8)(b)

RSC. As already explained, the interim order made on 14 February 2023 was not in substance a stay. It was, rather, a mandatory injunction. Having regard to *DK v Crowley,* it is clear that the order should not have been granted in the terms it was. If the order had been made in proper form, the Applicant would have had to bring an application for an interlocutory injunction and, in that scenario, would clearly have borne the onus of establishing that such an order should be granted. It could not be the case that the School was to be prejudiced, and the Applicant to be correspondingly advantaged, by reason of the form in which the interim order was made.

28. Where an order is made *ex parte* that immediately and materially affects another party – such as the stay at issue in *McDonnell*, the interim barring order at issue in *DK v Crowley* or the interim injunction here – the affected party is entitled to apply to have the order set aside. The party that obtained the *ex parte* order must then satisfy the court that the order should continue in force by showing that, if the court was being asked to make that order for the first time, it would be appropriate to do so. In other words, the application to set aside is to be treated as if it were an *inter partes* application for the relevant order. The Foreign Tribunals Evidence Act and Order 11 RSC cases fit comfortably within this paradigm. Such orders have an immediate and material impact on third parties: orders under the Act impose obligations on third parties to attend to give evidence and/or make compulsory disclosure of documents and orders under Order 11 RSC have the effect of requiring "*a person, not otherwise within the jurisdiction of our courts, to appear here and to answer the claim of a person made in what is for him a foreign court rather than leaving the plaintiff to pursue his remedy against that person*

in that other jurisdiction" (*Analog Devices BV v Zurich Insurance Company* [2002] 1 IR 272, per Fennelly J at 281).

29. I do not mean to suggest that in every application to set aside an order made *ex parte* the onus is on the party who obtained the order rather than on the moving party. That depends on the nature and effect of the *ex parte* order. Thus, it is clear from *Adam v Minister for Justice* [2001] IESC 38, [2001] 3 IR 53 and *Gordon v DPP* [2002] IESC 47, [2002] 2 IR 369 that where a party seeks to set aside an order granting leave to seek judicial review, it bears the onus of showing that leave should not have been granted. But, as Fennelly J explained in *Gordon*, that results from the fact that the leave procedure is "*intended to provide a filtering process, a protection against frivolous or vexatious applications*" (page 375). The requirement to obtain leave is an exception to the general rule that proceedings may be commenced administratively (by the issue of a summons or other process) and the effect of an order granting leave is merely to permit an application for judicial review to be brought. It does not have an immediate and direct impact on the respondent equivalent to the impact of the interim order here.[3]

30. In the circumstances here, the School was indeed entitled to "*an interlocutory type hearing of an ex parte injunction as would occur in a Chancery matter*" (Judgment,

[3] A point made by the High Court (Kelly J) in *Gorman v Minister for the Environment [*2001] 1 IR 306, at 312.There may be unusual cases in which the grant of leave has the same effect as a grant of an interlocutory injunction but in that event there are other procedural means of protecting the position of the respondents/notice parties, such as by requiring the applicant to give a fortified undertaking in damages as a condition to being permitted to continue with the application for judicial review: *Broadnet Ltd v Director of Telecommunications* Regulation [2000] 3 IR 281. In contrast to the position in *Broadnet*, the Applicant here sought and obtained an injunction without being required to give any form of undertaking in damages.

para 15). The right of the School to fair procedures, including its right to an effective hearing, was in no way inferior to the rights of a defendant in a chancery action against whom an interim injunction is made *ex parte.* That right to be heard was not adequately met by a hearing limited to considering whether the additional evidence it had put before the High Court was sufficient to demonstrate that the *ex parte* injunction would not have been granted if that evidence had been before Meenan J (Judgement, para 27).

31. The High Court also erred giving the weight it did to the fact that the School had not sought to set aside the grant of leave. In the first place, as illustrated concretely by *McDonell v Brady*, that was not a precondition to applying to set aside the interim order. Secondly, the fact that, in an *ex parte* application for leave, the leave judge had been satisfied that the application at least met the arguable case threshold established in *G v Director of Public Prosecutions* [1994] 1 IR 374 ought not to have foreclosed the Court's assessment. The burden was on the Applicant to establish all of the elements required for a grant of an injunction in the terms sought by him. As a matter of first principle, the *ex parte* determination granting leave did not – and could not – give rise to any form of *res judicata* or estoppel. Even if the applicable threshold for granting injunctive relief here was that of "*serious issue/fair question to be tried*" – which in my opinion it was not – and even if that threshold is the same as the *G* "*arguable case*" threshold – and that appears to be unclear – the School was nonetheless entitled to dispute that such threshold had been met here and, in such circumstances, the High Court was obliged to undertake its own assessment and arrive at its own conclusions on that issue.

32. No doubt, in most cases where leave to apply for judicial review is granted, the basis on which leave was granted will be clear and it will be equally clear that the case meets the merits threshold for the making of an order under Order 84, Rule 8 RSC (at least where the relief is a stay or purely prohibitory injunction). From a practical point of view, in such cases the grant of leave may have decisive effect, However, that was decidedly not the position here. All that was clear was the *fact* that leave had been granted and that an interim order had been made but those facts on their own were not in any way probative – less still of decisive effect – of the Applicant's right to continuing injunctive relief.

33. The decision of the High Court (O' Sullivan J) in *Martin v An Bord Pleanála* [2002] 2 IR 655 is also relevant in this context. The applicant obtained leave to seek judicial review challenging the transposition of the EU environmental impact assessment rules in relation to projects requiring both planning permission and an EPA licence. The applicant and others had appealed a planning permission for an incinerator to An Bord Pleanála ("*ABP*"). Following the grant of leave, the applicant applied for a stay on any consideration of that appeal by ABP pending the determination of the judicial review proceedings. He argued that, as there had been no application to set aside the grant of leave, the court had to proceed on an assumption that he had established a serious issue to be tried. The High Court did not agree that any such assumption arose: page 660. In his analysis, O' Sullivan J first referred to *Gordon* and the observations of Fennelly J referred to above. Secondly, he referred to an unreported decision of the High Court (Kelly J) indicating that threshold for an interlocutory application was higher than the leave threshold of an arguable case (*Ryanair Ltd v Aer Rianta CPT* (Unreported, 25

January 2001)). In light of those considerations, O' Sullivan J concluded that "*it would be improper to draw the inference that a failure on the part of any of the parties to these proceedings to bring an application to set aside the order of the High Court … in the present case confers on the applicant's case an automatic entitlement to be treated on this application as comprising a serious issue to be tried. In my view, I must on this application apply the normal rules without any such inference*." (*ibid*). O' Sullivan J then proceeded to undertake his own assessment and concluded that the applicant had, in fact, made out a serious issue to be tried (though the stay was refused by reference to the adequacy of damages and the balance of convenience).

34. Just such an inference was drawn by the High Court Judge here and in my respectful view her approach was in error. Nothing followed from the fact that the School had not sought to set aside the leave order. That did not alter the status or effect of the leave order. It did not transform the implicit determination that the *G* threshold of an arguable case had been met into a finding that bound the parties or the court itself when considering whether to continue the interim order.

35. In any event, for the reasons I have explained, the threshold applicable here was not that of serious issue/fair question to be tried: the Applicant was required to demonstrate that he had a strong case. That, it should be said, was the threshold argued for by the School, though the argument is not addressed in the Judgment. I confess that I am very doubtful that, on the material before the High Court, the lower threshold was met: but on no version of events could the Applicant claim to have satisfied that higher threshold.

36. In the circumstances, it is not necessary to consider whether the *G* "*arguable case*" threshold is the same as the threshold of "*serious issue to be tried*." *Ryanair Ltd v Aer Rianta CPT* (Unreported, 25 January 2001) indicates that it is not. However, in *O' Doherty & Waters v Minister for Health* [2022] IESC 32, [2022] 1 ILRM 421, O' Donnell CJ (Irvine P., MacMenamin, O'Malley, Baker and Murray JJ agreeing) expressed the view (*obiter*) that the tests were essentially the same: at para 39. The issue was not really addressed in argument and in the circumstances it would be better to leave to a case where it actually requires resolution.

37. I also respectfully differ from the learned Judge's assessment of the balance of convenience. In my view, she did not give appropriate weight to the interests of the School and its students in the implementation of the decision to expel the Applicant. That decision was not challenged in the proceedings and so it had to be treated as valid. That the Applicant intended to bring an appeal against the decision under section 29 of the 1998 Act did not alter that fact. In the School's opinion, the Applicant had been guilty of serious misconduct warranting his permanent exclusion. The School having made that assessment (following a detailed procedure, including the involvement of the educational welfare officer under section 24 of the 2000 Act), it was a very significant imposition on it, its management and staff, to require it to allow the Applicant to continue to attend as a student in any capacity. Such an order was liable to undermine the authority of the management of the School. It also created a clear risk to the welfare of teachers and of the students enrolled in the School. No sufficient weight was given to these matters by the Judge. She did refer to the impact of the injunction on the student who was the target of some of the Applicant's misconduct (Judgement, para 25) but she

appears to have limited her assessment to the additional evidence put before the Court by the School (Judgment, para 23). For the reasons already set out, the Judge was wrong to constrain her assessment in that way. The weight of the material before the court indicated significantly problematic behaviour by the Applicant vis-à-vis both teachers and other students (and that one specific student in particular). In any event, she wrongly discounted the concerns of the School and effectively substituted her judgment for that of the School that the welfare of the students generally, and of that particular student specifically, required the Applicant to be excluded (a judgment vindicated both by the problematic behaviour of the Applicant after his return to the School and by decision of the section 29 appeal committee to uphold his expulsion).

38. Conversely, I consider that the Judge gave too much weight to the effect on the Applicant of a refusal of an injunction. Absent an injunction, the Applicant certainly could not attend the School again unless and until his section 29 appeal was successful, in which case he would be readmitted. No fixed timescale for the determination of such an appeal is prescribed by the 1998 Act but it seems clear that the Act contemplates an expeditious process. The period between the decision to exclude and the determination of the section 29 appeal was likely to be relatively limited. Temporary educational arrangements might have been put in place for that period. The Applicant could have sought admission to a different school. No doubt, either course would have been practically challenging but, without seeking to diminish the impact of exclusion on the Applicant, on any analysis his rights and interests did not outweigh the rights and interests of the School, it teachers and students in the circumstances here.

39. Finally, there was significant debate as to whether the High Court had any jurisdiction to grant *any* injunction here. The School contended that the injunctive relief granted by the High Court was effectively a form of ancillary relief, granted in aid of the statutory section 29 appeal which the court had no jurisdiction to entertain or determine. According to the School, there is no jurisdiction to grant such an injunction, whether under the Judicature (Ireland) Act 1877 or otherwise. That was in turn disputed by the Applicant. Multiple authorities were cited to us, including *The Siskina* [1979] AC 210, *Caudron v Air Zaire* [1985] IR 716 and the recent decision of the Privy Council in *Convoy Collateral Ltd v Broad Idea International Ltd* [2023] AC 389. We were also brought to a number of conflicting High Court decisions on the issue of whether the Constitution gives that court a jurisdiction to make ancillary orders, including injunctions, for the purpose of ensuring the effectiveness of a statutory remedy available from a non-court tribunal or body: see *McGrath v Athlone Institute of Education* [2011] IEHC 254 and *Power v HSE* [2019] IEHC 462. These interesting and difficult issues were not debated before the High Court and it is not necessary to address them for the purpose of resolving this appeal. I would leave them for another day.

40. Even on the assumption that the High Court has power to grant an injunction "*in aid of"* a section 29 appeal, whether arising from the Judicature Act or otherwise, in my view the exercise of such a power would be justified only exceptionally. The section 29 appeal is a novel and useful procedure, offering a *de novo* assessment of the expulsion decision by the appeal committee: *Board of Management of St Molaga's National School v Secretary General of the Department of Education* [2010] IESC 57, [2011] 1 IR 362. That is not the only statutory constraint on schools' power of expulsion –

section 24 of the 2000 Act imposes another important constraint, prior to the point of a final decision being made. But while intervening in these ways, the Oireachtas has refrained from imposing any requirement on schools to retain an expelled student pending the outcome of a section 29 appeal. That appears to be a deliberate legislative judgement rather than any oversight or omission – on the one hand conferring a right of appeal that is intended to operate expeditiously and which may result in the readmission of the student but, on the other, not further interfering with the autonomy of the school by requiring it to accept an expelled student pending the outcome of that appeal. In my view, even if courts have jurisdiction to do so, they ought to be very slow to intrude into this carefully constructed statutory scheme. Equally, I would add, where students choose not to pursue a section 29 appeal and elect instead to seek judicial review of an expulsion decision (a potentially perilous choice in light of the decision of the High Court (Simons J) in *AB (a Minor) v Board of Management of a Secondary School* [2019] IEHC 255), courts should be very slow to make an order compelling a school to allow an expelled student to continue to attend school and should do so only in the clearest of cases.

41. I would allow the School's appeal.