THE COURT OF APPEAL

CIVIL

[2018 No. 445]

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The President
Whelan J.
Costello J.

BETWEEN

B (A MINOR) SUING BY HIS MOTHER AND NEXT FRIEND X

APPLICANT/RESPONDENT

AND

THE BOARD OF MANAGEMENT OF ST. Q'S COLLEGE

RESPONDENT/APPELLANT

AND

C (A MINOR) SUING BY MOTHER AND NEXT FRIEND Y

APPLICANT/RESPONDENT

AND

THE BOARD OF MANAGEMENT OF ST. Q'S COLLEGE

RESPONDENT/APPELLANT

JUDGMENT of the President delivered on the 31st day of July 2019

1. On 3rd October 2018, during the course of a 6th year construction class being held in the Design and Communications classroom of St. Q's College, a secondary school under the patronage of a Catholic religious order, a pupil produced a white powdered substance in a small, clear plastic bag. The pupil in question: Boy A, who is not and has never been a party to the present proceedings, proceeded to place some of that substance on a key and then place the key with the substance on it to his nose and to snort it. The substance snorted may or may not have been cocaine. The student directly involved in the incident has denied that it was and it has never been analysed. Both Boy B and Boy C were pupils in the class at the time. It has never been suggested that either boy had any involvement with snorting or ingesting the substance. However, both boys produced mobile phones and filmed what was occurring and that same footage later appeared on a messaging app known as "Snapchat".

2. In the case of Boy B, there were some 50 people in his Snapchat group or who had access to his "story". Subsequent enquiries, including enquiries conducted by Boy B's father, who is an IT consultant, would suggest that some ten or twelve people viewed the material before it was taken down. One of those who did view the material was a brother of Boy B and he reported what he had seen to his mother. Boy B's mother was very concerned at what she viewed. She went immediately to the school and requested to speak to the school Principal. He was unavailable, but in his absence, she met with one of the Deputy Principals who was permitted to take a copy of the footage. Ms. B, mother of Boy B, has averred that she was expressly assured that her son would not be in any trouble and that it was on that basis that she allowed the school authorities take a copy of the footage. The Deputy Principal, on the other hand, says that she never gave any assurances about the boy not being in trouble, but on the contrary, expressly informed her that she could not ignore what she had seen and would have to take all appropriate and necessary action.

3. It is something of a recurring theme in the case that the family members of the boys who filmed the incident, and indeed, the boys themselves, refer to receiving a degree of comfort and assurance that the boys would not be in trouble and that the important thing was that they should now tell the truth, whereas the senior members of the school teaching staff with whom they dealt, insist that there were no such assurances. To the extent that there is a conflict, it is not possible to resolve it at this stage. In my view, probably little enough turns on this. It may well be that the teachers involved were seeking to be supportive and encouraging and that family members in their stressed state paid too much attention to this aspect of the message.

4. On 4th October 2018, the applicant, Boy B, met with another of the school's two Deputy Principals, though not the same Deputy Principal that his mother had met the day previously, and he gave a statement to her. Once more, there is a degree of controversy as to whether he was told that he was not in any trouble and should not worry. A similar interview is said to have been conducted with Boy C in which similar assurances are alleged to have been made.

5. On 8th October 2018, the parents of Boy B met with the school Principal who explained that the issue was to be considered by the school's Board of Management and the question of sanction, if any, if that stage was reached, would be a matter for the Board. On the same day, the mother of Boy C, received a phone call to say that the matter was being put before the Board of Management. On 10th October 2018, the parents of both Boy B and Boy C learned that their sons had been suspended pending a meeting of the Board which was to take place on 15th October 2018. At the meeting on 15th October 2018, a report on the incident was presented by the

school's Principal, the boys and their parents had an opportunity to address the meeting, and thereafter they and the Principal withdrew.

6. In the case of Boy B, it is to be noted that he is dyslexic, and since he started in the college has been assisted in his studies by way of additional one-to-one resources. His behaviour in school prior to this incident had generally been good. On the other hand, in the case of Boy C, his previous disciplinary record was described by the school Principal in his report to the Board of Management as "[having] on occasions, been challenging". He had been suspended from school for short periods on a number of occasions.

7. The matter was discussed and the Board of Management reached a unanimous view. This view was communicated to the boys' parents by a letter dated 16th October 2018 from the school Principal, in his capacity as Secretary to the Board of Management. It recorded that the Board had decided that a sanction was warranted and that given the very serious nature of the matter under consideration, it had formed the opinion that the appropriate sanction was expulsion. It indicated that the Board had formed that opinion on the following grounds:

> I. That the gravity of the incident being filmed and the deliberate posting of it online for the attention of others is an inappropriate use of ICT which may lead to serious sanction, up to and including expulsion;
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> II. That the student had been involved in a serious one-off offence which breached the college's Code of Behaviour and Discipline; and
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> III. That the students' behaviour was such that it brought the good name and reputation of the college into disrepute.

The letter further stated that in accordance with the terms of the Education (Welfare) Act 2000, that the Board had to allow for a period of twenty school days before reaching a final decision. During that time, the Board was available to engage in a facilitation process with the National Education Welfare Board (NEWB) and the boys' parents. At the end of the twenty-day period, the Board would reconvene and consider the outcome of those consultations and the opinion formed. The letter concluded by saying that the Board was of the view that the behaviour posed a serious threat to the good order and discipline of the school, and given that, it had decided to suspend Boy B and Boy C until the Board reconvened on 20th November 2018 to consider the matter further. In fact, due to the intervening holidays, the Board would reconvene instead on 23rd November 2018.

8. The cumulative effective of these actions on the part of the school must be considered. The decision to suspend on the 10th October 2018 pursuant to the Code of Discipline and Behaviour when combined with the formation of the Board's opinion that expulsion was the appropriate sanction on 15th October 2018, which itself triggered the statutory grace period of twenty school days during which time an Education Welfare Officer would prepare a report on their cases, meant that both boys would be suspended from 10th October 2018 to 23rd November 2013. Thereafter, they would face expulsion.

9. On 12th November 2018, the applicants sought leave to apply by way of judicial review, seeking certain reliefs. On 15th November 2018, the applicants sought short service of an application for interlocutory injunctive relief. The matter came on for hearing on 20th November 2018 and the following day, Barrett J. delivered judgment in the High Court. The High Court concluded its judgment by saying that it considered it appropriate, on the particular facts of the application before it, to grant an interlocutory injunction compelling St. Q's College to permit each of the applicants to attend St. Q's and continue their education for the present academic year (2018/2019) pending the full and final determination of the above-titled proceedings. It will be necessary to consider in some more detail just what was decided by Barrett J, the terms of his order and the nature of the reliefs that had been sought by the applicants, which had not been in identical terms. However, before doing so, to complete this overview of what has brought us here, it is necessary to refer to one further aspect. Section 29 of the Education Act 1998 provides that where a Board of Management makes a decision to permanently exclude a student from a school, an appeal lies to the Secretary General of the Department of Education and Science. The s. 29 appeals procedure was considered by the Supreme Court in *Board of Management of St. Molaga's National School v. The Department of Education and Science* [2011] 1 IR 362. The decision in that case establishes that an Appeals Committee convened pursuant to s. 29 has jurisdiction to conduct a full re-hearing of the appeal and is not limited to reviewing the decision of the Board of Management. Appeals have been brought and processed in both cases, and in the case of Boy B, that appeal was successful, while in the case of Boy C, the appeal was unsuccessful. This Court was told that steps have been taken seeking to judicially review the decision of the s. 29 appeals Board in the case of Boy C to dismiss his appeal and uphold the decision of the Board of Management.

10. Turning to the judgment of Barrett J, having referred briefly to the background facts, during the course of which he commented that the Court did not understand it to be alleged that what had occurred was a planned or pre-agreed occurrence, he then commented that on 15th October 2018, the Board of Management of St. Q's College decided to expel Boy B and Boy C. The Trial Judge's findings in this regard are the subject of sharp criticism by the appellants. It is said that the finding at para. 2 of the judgment that the Board of Management of St. Q's College decided to expel Boy B and Boy C on 15th October 2018, was not in accordance with the facts, but indeed, was in contradiction to the express terms of the letter dated 16th October 2018, in the course of which the parents of the two boys were informed, not that the Board had made a decision to expel the applicants, but rather, that the Board had "formed an opinion" that the appropriate sanction was expulsion.

11. The appellants say that the trial Judge fell into serious error by equating an opinion that expulsion was the appropriate sanction with a decision to expel. In my view, if the trial Judge's reference to the Board of Management having decided to expel on 15th October 2018 stood in isolation, there might be substance in the appellants' criticism. However, the remark to which objection is taken was immediately followed by reference to s. 24 of the Education (Welfare) Act 2000. The same section of the judgment makes reference to the college's Code of Behaviour and Discipline which provides that an expulsion does not become effective for twenty school days after the NEWB has been notified. The High Court drew attention to the fact that the Code then stated "the student remains suspended during this time" and then commented that under the Code, it appeared to be an inexorable consequence of the decision to expel that a period of suspension follows. While the High Court might, more properly, have characterised the suspension as being an inexorable consequence of the formation of an opinion that expulsion was the appropriate sanction, the point made by the High Court, nonetheless, appears a fair and valid one. The High Court was of the view that the apparent inexorability of suspension under the Code, when a decision to expel is subsequently made, suffices to deal with the contention by counsel for the college that the pleadings to the within proceedings assailed the decision to expel when they should have assailed the decision to suspend. The High Court Judge commented that in challenging the decision to expel, one cannot but challenge the suspension.

12. Barrett J. is criticised for commenting that it does not appear from the Code that a separate decision to suspend arises, notwithstanding that the letters of 16th October 2018 sent to the parents in question refer to the fact that there had been what he described as a purported decision to suspend in addition to the decision to expel. He felt that there was an artificiality to the contentions advanced by the defendants in the proceedings before him, now the appellants in this appeal. The Judge's focus on the

fact that the applicants remained suspended in the aftermath of 15th October 2018 is criticised. It is said that the now appellants had not addressed that which appeared in the Code because prior to the oral hearing in the High Court, it had not been in issue. It is said that if it was going to be contended that the reference to the fact that it was decided that the two boys should remain suspended was formulaic and pre-determined by the Code of Conduct and Discipline, that should have featured in the statement of grounds. The appellants say that the affidavit provided by the school Principal dealt specifically with the fact that apart from forming the opinion that expulsion was the appropriate sanction, it also dealt with the fact that the Board of Management had decided that the then applicants' behaviour posed a serious threat to the good order and discipline of the school, and on that basis, that the Board of Management decided to suspend the applicants until the Board met again.

13. The High Court Judge, with reference to the letters of 16th October 2018, which he referred to as advising of the decision to expel, categorised that decision as "a justiciable and non-inchoate decision". The Judge's just of the phrase of "justiciable and non-inchoate", and in particular the word "non-inchoate" is an interesting one. At one level, it involves a double, or rather, a treble negative. Inchoate, meaning in process of formation, choate, which comes from it, meaning completed or, in and of itself, and non-inchoate meaning not incomplete and not in the process of formation. In choosing the term, the Judge was obviously addressing the arguments advanced by the applicants that the opinion formed at the meeting of 15th October 2018 was not a concluded one, was not binding and was not amenable to judicial review.

14. The applicants have referred to the case of Cintra Infraestructuras International Slu v. Revenue Commissioners [2016] 2 IR 314. In my view, the analogy with Cintra is not a valid one. Here, in contrast to Cintra, where what was in issue was the expression of a non-binding opinion in the course of correspondence, the decision taken at the Board meeting of 15th October 2018 to form an opinion that expulsion was the appropriate sanction had real and significant consequences. It was a decision taken in respect of students in their Leaving Cert year. While it might be to overstate matters to say that it would lead inexorably to a decision to expel, it was certainly a major step on the road to the taking of a decision to expel. Indeed, it necessarily triggered the statuary process and it follows had consequences under statute, including the appointment of an Educational Welfare Officer to report on the matter. Such a course of action would undoubtable affect the rights of the students in a substantial manner, and in my view, would affect their rights to an extent considered justiciable in *Maguire & Ors v. Ardagh & Ors* [2002] 1 IR 385. Hardiman J. noted at p.669-670:

> "[t]he applicants do not submit that the "findings of fact" by the sub-committee would be an administration of justice. But they say, and it has not been disputed, that while such findings have no "legal" effect, they may have many and far reaching effects.
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> Moreover, I have to say that I find the phrase "legally sterile" extremely unattractive in any realistic human context. Counsel for one of the respondents, on being asked whether he would repeat the phrase without the qualifying adverb said, very naturally, that he could not do so.
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> One is therefore left with an entity described as a "finding of fact or conclusion" which, it is agreed, could, in practice, have an adverse effect on an individual. But that, the respondents contend, does not take away from the central truth that "in law" it is of no effect at all.
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> I do not find appealing a line of argument which sets up a distinction between a universally accepted state of fact in real life and a quite contrary state of law. If this is the law, then it can only be described as a legal fiction. No ordinary person, such as one of the applicants, on receiving the letter of directions to attend, could possibly interpret it in the artificial sense suggested. Even more significantly, no ordinary person hearing that a parliamentary committee had found as a fact that a named person had unlawfully killed another would be expected, by anyone other than a small minority of lawyers, to reflect that that of course was merely a matter of opinion. It is true that even the most adverse imaginable finding of fact or conclusion by the sub-committee will not amount to a conviction and will not determine any person's rights and liabilities in civil law and will not expose him to any penalty or liability. But that is not the same as saying it has "no" effect. Not merely is it conceded that it would have effects: these effects would sound, inter alia, in the area of the affected person's constitutional rights…many persons have been economically ruined and socially outcast by virtue of decisions which are "legally sterile".

I believe the foregoing demonstrates the wisdom of the judgment of this court. *In re Haughey* [1971] I.R. 217 where it was held, in the words of Ó Dálaigh C.J. at p. 264:-

> '… in proceedings before any tribunal where a party to the proceeding is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may correctly be classed as proceedings which may affect his rights …'"

15. As already referred to, the reliefs sought by the applicants were not identical, though in substance, they sought the same end, the return of the excluded student to the classroom and ending or suspending the period of exclusion pending further order. In the case of Boy B, the orders sought included an order staying the decision of the appellant suspending the applicant from school, as well as an order directing the appellant to readmit the applicant to the school. In the case of Boy C, the orders sought included a stay on the decision of the appellant of 10th October 2018 and 16th October 2018, and an order prohibiting the appellant from continuing the suspension of the applicant pending the outcome of the within proceedings, or without prejudice to the foregoing, the outcome of any appeal pursuant to s. 29 of the Education Act 1998 and, if necessary, an interlocutory injunction compelling the appellant to permit the applicant to attend the respondent school and continue his education for the present academic year pending the determination of the within proceedings, or (without prejudice to the foregoing), the outcome of any appeal pursuant to s. 29 of the Education Act 1998.

16. In the High Court, Barrett J. referred to the decision of Clarke J. in *Okunade v. The Minister for Justice, Equality & Law Reform* [2012] IESC 49, where the considerations that apply when a court is considering whether to grant a stay or an interlocutory injunction in judicial review proceedings was addressed. Clarke J. offered the following roadmap:

> "(a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;
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> (b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:
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> (i) Give all appropriate weight to the orderly implementation of measures which are prima facie valid;
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> (ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular

scheme in which the measure under challenge was made; and

(iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also

(iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) In addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages.

(d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

The High Court then turned to address those principles in the context of the case before it.

17. The Judge addressed, first, the question of whether the applicants had established an arguable case. He felt the threshold was a notably low one and had easily been met on the facts of the case. He indicated that he read *Okunade* as meaning that an applicant for interlocutory injunctive relief in judicial review proceedings did not have to present a post-*Maha Lingham* style strong, clear case. For my part, even if the view is taken that the case was on all fours with *Maha Lingham v. Health Services Executive* [2006] 17 ELR 140 where it was stated that the applicant had to show that he had a strong case likely to succeed at the hearing at the action, that test might well be met in any event. I think the applicants would be expected to go considerably further than arguability as that term is understood in cases such as G v. DPP [1994] 1 IR 374. I see significant differences of context between school discipline cases and the employment context. In any event, wherever precisely the threshold is set, I am satisfied that both boys have a strong arguable case that the decision to expel them in their Leaving Cert year was irrational in the Keegan v. Stardust (Supreme Court, 16th December 1986) sense. In particular, it seems to me that Boy B has a particularly strong case. His dyslexia and learning difficulties meant that an expulsion would impinge particularly seriously on him. Weighing on the scales against expulsion was his previous good disciplinary record and the manner in which, having behaved very badly by filming what was going on in the classroom, he and his family members responded, making every effort to take down the material and prevent access, and in his mother's case, bringing the incident to the attention of the school. Indeed, the fact that both boys, having behaved as badly as they did in filming the incident, then sought to undo what they had done by taking down the material and eliminating or minimising access to it was a matter that was required to be weighed in the balance in their favour.

18. In addressing the question of where the greatest risk of injustice would lie, the Court indicated that it had derived some assistance from the judgment in *Wright v. The Board of Management of Gorey Community School* [2000] IEHC 37. The Court made the point that it considered it significant that it was not dealing here with the substance taker, but with two schoolboys who appeared to have engaged in unplanned filming of an impromptu occurrence as it unfolded before them, and thereafter, to have shared that footage with what is claimed to have been a limited number of Snapchat participants. The Court made the point that so far as Boy B is concerned, that it had to be alive to his particular educational needs, and that so far as both boys were concerned, that the Court noted that all that appeared to be available to them since their exclusion was home study supplemented by limited remote assistance from St Q's. The Court observed that this limited support and the related want of formal schooling cannot but be disruptive in the most important academic year of their school lives. The Court drew a distinction with Wright, in that, here, Boys B and C were facing into their Leaving Certificate Examination, easily the most important series of academic examinations that they will have sat to this time and examinations that will have a significant determinative effect on the future course of their lives. The Court also drew attention to the fact that the Educational Welfare Officer of Tusla, who had become involved with the children following on their exclusion from school, was of the view that both boys would be better back at St. Q's.

19. In my view, the analysis conducted by the High Court was a careful one and an appropriate one and I would agree with the conclusions reached as to where the greater risk of an injustice lay.

20. Subject to one issue with the form of the order, I believe that the approach of the High Court Judge to the issues that confronted him was the correct one and I would dismiss the appeal. The issue that I have with the form of order arises from the fact that the Judge expressly contemplated that the disciplinary process would continue. He recorded that both Boy B and Boy C acknowledged that the disciplinary process would continue. By the time matters came before the High Court, there had already been an involvement by educational welfare officers of Tusla who had been of the view that the two boys would be better off back at St. Q's College. The High Court saw this as a matter of significance to which due regard had to be paid.

21. The order of the High Court as drawn up permitted the applicants to attend the college in question and continue their education for the present academic year, 2018/2019, pending the full and final determination of the within proceedings. In a situation where all involved contemplated that the s. 29 appeal process would take its course, the reference to continuing education for the present academic year seems a little out of place. As it happens, the appeal process did take its course and, as we have seen, the appeal of Boy B was successful and that of Boy C, unsuccessful.

22. This gives rise to two curiosities. In the case of Boy B, his expulsion was reversed and his status as a pupil of the school was restored. This caused his counsel, at the resumed hearing, to make the fairly obvious point that so far as his client was concerned, the case was certainly now moot. Counsel for the appellant, rather than challenging this proposition head on, took a somewhat more pragmatic approach and pointed out that the two appeals had been heard together in the High Court and they had been appealed together and that such was the overlap of the issues that it was appropriate that the Court having embarked on the hearing should conclude both appeals. The Court was prepared to adopt this approach.

23. In the case of Boy C, the position is quite different. He has invoked the statutory appeals process, but was unsuccessful. Despite the Statutory Appeals Committee upholding the decision of the Board of Management, he has remained in the school on foot of the High Court order. This is an unusual, and frankly, unsatisfactory state of affairs. In my view, the High Court should have made clear that its intervention was limited in duration to the determination of the matter, whether that would come about by way of a decision on the substantive judicial review proceedings, or the statutory appeals process coming to a conclusion. The judgment of the High Court had referred in passing to the possibility that a decision of the Appeals Committee might be the subject of judicial review, and indeed, that has come to pass, but in my view, that qualification matters not. Decisions as to what regime should apply can be taken, if necessary, in the context of those judicial review proceedings, but it is inappropriate that the decision of the Appeals Committee was, in effect, set at naught by a decision of the High Court taken before the committee had even convened.

24. Accordingly, I would dismiss the appeal and uphold the decision of the High Court. However, I would vary the orders of the High Court so as to provide that the two boys should be readmitted to the school pending the hearing of the appeal, but with that limited qualification only.