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 Gerard Hogan delivered the 10th. day of April 2024

Introduction

1. This appeal raises important questions regarding the jurisdiction and practice of the High Court to grant interlocutory relief in Ord. 84 judicial review proceedings. The issue arises in the following way.

2. The respondent to this appeal, MD, was a secondary school student ("the student") in his Junior Certificate year at a particular secondary school. The school in question is a

recognised school for the purposes of the Education Act 1998 ("the 1998 Act"). (As the High Court made an order to this effect pursuant to s. 45(1) of the Courts (Supplemental Provisions) Act 1961, the identities of the parties – including the name of the school - have been redacted). Serious allegations of misconduct were made against the student, including very serious allegations of bullying directed at a fellow female student in the school. In December 2022 the school's Principal prepared a report detailing the allegations.

3. In the wake of these allegations the Board of Management met on 17th January 2023 and made a preliminary decision to expel the student from the school. By virtue of s. 24(4) of the Education (Welfare) Act 2000 ("the 2000 Act") a period of 20 school days must elapse before the Board can make a final decision to exclude a student. Taking account of the mid-term break the 20-day period was due to expire on 2nd March 2023. By letter dated 26th January 2023 MD's solicitors wrote to the Principal of the school calling upon him to permit the student to remain in the school pending the outcome of a statutory appeal of the expulsion decision to the Secretary General of the Department of Education and Skills pursuant to s. 29(1) of the 1998 Act. Where this occurs, the Secretary General is obliged to appoint an appeal committee pursuant to s. 29(2) of the 1998 Act. This Court has already determined that this particular statutory appeal is a *de novo* appeal on the merits: see *Board of Management of St. Mológa's National School v. Secretary General of the Department of Education and Science* [2010] IESC 57, [2011] 1 IR 162.

4. The letter of 26th January 2023 threatened legal proceedings to compel the school to maintain the enrolment of MD pending the outcome of the s.29 appeal. The Chairman of the Board of Management replied by letter dated 30th January 2023 saying that there was no provision in the Department of Education's procedures "whereby a student could remain in a school pending a final determination of a Board of Management meeting that the student in question should be permanently excluded."

5. Following a further exchange of correspondence, the applicant commenced judicial review proceedings in the High Court. The key reliefs sought at paragraph 2, 3 and 4 of the grounding statement were in the following terms:

> "2. An order of certiorari, by way of application for judicial review, quashing the decision of the respondent on the 30th January 2023 ("the decision") refusing to allow the applicant to remain in the school following the decision to expel and pending the determination of the appeal pursuant to section 28 of the Education Act 1998.
>
> 3. A declaration by way of application for judicial review that the decision was reached contrary to fair procedures and/or was irrational and/or unreasonable and/or disproportionate and/or was made in a manner that fettered the respondent's discretion.
>
> 4. An interim order staying the decision of the respondent, or interim and/or continuing injunction prohibiting the respondent from excluding the applicant from the school pending the determination of an appeal of the decision of 30th January made by the applicant pursuant to section 29 of the Education Act 1998."

6. While the challenge was accordingly to the "decision" of the school not to allow the student to remain in the school pending the outcome of the s. 29 appeal – as distinct from a challenge to the expulsion decision itself - there was at times some confusion in this regard. On 14th February 2023 Meenan J. granted the student leave to apply for judicial review in respect of these reliefs. He also made an order staying the decision of the Board of Management to exclude the student from the school pending the determination of the s. 29 appeal by the appeal committee. (Due to a misunderstanding at the time, it was believed by the student that the expulsion would take effect on 17th February 2023.) The order was in the following terms:

> "An interim order staying the decision of the respondent, or interim and/or continuing injunction prohibiting the respondent from excluding the applicant from the school

pending the determination of an appeal of the decision of the 30th January 2023 made by the applicant pursuant to section 29 of the Education Act 1998, such injunction order is subject to the entitlement of the respondent having liberty to apply to the Court on 72 hours' notice to the applicant seeking to vary or remove the interim injunction order."

7. It is important to note that the school maintains that the student did not, as such, challenge the validity of the decision to exclude him from the school and that in substance he instead sought this injunctive relief in aid of the s. 29 appeal itself. Section 29 does not itself provide for any stay procedure pending the outcome of the appeal against any expulsion decision.

8. It seems to have been accepted that the injunction which was in fact granted was nevertheless principally – if not, indeed, exclusively - in aid of the s. 29 appeal. As Bolger J. was later to observe (at paragraph 15 of her judgment) that:

"the injunction was required to give any meaning to the applicant's attempts to challenge his removal from the school pending the determination of his s. 29 appeal in that, if the school had been permitted to expel him before that determination, the expulsion he seeks to challenge by way of a s.29 appeal would become effective, which he says will jeopardise his education in a manner that cannot be compensated in damages."

9. On 3rd March 2023, the school applied to the High Court (Bolger J.) to have the interim injunctive orders which had been granted by Meenan J. set aside. This application was refused by Bolger J. in a judgment delivered on 8th March 2023. As she explained (at paragraph 30 of her judgment):

"The injunction only restrains the [school] from excluding the applicant pending the determination of the s. 29 appeal, which the [student] has accepted will only be to the

date of the Appeal Committee and will not include any period during which any challenge may be brought to that decision. The [student] has committed to lodging the s. 29 appeal within 72 hours of the final decision of the school should the decision to be to exclude [him]. The orders only relate to the s. 29 procedure…and the jurisdiction of this Court in relation in relation to matters pertaining to the s. 29 appeal which includes the subject matter of the substantive judicial review."

10. The Board of Management met on the day after Bolger J. delivered judgment and determined that the student should be permanently excluded from the school. The student duly invoked the s. 29 appeal procedure. That appeal was finally rejected by the Appeal Committee on the 8th June 2023.

11. It should also be noted that on 17th April 2023 the school made a further application to vary or set aside the earlier order of Bolger J. on the ground that the student had engaged in what was alleged to be further acts of serious misconduct directed at the female student who was the subject of the original alleged acts of bullying by him. At the time the student was not enrolled with the school, but he was entitled to attend pursuant to the original High Court order. That application was refused by Bolger J.

The grant of leave by this Court

12. This Court granted leave pursuant to Article 34.5.4º of the Constitution on 25th May 2023 for a direct appeal from the decision of Bolger J. in the High Court: see [2023] IESCDET 68. All sides accept that the underlying issue has now been rendered moot by reason of the decision of the Appeal Committee. In view, however, of the importance of the underlying issues and the fact that they have a systemic importance not only for the education sector but also because of the manner in which interlocutory relief may be granted by the High Court in judicial review proceedings, then in line with its decision in *Odum v. Minister for*

Justice [2023] IESC 3, I would propose that this Court should nonetheless address the merits of these issues.

Issues on the appeal

13. It is accepted that there is no mechanism contained in s. 29 of the 1998 Act whereby a decision to exclude a student can be stayed pending a decision of the Appeals Committee, save, of course, for the 20-day period itself provided by s. 24(1) of the 2000 Act. That period expired on 2nd March 2023, so that (in effect) the injunctive relief covered the period from that date until the final decision of the s. 29 Committee on 8th June 2023.

14. The principal issue arising on the appeal accordingly concerns the general jurisdiction of the High Court to grant an injunction under s. 28(8) of the Supreme Court of Judicature (Ireland) Act 1877 as applied by s. 48 of the Courts (Supplemental Provisions) Act 1961. This raises the issues of whether the injunctive relief which was in fact given was in substance a mandatory interlocutory injunction, along with the issues of whether the onus was on the school to have the injunction discharged and whether the existence of the strong prima facie case required for injunctive relief of this nature had itself been established by reason of the grant of leave to apply for judicial review.

15. A broader question which might also be said to arise is whether an applicant can obtain injunctive relief in aid of a statutory remedy (such as s. 29) where there is, as such, no underlying cause of action in the High Court. This issue was not, however, debated in the High Court and it only featured in passing in argument before this Court.

16. While this appeal principally concerns the manner in which injunctive relief was granted by the High Court, one might note that the School also contends that well-established case-law demonstrates that, in general, the High Court cannot grant an injunction save in aid of a subsisting cause of action in the High Court itself and, specifically, that the Court cannot grant an injunction in aid of a statutory remedy such as s. 29 which does not provide for

such or some equivalent form of relief. It relies on the decisions of the House of Lords in *The Siskina* [1979] AC 210, the Privy Council in *Mercedes Benz AG v. Leiduck* [1996] AC 294 and that of this Court in *Caudron v. Air Zaire* [1985] IR 716 for this general proposition. It also points to a series of decisions which reject the proposition that there is such a jurisdiction to grant an injunction in aid of statutory administrative procedures: see, *e.g., Nolan v. Emo Oil Ltd*. [2009] IEHC 15; *Power v. HSE* [2019] IEHC 462. As Allen J. put it in *Power*, the "remedy must follow the right."

17. The student maintains in response that *The Siskina* was effectively overruled by a seven-judge panel of the Privy Council in *Convoy Collateral Ltd. v. Broad Idea International Ltd.* [2021] UKPC 24, [2023] AC 389. In *Convoy Collateral* Lord Leggatt also drew attention to the judgment of the House of Lords in *Re Channel Tunnel* [1993] AC 334 where it was held that an injunction could be granted in aid of arbitration proceedings. In these circumstances the student effectively asks this Court to overrule *Caudron v. Air Zaire*.

18. The student also points to another line of High Court authority – such as *McGrath v. Athlone Institute of Technology* [2011] IEHC 254, *Holland v. Athlone Institute of Technology* [2011] IEHC 414, [2012] ELR 1 and *Albion Properties Ltd. v. Moonblast Ltd.* [2011] IEHC 107, [2011] 3 IR 563 – where the Court's jurisdiction to grant an order in aid of administrative proceedings was said to derive either from the High Court's original jurisdiction under Article 34.3.1º or from the State's duty to ensure an effective judicial remedy under Article 40.3.2º.

Whether the High Court applied the correct test in granting injunctive relief in the present case

19. It may first be noted that the deployment of judicial review in school disciplinary proceedings is a relatively new phenomenon. Prior to the 1998 Act, admission to a

secondary school was largely a matter of contract. Given, however, that aspects of the apparatus of school discipline are now regulated by the 1998 Act (and, indeed, by s. 24 of the 2000 Act), there seems little reason to doubt but that in principle decisions to expel pupils and other serious disciplinary punishments with long-term reputational implications for the students affected can be subject to judicial review as these decisions have now been invested by that Act with the requisite public law character. In general, however, where possible, school disciplinary matters are best dealt with by means of the specific remedy provided in this instance by s. 29 of the 1998 Act, not least given the cheap, speedy and efficacious nature of this statutory remedy. In this respect, I entirely agree with the comments of Simons J. in *Student AB v. Board of Management of a School* [2019] IEHC 255 (at paragraphs 41-45) who expressed concern that the very prospect of litigation (and its attendant costs) might deter schools from exercising their disciplinary jurisdiction, even in a case where this might be thought to be appropriate. And absent quite exceptional circumstances, the courts should not be the vehicle for resolving minor and ephemeral school disciplinary adjudications: see, *e.g., Murtagh v. Board of St. Emer's National School* [1991] 1 IR 482.

20. Returning now to the decision of Meenan J., it is important to stress that the principal relief sought in the student's statement of grounds was an order quashing the decision of the school dated 30th January 2023 as refused to allow the student to "remain in the school following the decision to expel and pending the determination of an appeal pursuant to s. 29 of the Education Act 1998." It is true that the student's pleadings also contend that the "decision was reached contrary to fair procedures" and that it was unreasonable and irrational. But the "decision" which was challenged in these judicial review proceedings was *not* the substantive decision to expel the student, but rather the separate "decision" not to allow him to remain in the school pending the outcome of the s. 29 appeal.

21. One must accordingly assume that it was in respect of this "decision" that Meenan J. considered that the student had raised an arguable case. One way or another, Meenan J. obviously considered that the matters raised were sufficiently weighty to merit both the grant of leave to apply for judicial review and the making of an interim order restraining the expulsion of the student. In the context of a busy list where the judge is often required to act *ex parte* on the basis of a necessarily imperfect and incomplete knowledge of the underlying facts, this was a perfectly understandable decision.

22. The student's failure to challenge the expulsion decision itself means that the decision to expel him was valid and must be accepted as such. He was no longer an enrolled student for the purposes of the 1998 Act. It follows in turn that the application for injunctive relief was in substance an application for a mandatory interlocutory injunction requiring the school to re-admit the (otherwise validly expelled) student pending the outcome of the s. 29 appeal.

23. One of the procedural changes effected by the reform of the judicial review procedure in 1986 was that it enabled the High Court to grant injunctive relief in aid of the well-established public law remedies such as certiorari or prohibition. These changes were, however, effected by statutory instrument made pursuant to a medley of various statutory provisions, such as ss. 65 and 66 of the Courts of Justice Act 1936 (in the case of the Superior Courts Rules Committee). The Rules of the Superior Courts must in any event concern only matters of "pleading, practice and procedure": see s. 14(2) of the Courts (Supplemental Provisions) Act 1961. Any attempt to change the substantive law by rules of court will be held to be ultra vires: see, *e.g.*, decisions of this Court such as *MOS v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 ILRM 149 and *Director of Public Prosecutions v. McGrath* [2021] IESC 66, [2021] 3 IR 785.

24. The substantive rules governing the grant of injunctive relief – whether (as prior to 1986) in a plenary action or (as now) judicial review proceedings cannot be regarded "even on the widest possible interpretation of the term 'practice and procedure', part of the practice and procedure…It is a matter of substantive jurisdiction": *The People v. Rice* [1979] IR 15 at 19, per Henchy J. On the coming into force of the Constitution on 29th December 1937 the High Court was not empowered to grant the equivalent of an interlocutory injunction on an *ex parte* basis. All that the Court could properly do *ex parte* was to grant an interim injunction for a short period (usually measured in days) pending the *inter partes* hearing of the interlocutory injunction. The onus was then on the moving party to seek and obtain an interlocutory injunction on notice to the appropriate defendant. At that hearing the moving party would carry the burden of proof and the interlocutory relief was either granted or refused pending the full hearing.

25. These rules were, as I have just stated, part of the substantive jurisdiction of the High Court. The Ord. 84 procedure introduced by the 1986 Rules did not purport to change these substantive rules: it simply enlarged the circumstances in which the High Court's existing general injunctive jurisdiction could now properly be invoked in judicial review proceedings: see Ord. 84, r. 20(8)(a). This was an innovatory procedural change which enables the High Court to grant such interim relief in judicial review proceedings "as could be granted in an action begun by plenary summons." It is true, however, that Ord. 84, r. 20(8)(b) provides that "where the relief sought is an order of prohibition or certiorari", then the High Court, should it consider it "just and convenient to do so", make an order "staying the proceedings, order or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders."

26. One possible reading of Ord. 84, r. 20(8)(b) might admittedly suggest that the High Court has a jurisdiction to grant at the leave stage what amounts in substance to an interlocutory

injunction *ex parte* "staying" the proceedings until the High Court had determined the merits of the judicial review challenge or it should otherwise order. While Collins and O'Reilly, *Civil Proceedings and the State* (3rd ed.)(Dublin, 2019) consider (at 165) that it is "implicit in Ord. 84, r. 20(8) that interlocutory, as distinct from interim, relief should not issue on the hearing of an *ex parte* application for leave to apply for judicial review", they also accept that there "has been some confusion in this regard."

27. It may be, however, that it is actual wording of Ord. 84, r. 20(8)(b) which is the source of at least some of this confusion. This provision may in turn possibly reflect the traditional pre-1986 thinking of both bar and bench that the grant of a conditional order of certiorari or prohibition amounted to a (virtually automatic) stay in respect of the effect of the decision under challenge.

28. One way or another, however, I consider that Ord. 84, r. 20(8) should not be read as empowering the High Court to grant what amounts in substance to a mandatory interlocutory injunction *ex parte* following the grant of leave to apply for judicial review. It must be stressed that the basis for any challenge to the "decision" not to allow the student to remain in school was, at best, weak and exiguous. If, moreover, interim relief was granted, it should have been time limited, and any order should have provided for the making of an application for an interlocutory injunction in which the school would have been on notice and in respect of which the student would have carried the onus of proof.

29. Apart from anything else, the Superior Court Rules Committee would not have had the jurisdiction so to alter the substantive law in respect of the granting of injunctive relief. As Keane C.J. observed in *McDonnell v. Brady* [2001] 3 IR 588 at 598:

> "There is nothing in the wording of [what is now Ord. 84, r. 20(8)(a)] to suggest that, when an applicant seeks an order of prohibition or certiorari, he is further entitled *ex debito justitiae*, to a direction that the proceedings should be stayed. There seems 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 a stay."

30. All of this means that the onus in the present case was on the student as moving party to apply for an interlocutory injunction on notice to the school upon a return date for the hearing of that application in the High Court following the expiration of the original interim order granted *ex parte*. In the course of that application the student would have been required to demonstrate the existence of an arguable case, that the balance of convenience rested in his favour and that damages were not an adequate remedy: see *Merck, Sharp & Dohme Corporation v. Clonmel Healthcare Ltd*. [2019] IESC 65, [2019] 2 IR 1. If (as here) the application was in substance an application for a mandatory interlocutory injunction, the student would have been required to meet the most exacting *Maha Lingham* standard of a strongly arguable case (*Maha Lingham v. Health Service Executive* [2005] IESC 89, [2006] ELR 137).

31. This, however, was not quite what happened. The order of Meenan J. dated 14th February 2023 had provided that the injunction restraining the expulsion from the school pending the outcome of the s. 29 appeal would continue, save that the school was given liberty "to seek to remove the said interim injunction on 72 hours' notice to the applicant." When the school sought to discharge the interim injunction, it additionally protested that it ought to have been heard prior to the granting *ex parte* of what in substance was contended to be an interlocutory injunction.

32. This argument was rejected by Bolger J. in her judgment delivered on 8th March 2023, saying (at page 7) in which she refused to set aside the order which had been granted, saying: "They [i.e., the School] were certainly given liberty to apply, but I do not consider

that to equate to a right to an interlocutory type hearing of an *ex parte* injunction as would occur in a Chancery matter, an analogy urged on the Court by the respondent."

33. I cannot help thinking but that in these respects the High Court fell into error. While it was perfectly understandable that the High Court would have sought to prevent on an interim basis the expulsion of a secondary student from school which was then understood to be imminent, that interim order should really have lasted no more than a few days. As I have already pointed out, the onus should then have been on the student to take steps to apply for an interlocutory injunction. The order which was, however, granted was one which in substance amounted to the grant of a mandatory interlocutory injunction on an *ex parte* basis. The fact that the school was expressly given liberty to apply to have the order discharged did not take from this. Apart from anything else, such an order in substance reversed the onus of proof by requiring the school to demonstrate why the interlocutory injunction should be discharged. This is effectively a heavier burden of proof inasmuch as the moving party "has to establish that [the order] should not have been granted, a negative proposition": *Gordon v. Director of Public Prosecutions* [2002] 2 IR 369 at 375, per Fennelly J.

34. The basic fact remains that the High Court simply has no jurisdiction to grant an interlocutory injunction on an *ex parte* basis. The High Court has been a unified court since its initial establishment in June 1924 and the substantive rules governing the grant of an interlocutory injunction do not depend on the precise form of the proceedings. It might also be observed that in *DK v. Crowley* [2002] 2 IR 744 this Court held that s. 4(3) of the Domestic Violence Act 1996 was unconstitutional as contrary to the Article 40.3 derived right to fair procedures inasmuch as it provided for an open-ended interim order which had the effect of barring the other spouse from the family home for the duration of that order: see [2002] 2 IR 744 at 759-760 per Keane C.J.

35. As Keane C.J. noted in his judgment, the grant of such relief "may…crucially tilt the balance of the entire litigation against him or her to an extent which may subsequently be difficult to redress." These comments have a resonance so far as the present case is concerned because the practical effect of the original orders made was that interlocutory relief was granted without the school having been heard. And while not purporting to offer any definitive views on the fresh allegations of bullying made after the grant of interlocutory relief, the very fact that such relief had been granted in the manner in which it was must have complicated the school's capacity fairly to address the issues arising in the litigation or to adduce evidence regarding the balance of convenience.

36. It is, in any event, difficult to avoid the impression that the fact that leave to apply had been granted on an *ex parte* basis by Meenan J. was in itself treated as dispositive of the question of whether the first limb of the traditional *Campus Oil* test (*Campus Oil Ltd. v. Minister for Industry and Commerce (No. 2)* [1983] IR 88) had been satisfied. Again, I think that this is incorrect as a matter of principle. As O'Sullivan J. observed in *Martin v. An Bord Pleanála* [2002] 2 IR 655 at 660, "…just because there has been no application to set aside the order granting leave to bring judicial review proceedings" this does not mean that "on this application for interlocutory relief, it must be assumed without further examination of the applicant's case that he has established a serious issue to be tried."

37. To all of this one might add that the applicant does not seem ever to have advanced a significant case on the merits of the judicial review application such as would have merited the grant of interlocutory relief, never mind the higher *Maha Lingham* standard (*Maha Lingham v. Health Service Executive* [2005] IESC 89, [2006] ELR 137) of a strong arguable case required in applications for mandatory interlocutory injunctions. On any view, the student's challenge to the "decision" not to allow him to attend the school fell well short of meeting that more elevated standard and the basis by which it was said that

this decision was in itself invalid was never properly explained. As I have noted already noted, the student expressly disclaimed any challenge to the validity to the expulsion decision or to the fairness which attended the actual expulsion process. In this respect the present case would appear to be quite different from *B v. Board of Management of St. Q's College* [2019] IECA 229 where an interlocutory injunction was granted restraining the expulsion of the two students concerned in circumstances where serious issues attended both the fairness of the disciplinary process and the general balance of convenience.

38. The challenge in the present proceedings was to the decision of the school not to permit him to attend class pending the outcome of the s. 29 appeal. The procedure followed in respect of the grant of interlocutory relief in the present case is still open to the fundamental objection that there was no separate consideration of whether the student had satisfied the strong arguable case threshold and the burden of proof was effectively reversed in a manner which is not consistent with the existing law regarding the grant of interlocutory injunctions, both as to the burden of proof and fair procedures.

39. To this one must add the fact that not only was the more elevated *Maha Lingham* standard required of applications for interlocutory injunctions not established, but there was no proper analysis of the balance of convenience. There was no evidence that the student could not have attended another school or that other tuition arrangements could not have been satisfactorily made such as would have enabled him to sit the Junior Certificate examinations in June 2023. Here it may be observed that a school is obliged by s. 24(1) of the 2000 Act to notify the relevant education welfare officer in advance of the proposed expulsion of the student concerned and to give the reasons for that decision in writing. Section 24(2) then imposes a duty on the education welfare officer to make "all reasonable efforts to ensure that provision is made for the continued education of the student to whom the notification relates."

40. There was, moreover, the fact that the school was obliged to accept for what transpired to be a four-month period a student which it did not want to have and whose presence in the school had the potential to be seriously disruptive, not least for the victim of his unacceptable, wanton and reckless behaviour. A further consideration was that the grant of an injunction had the effect of precluding the school from exercising the discretion which the student contended it enjoyed whether or not to permit the student to remain in the school. If the student was correct, then the school could permit him to remain in the school, but it was not obliged to permit that. The grant of an injunction accordingly granted the student a remedy which he could not have achieved even if he had succeeded in his claim.

Conclusions

41. In these circumstances, I find myself concluding that the manner in which the order restraining expulsion was granted by the High Court was not in accordance with established legal principles regarding the granting of interlocutory injunctions and, in any event, there was no proper consideration of the balance of convenience. Nor was there any recognition of the fact that this was in substance an application for a mandatory interlocutory injunction.

42. Despite any possible confusion arising from the wording of Ord. 84, r. 20(8)(b), I consider that these principles apply irrespective of whether the applicant has commenced the proceedings by plenary action or by way of judicial review. Accordingly, if, interim relief is granted in judicial review proceedings, that relief should be time limited, and it should also provide that the onus lies with the moving party to apply for interlocutory relief on notice to the respondent. The mere fact that leave to apply has been granted does not in and of itself establish that the *Campus Oil/Merck* test (or, in the case of mandatory interlocutory injunctions, the more elevated *Maha Lingham* test) has been satisfied. I would accordingly allow the appeal on this basis.

43. In these circumstances it is unnecessary for me to express any view on the wider question of whether the High Court enjoys a free-standing jurisdiction to grant an injunction in aid of an administrative appeal even though the claimant might have no cause of action in the High Court itself. I am conscious that as a judge of the High Court I delivered two judgments in *McGrath* and *Holland* which suggested that this question should be given an affirmative answer. While not necessarily wrong, these two decisions must nevertheless suffer the criticism that I did not examine the issues regarding the scope of injunctive relief raised in important decisions such as *The Siskina* and *Caudron v. Air Zaire*. Conversely, the decision of this Court in *Caudron* might well have to be re-examined in the light of modern developments such as the Privy Council's decision in *Convoy Collateral* (albeit that the Privy Council in that case was sharply divided on this issue), along with questions bearing on the full original jurisdiction of the High Court (Article 34.3.1º) and the court's general duty to secure an effective remedy (Article 40.3.1º and Article 40.3.2º).

44. Even if the High Court's injunctive jurisdiction is broader than was suggested in *Caudron,* it would not necessarily follow that an injunction could be granted in aid of a statutory remedy such as s. 29 of the 1998 Act when the legislation itself did not provide for it. A further issue would arise as to whether such an injunction in aid could be grafted on to that particular statutory procedure when it did not in itself provide for any interim relief pending the outcome of the s. 29 appeal.

45. Other than drawing attention to these broader and complex issues, nothing in this judgment should be read as expressing a view one way or another in respect of these difficult questions.

46. It follows, therefore, that for the reasons which I have already given I would allow the appeal.