[2019] IEHC 230

THE HIGH COURT

2019 No. 83 JR

Between:

X (A MINOR) SUING BY HIS FATHER AND NEXT FRIEND Y

APPLICANT

– and –

THE BOARD OF MANAGEMENT OF SCHOOL Z

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 29th March, 2019.

I. Introduction

1. X, a 15 year old boy, is a Third Year student in School Z. He has admitted to (i) smoking cannabis with others, including pupils of School Z, (ii) having a 'stash' of cannabis in off-campus woods behind School Z and going out there to smoke cannabis after school, and (iii) having had discussions with fellow pupils about collectively sourcing and/or going to smoke cannabis. X strenuously denies that he has brought cannabis to School Z and supplied it to other pupils.

2. Arising from the foregoing, X was suspended from School Z by the head-teacher with effect from 03.12.2018. Thanks in part to these proceedings no final decision has yet been taken as to what to do with him in terms of punishment/outcome. The substantive hearing of these proceedings will come on in April but it could be May (practically the end of the present school year) before a reserved judgment issues on foot of those proceedings, and that judgment will be reserved seems likely. In the meantime, X is isolated at home, he is receiving no structured, school-based education from teachers, he does not know what outcome he will eventually face, and his overall health appears to be suffering. He was in court at the hearing of this application last Wednesday and he looked considerably frightened.

3. Needless to say, the court is taken aback by X's behaviour. By his own admission, he has broken the law and he has engaged in conversations with other children about breaking the law. He has repeatedly consumed an illegal drug with who knows what consequences for his health. And his actions have been reported to the Gardaí. He should appreciate – and if there is one thing that can be said about the agonies of the last few months it is that they can only have brought home to him – the seriousness of his misdeeds, and the need to change his ways immediately before he lands himself in greater trouble. He might also wish to consider the impact of his behaviour on his parents: his father sat through the hearing last Wednesday and appeared to be a worried man. However, the court does not wish to be unduly harsh: children err; that is the nature of childhood; and, when they err, a level of understanding falls to be shown to them that would not necessarily be shown to adults.

4. Before proceeding to adjudicate on the application now before it, the court notes that this is the second application to come before it in the last four months or so arising from a school disciplinary process. The court is unconvinced that school disciplinary processes should come regularly before a court of law, and it would be troubled if these two cases are evidence of an increasing trend in this direction. What to do with a schoolboy who has landed himself in trouble is, in the first instance, more properly the preserve of educators and other experts in child and adolescent behaviour, not judges trained in the law. Disciplinary matters should be primarily for schools and any appeals/mediation processes operated by the Department of Education. That said, there will be cases in which the courts become involved. This is one such case.

II. The Application Now Made

5. As mentioned, X was suspended from School Z by the head-teacher with effect from 03.12.2018. He has been out of school since then. Under s.29 of the Education Act 1998, a student suspended from school for over 20 school days may appeal that suspension to a committee established by the Department of Education, *etc*. On or about 14.01.2019, X's parents appealed X's suspension to such a committee. Meanwhile, following notification by the Board of Management of School Z that it proposed to hold a disciplinary hearing, X's parents, through their solicitor, raised various complaints about the Board of Management's processes. The s.29 appeal came on for hearing on 15.02.2019 and was unsuccessful. X also makes various complaints about the operation of the appeal process. The court does not propose to go into the complaints about the Board of Management and the s.29 appeal processes. Suffice it to note that counsel for X has shown a strong, clear case in terms of the case that he will be making in a few weeks' time about alleged errors presenting in how School Z has managed its disciplinary process (though that is not, of course, to say that that application will succeed). The original intention of School Z was that a Board of Management hearing would take place on 21.01.2019. It has not yet taken place as a result of court order. In the present application X seeks by way of principal relief, "[a]*n interlocutory injunction restraining the respondent from enforcing the suspension imposed upon the Applicant with effect from the 3rd December, pending the outcome of these proceedings*".

III. *Okunade* Applied

6. In *Okunade v. Minister for Justice, Equality and Law Reform & ors* [2012] IESC 49, Clarke J., following an excursus on applicable law, identified, at para. 9.42, the considerations applicable where a court is asked to grant a stay or interlocutory injunction in judicial review proceedings. The court now applies those considerations (quoted below) to the facts at hand.

[1] "The court should first determine whether the applicant has established an arguable case; if not, the application must be refused".

7. A requirement that a case be arguable is a notably low threshold and has easily been met here. Counsel for School Z notes that what is being sought is, in effect, mandatory relief, *viz*. that X be allowed to return to school. 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, at least to the extent identified in limb (d) of the test propounded in *Okunade* at para.9.42. But even if more were required, X, in terms of his substantive application, has shown a strong, clear case in terms of the substantive application that he will be making in a few weeks' time about alleged errors presenting in how School Z has managed its disciplinary process (though that is not, of course, to say that he is assured of success in that application).

[2] "The court should consider where the greatest risk of injustice would lie."

8. In the concluding section of his judgment in *Wright v. The Board of Management of Gorey Community School* (Unreported, High Court, 28th March, 2000), 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*,
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> (2)(i) the access of the Wright siblings to appropriate schooling,
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> (2)(ii) the fact that neither sibling was facing a watershed examination in the coming summer, and
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> (2)(iii) the opportunity that the judicial review proceedings would offer them to vindicate their reputations.

9. As regards (1), the court considers that it can take judicial notice of the challenge facing schools in dealing with the scourge of illegal drugs. However, it has to weigh against this the fact that X has now been suspended since last December (with all the ill-consequences for him that are described above) and with no end yet in sight, possibly until almost the whole of his last school year before he sits the Junior Certificate examinations will have gone. The court also notes that, while X has admitted to smoking cannabis and talking to fellow pupils about their jointly sourcing cannabis (serious wrongs), it has never been established, and X strenuously denies, that he has ever supplied cannabis to others. Were it the case that X had supplied any illegal drugs to another child at his school, this Court would unhesitatingly have refused him any relief in this application.

10. As regards 2(i), (I) all that has been available to X throughout his suspension is home-study supplemented by limited remote assistance from School Z, (II) this limited support and want of formal schooling cannot but be disruptive of his education in what is his Junior Certificate year.

11. As regards 2(ii), X will be sitting his Junior Certificate examinations this summer. Counsel for the Board of Management contended that the Junior Certificate examinations are not all that significant. The court freely accepts that they are not as significant as the Leaving Certificate examinations. However, they are a most important preparation for the Leaving Certificate, they get one used to the stress of sitting State examinations, and one's results in the Junior Certificate play a notable part in determining what subjects to study for the Leaving Certificate and at what level (Honours or Ordinary). So the court has no hesitation in describing the Junior Certificate as, in its own way, a watershed examination that X is facing in the coming summer.

12. As regards 2(iii), reputation, to this Court, seems more truly the preserve of adults than minor schoolchildren whose characters are not fully formed and who, like all children, will sometimes stray.

[3] "[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."
13. As to (i), although X appears to the court to have a strong case when it comes to the substantive proceedings (though that is not to say that he is assured of success), his suspension is nonetheless *prima facie* valid and must be given all appropriate weight.

14. As to (ii) and (iii), there is the clearest public interest in a well-ordered school system in which behaviour related to, *inter alia*, admitted illegal drug-taking is capable, where and to the extent appropriate, of yielding adverse consequences.

15. As to (iv), the court notes again (a) the more limited educational provision available to X while on suspension, (b) the fact that his suspension has now endured since the start of December, with the possibility of no end in sight until May (with the Junior Certificate examinations falling to be sat the following month), and (c) that X is isolated at home and his general health appears to be suffering as a consequence.

16. [4] "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."
17. This is not a case where damages would be an adequate remedy.

18. [5] "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."
19. The court reiterates its observations concerning the strength of X's substantive case, albeit noting again that that is not to say that he is assured of success in his substantive application.

IV. Some Points Made by School Z

20. School Z criticises the time that X took in bringing the within application. The court does not see that School Z has sound complaint to make in this regard. X commenced his substantive proceedings within time. Within the context of those proceedings, he has brought the within application as he is entitled to do.

21. School Z objects to X relying on the length of time that his suspension has been extant as a basis for the injunctive relief sought. If the timing of this application was in any way contrived, *i.e.* deliberately engineered so as to steal an advance, School Z would have solid ground for complaint. However, the court sees no contrivance to present. In fact, at hearing counsel for School Z twice noted that X's father and next friend is just seeking to do right by his son; and, so far as the court could discern, X's father seemed genuinely worried at the hearing of the application. In short, X's father does not seem to the court a person who has engaged in contrived delay and there is nothing in the evidence to suggest that he has done so.

22. School Z contends, by reference to the s.29 appeal, that the within application breaches the rule in *Henderson v. Henderson*. The court accepts that the present messy arrangement whereby a Board of Management tries to progress a disciplinary matter, a s.29 appeal against suspension can separately be brought, and judicial review proceedings can contemporaneously be instituted concerning alleged administrative law errors presenting, is not conducive to the efficient and timely despatch of school disciplinary proceedings, and may yet require legislative attention. However, the court does not accept that a breach of the rule in *Henderson v. Henderson* presents. As Fennelly J. indicated in *McFarlane v. DPP* [2008] 4 IR 117, 135, that rule seeks "*to prevent abuse of the court's process and to protect parties from being subjected to harassment by successive proceedings dealing with the same*

subject-matter." Here there is no abuse, no harassment, and no (to borrow again from the judgment of Fennelly J. in *McFarlane*, at 135) "*keeping points over from one legal proceeding to another*".

23. School Z objected to the hearing of the within application on the basis, *inter alia*, that X had not challenged the suspension in the substantive proceedings and had not sought to amend the statement of grounds. During the course of the hearing of this application, counsel for X applied to amend the statement of grounds on the basis previously identified to the Board of Management in a letter of 20.03.2018. It did not seem to the court that especially strenuous objection was made to this application and the court, in any event, is satisfied to allow the amendments sought.

24. Finally, as to the averments in the affidavit evidence of the Board of Management's chairman (under the heading 'Balance of Convenience'), the court notes the suggestion by counsel for X that these averments offer a radically different basis for the suspension to that which had hitherto been forthcoming from School Z. So far as this application is concerned, this Court respectfully sees the said averments as but offering to the court the chairman's informed sense of where the balance of convenience lies in the within proceedings.

V. Conclusion

25. The court is taken aback by X's behaviour. By his own admission, he has broken the law and he has engaged in conversations with other children about breaking the law. However, the court notes that X strenuously denies that he has brought cannabis to School Z or that he has supplied it to other pupils. Were this a case involving the supply of illegal drugs to others, the court would unhesitatingly have refused X the relief he now seeks; and he should note that the decision whether or not to allow him to return to School Z has been a close-run matter. This is because the court is presented with quite a dilemma as to how to do right by X whilst ensuring that he does not do wrong by any of his fellow pupils. However, the court does not wish to be unduly harsh: children err; that is the nature of childhood; and when they do a level of understanding falls to be shown to them that would not necessarily be extended to adults. Having regard to (a) the various factors touched upon in this judgment, and (b) more particularly, the various conclusions reached in the court's consideration of the *Okunade* criteria, especially the fact that the suspension has been ongoing since last December and shows no signs of swift resolution in what is now the late-spring of X's Junior Certificate Year, the court has decided on balance to allow X to return, with immediate effect, to School Z, pending the outcome of these proceedings. However, the granting of the injunction sought comes with two conditions:

> – first, the court will grant liberty to the Board of Management to seek at any time from this Court a lifting of the injunction if the head-teacher of School Z has serious concerns about X's behaviour following his return to school. So X will need to behave himself well. X should note that (a) no-one is likely to be impressed if he engages in any gloating about his having been returned to school, and (b) any further involvement in any way with illegal drugs (whether in the use of same or otherwise) will offer the Board of Management the soundest of bases on which to seek a lifting of the injunction.
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> – second, the court would have benefitted in this application from the Child and Family Agency's view on matters. To ensure that nothing has been missed in this regard, the court proposes (a) to ask the Child and Family Agency to meet with X in the coming days and quickly to prepare a report about his general welfare/schooling, (b) to direct that a copy of that report be provided to X's parents, the head-teacher of School Z and the chairman of the Board of Management, (c) to grant the Board of Management liberty to seek a lifting of the injunction in the event that any aspect of that report raises any especial concern, and (d) to require an undertaking from counsel for X that a copy of the said report will be included in the materials to be provided to the trial judge at the substantive proceedings.

26. X should now 'knuckle down' to work and demonstrate to his parents, his school, his teachers, and the High Court, the respect they each deserve by doing the best that he can in his Junior Certificate examinations.