THE HIGH COURT

2018 No. 944 JR

Between:

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

Applicant

– and –

THE BOARD OF MANAGEMENT OF ST Q's COLLEGE

Respondent

2018 No. 940 JR

Between:

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

Applicant

– and –

THE BOARD OF MANAGEMENT OF ST Q's COLLEGE

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 21st November, 2018.

1. On 03.10.2018, Schoolchild A (not party to the within proceedings) while on the premises of St Q's College, apparently engaged in the impromptu 'snorting' of what may/may not have been cocaine powder. Schoolchildren B and C, both 6th Year pupils at St Q's, and both due to sit Leaving Certificate examinations next summer, filmed Schoolchild A's actions on their mobile phones and uploaded the footage to Snapchat, a multimedia messaging app, enabling a (limited, it is claimed) number of persons to witness Schoolchild A's actions. Neither Schoolchild A nor B are alleged to have consumed an illegal drug; nor does the court understand it to be alleged that what occurred was a planned or pre-agreed occurrence.

2. Following the above, on 15.10.2018, the board of management of St Q's decided to expel Schoolchildren B and C. This decision was communicated to the parents of Schoolchildren B and C by letters of 16.10.2018. Under s.24 of the Education (Welfare) Act 2000, a decision to expel does not take immediate effect, s.24(4) providing that "*A student shall not be expelled from a school before the passing of 20 school days following the receipt of a notification under this section by an educational welfare officer.*" Consistent with s.24(4), St Q's *Code of Behaviour and Discipline* (para.10) provides that "*The expulsion does not become effective for twenty school days after the National Educational Welfare Board has been notified.*". Notably, the Code then states: "*The student remains suspended during this time*". So under the *Code* it appears to be an inexorable consequence of the decision to expel that a period of suspension follows.

3. The apparent inexorability of suspension, under the *Code*, where a decision to expel is made suffices to deal with the contention by counsel for St Q's that the pleadings in the within proceedings assail the decision to expel when they should have assailed the decision to suspend. In challenging the decision to expel, one cannot but challenge the suspension, *i.e.* it does not appear from the *Code* that a separate decision to suspend arises to be made, notwithstanding that the letters of 16.10.2018 sent to the parents of Schoolchildren B and C advising of the decision to expel (a justiciable and non-inchoate decision) advise that, contrary to what the *Code* provides, there has been a (purported) decision to suspend additional to the decision to expel. There is in any event, it seems to the court, with every respect, an artificiality to the contention aforesaid. This is because at all times in the within proceedings it cannot but have been clear to all involved that these proceedings (1) are a challenge to (a) the board of management's decision to expel of 15.10.2018, and (b) the associated consequential suspension of Schoolchildren B and C from St Q's, however arrived at, and (2) represent an attempt by two Leaving Certificate schoolchildren to have themselves reinstated for a time at the school they know, among the pupils they know, under the tutelage of schoolteachers they know. The reason the court states 'for a time' is because Schoolchildren B and C are satisfied that the disciplinary process should continue against them (mindful that they will have a right of appeal and may seek further judicial review, *e.g.,* of the end-decision). For now, all they each want, in what for them is a most important school year, is to get back to school, get down to work, and get the best possible Leaving Certificate results.

4. Various legal deficiencies are contended to present in the impugned disciplinary proceedings. The statement of grounds in Schoolchild B's proceedings allege, inter alia, (i) breaches of fair procedures in the investigative limb of the disciplinary process, including an alleged inducement of a statement of events from Schoolchild B through an alleged indication that Schoolchild B himself was not in any trouble, (ii) irrationality and unreasonableness in the decision-making process, *e.g.*, in failing, it is claimed, to have regard to Schoolchild B's previous good record and in deciding that Schoolchild B's behaviour warranted expulsion, and (iii) want of proportionality in the decision to expel. The statement of grounds in Schoolchild C's proceedings allege, *inter alia*, (a) breach of fair procedures and natural and constitutional justice in the manner in which a preliminary interview was conducted with him, (b) injustice in the alleged resilement of a named schoolteacher from a particular representation allegedly made to Schoolchild C (viz. that if he cooperated he would not get into trouble), and (c) a want of proportionality in the decision reached in that, inter alia, there was, it is alleged, a failure to take account of the fact that Schoolchild C was a footage-maker, not a substance taker. These and other complaints made in the judicial review proceedings will fall to be adjudicated upon in the substantive hearing. At this time, the court is presented with two applications for interlocutory relief, seeking, per the notices of motion:

– in the case of Schoolchild B, *inter alia* "*(a) An order staying the decision of the Respondent suspending the Applicant from school*", "*(b) …an order directing the Respondent to re-admit the Applicant to the school*", and "*(c) Such further or other Order as…may seem fit";*

– in the case of Schoolchild C, *inter alia, "1. A stay on the decisions of the Respondent of 10 October 2018 and 16 October 2018 and an order prohibiting the Respondent 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", "2. If necessary, an interlocutory injunction compelling the Respondent to permit the Applicant to attend the Respondent's 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", and "3. Further or other order".

5. In their legal submissions, the parties referred the court to a number of decisions, the most helpful of which is the judgment of Clarke J., as he then was, for the Supreme Court in *Okunade v. Minister for Justice, Equality and Law Reform & ors* [2012] IESC 49. There, Clarke J., following an excursus on applicable law, concludes as follows, at para. 9.42, in respect of the considerations applicable where a court is asked to grant a stay or interlocutory injunction in judicial review proceedings:

> *"(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;*
>
> *(b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-*
>
> > *(i) Give all appropriate weight to the orderly implementation of measures which are prima facie valid;*
> >
> > *(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."*

6. The court turns now to apply these principles to the fact of the within proceedings.

7. **"(a) The court should first determine whether the applicant has established an arguable case; if not, the application must be refused**" A requirement that a case be arguable is a notably low threshold and has easily been met on the facts of the within proceedings. In passing, counsel for each of Schoolchildren B and C acknowledged that regardless of how the interlocutory reliefs that they have respectively sought are worded, essentially what they each seek is mandatory relief (because what is being sought is that two schoolboys currently suspended from school be allowed return to school). The court does not, however, read *Okunade* as requiring that an applicant for interlocutory injunctive relief in judicial review proceedings must present a post-*Maha Lingam* style strong, clear case to avail of such relief in such proceedings. The driving objective of the court when interlocutory injunctive relief is sought in judicial review proceedings is, as identified in *Okunade*, para. 9.5, "*to minimise the risk of injustice".* That said, the strength of an applicant's case has relevance, to the extent identified in limb (d) of the test propounded in *Okunade*, para.9.42 (which limb is considered later below).

8. **"(b) The court should consider where the greatest risk of injustice would lie**." The court has derived some assistance when it comes to this aspect of matters from the judgment in *Wright v. The Board of Management of Gorey Community School* (Unreported, High Court, O'Sullivan J., 28th March, 2000), albeit that that case pre-dates *Okunade*. In the concluding section of his judgment in that case, O'Sullivan J., in assessing the balance of convenience, weighed (1) the authority and policy of the defendant school in dealing with drug abuse against, *inter alia,* (2)(i) the access of the Wright siblings to appropriate schooling, (2)(ii) the fact that neither sibling was facing a watershed examination in the then coming summer, and (2)(iii) the opportunity that judicial review would offer them to vindicate their reputations. As regards:

- point (1), the court considers it of significance that it is not dealing here with the substance-taker (whatever the substance taken was) but with two schoolboys who appear simply to have (i) engaged in unplanned filming of an impromptu occurrence as it unfolded before them, and thereafter (ii) to have shared that footage with what is claimed to have been a limited number of Snapchat participants, with it not even being alleged that they consumed any illegal drug.

- point 2(i), (A) when it comes to Schoolchild B, the court is very alive to his particular educational needs, as identified in the pleadings, which needs are not properly met at home (a matter of very real concern and a factor of very considerable significance), (B) when it comes to both Schoolchild B and Schoolchild C (a) the court notes that (I) all that appears to have been available to them since their exclusion is home-study supplemented by limited remote assistance from St Q's, and (II) this limited support and related want of formal schooling cannot but be disruptive in the most important academic year of their school lives.

- point 2(ii), unlike *Wright*, here Schoolchildren B and C are facing into the Leaving Certificate examinations next summer, 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.

- point 2(iii), the court admits that it does not see much by way of reputation to be at stake on the part of Schoolchild B or Schoolchild C, their impugned behavior being that of apparently impromptu film-making, not substance-taking. Reputation in any event seems more truly the preserve of adults than minor schoolchildren whose characters are not fully formed and who, like all children, will sometimes stray without any reputational consequence necessarily presenting.

9. **"(b)...[I]n doing so [i.e. in deciding where the greatest risk of injustice would lie] the court should:- (i) Give all appropriate weight to the orderly implementation of measures which are *prima facie* valid; (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." As the court noted above, both Schoolchild B and Schoolchild C acknowledge that the disciplinary process will continue. They will have a right of appeal within that process, though any appeal(s) may or may not be successful; they will, of course, also be able to seek judicial review, e.g., of any decision made on any appeal. So if interlocutory relief is granted, (i) orderly implementation of the disciplinary process will continue and (ii) the public interest in (I) a well-ordered school system where rule-breaking yields consequences, and (II) compliance by the school with ordained disciplinary processes, will be protected. The court does not see additional factors of the type to which Clarke J. refers at (iii). As to (iv), the court considers that the applicants' respective prospects of attaining the highest possible Leaving Certificate results (something that will have a significant determinative effect on their futures), are almost certainly diminished in circumstances where their attendance at school during 6th Year is disrupted, a most grievous matter if the actions against them to this time are found to be unlawful. (The court notes, and considers it a matter of significance to which due regard must be had, that the educational welfare officers at Túsla, who have become properly involved with the children, following on the decision to expel, are of the view that Schoolchildren B and C would be better back at St Q's).

10. **"(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."** This is not a case where damages would be an adequate remedy.

11. **"(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**." Subject to the caveat identified by Clarke J. in the above-quoted limb (d) of the test from *Okunade*, para.9.42, and echoed by him at para.10.12 of his judgment ("[T]*he strength of the case can be taken into account provided that reaching an assessment does not involve analyzing disputed facts or dealing with complex issues of law"*), it seems to the court, when it has regard to the totality of the pleadings, and without analysing disputed facts or complex issues of law, that each of the applicants has a case possessed of some strength (though that is not, of course, to say that they are assured of success in the within proceedings).

12. Having regard to all of the foregoing, the court considers it appropriate, on the particular facts of the applications before it, to grant an interlocutory injunction compelling St Q's to permit each of the applicants to attend St Q's and continue his education for the present academic year (2018/19) pending the full and final determination of the above-titled proceedings.