THE HIGH COURT

JUDICIAL REVIEW

2019 No. 83 J.R.

BETWEEN

STUDENT A.B.

(A MINOR SUING BY HIS FATHER AND NEXT FRIEND C.D.)

APPLICANT

AND

THE BOARD OF MANAGEMENT OF A SECONDARY SCHOOL

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 17 April 2019.

REPORTING RESTRICTIONS

1. The within proceedings relate to the education of a minor. Accordingly, I made an order at the outset of these proceedings pursuant to section 45 of the Courts (Supplemental Provisions) Act 1961 directing that the proceedings be heard otherwise than in public. I also gave directions pursuant to section 40 of the Civil Liability and Courts Act 2004 (as amended) prohibiting the reporting, publication or broadcasting of any information which might enable the minor to be identified. In particular, I directed that none of the names of the parties, nor of the school the subject-matter of the proceedings, are to be disclosed. These orders remain in force.

2. The names of the parties and the school will not be referred to in this judgment.

SUMMARY OF JUDGMENT

3. These judicial review proceedings seek to challenge the manner in which a secondary school ("*the School*") is carrying out a disciplinary process in respect one of its students ("*the Student*"). In brief, the disciplinary process was invoked in circumstances where allegations had been made that the Student was in possession of a controlled drug, namely cannabis, while on school premises, and had supplied another student with a quantity of the drug. The Student has admitted that he has personally used cannabis, but steadfastly denies that he was either in possession of the drug while on school premises or that he was involved in the supply of the drug.

4. The disciplinary process is being carried out pursuant to the School's Code of Behaviour. This Code of Behaviour is modelled, in large part, on guidelines issued by the (former) National Education Welfare Board pursuant to section 23 of the Education (Welfare) Act 2000 ("*the NEWB Guidelines*"). The Code of Behaviour provides for a staggered procedure in respect of the possible expulsion of a student, consisting of a number of "steps". The NEWB Guidelines state that it is a matter for each board of management to decide which of the tasks involved in these procedural steps requires separate meetings, and which tasks can be accomplished together in a single meeting, consistent with giving parents due notice of meetings and a fair and reasonable time to prepare for a board hearing.

5. The first two steps involve the carrying out of a "detailed investigation" under the direction of the school principal ("*the Principal*") and the making of a recommendation to the Board of Management by the Principal. Thereafter, the Board of Management is to consider the Principal's recommendation, and to hold a hearing.

6. The dispute in the judicial review proceedings centres on whether the Principal carried out their functions in breach of the requirements of the Code of Behaviour. The Student contends that the Principal is not entitled to make what he characterises as "findings of fact". It is submitted that the making of a "finding of fact" is something which is reserved exclusively to the Board of Management, and that the Principal, by purporting to make "findings of fact", has contaminated the decision-making process. A related complaint is made that a decision made by the Board of Management on 17 January 2019 to the effect that the Principal's investigation was properly conducted in accordance with fair procedures gives rise to an apprehension that the Board has prejudged the matter.

7. The Student makes a further complaint that the hearing envisaged before the Board of Management will not allow him a proper opportunity to challenge the evidence against him. Whereas leading counsel on behalf of the Student was at pains to stress that his client is not necessarily looking for a right to cross-examine the witnesses against him (a number of fellow students who are themselves minors), counsel submitted that there was an obligation on the School to put forward proposals identifying what procedure would be followed. It was suggested, for example, that a procedure might be put in place whereby the members of the Board of Management would themselves interview the other students in the presence of the Student's parents (rather than rely on the summary of the interviews contained in the Principal's report).

8. The Student also complains that the provisions of the Code of Behaviour are unclear, and, in some instances, contradictory. For example, it was suggested that it is unclear whether expulsion is *mandatory* in the case of an alleged supply of drugs. This issue has, however, been clarified in correspondence prior to and during the course of the proceedings.

9. The School denies that there has been any breach of fair procedures. The School also makes the point that the application for judicial review is premature in circumstances where the disciplinary process has not yet been completed. In this regard, the School relies on the judgment of the Supreme Court in *Rowland v. An Post* [2017] IESC 20; [2017] 1 I.R. 355 ("*Rowland*").

10. For the reasons set out in detail herein, the application for judicial review is dismissed. First and foremost, judicial review is inappropriate in circumstances where there is an adequate alternative remedy available to the Student. More specifically, there is a statutory right of appeal against a decision to permanently exclude a student from a school. This right of appeal is provided for under section 29 of the Education Act 1998. This appeal takes the form of a full hearing on the merits, with the Appeals Committee having jurisdiction to make a determination on the issues raised. See *Board of Management of St. Molaga's National School v. Secretary General of Department of Education and Science* [2010] IESC 57; [2011] 1 I.R. 362, [24] to [28].

11. An applicant will ordinarily be required to exhaust this statutory right of appeal before having recourse to the courts by way of an application for judicial review. As discussed at paragraphs 41 *et seq.*, there are cogent reasons—grounded in both principle and pragmatism—as to why the courts should exercise restraint before entertaining judicial review proceedings in matters of school discipline.

12. Secondly, even if judicial review were an appropriate remedy, the application in the present case is *premature*. The disciplinary process is still in train, and no substantive hearing has yet taken place before the Board of Management. Still less has a decision actually been made to expel the Student. The Supreme Court in *Rowland* indicated that a court should only intervene in an ongoing disciplinary process where it was clear that the process has gone wrong; that there is nothing that can be done to rectify it; and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law.

13. The circumstances of the present case come nowhere close to meeting this threshold for intervention. The criticisms of the detailed investigation carried out by the Principal are unjustified, and any concerns could be addressed before the Board of Management. The Board of Management has yet to embark upon any substantive consideration of the matter, and has sought, in open correspondence, to address the concerns raised by the Student through his solicitors. Rather than engage with this correspondence in a meaningful manner, the Student instead moved to institute the within judicial review proceedings.

14. Accordingly, I will make an order dismissing the judicial review proceedings in their entirety.

FACTUAL BACKGROUND

15. These judicial review proceedings seek to challenge a disciplinary process being carried out in respect of the Student. The Student's parents had informed the School authorities in November 2018 that they had a concern that the Student had been smoking cannabis. Following an incident in mid-November 2018, whereby members of staff discovered a controlled drug, namely cannabis, in a schoolbag on school premises, a preliminary investigation was commenced. This preliminary investigation took place towards the end of November 2018, and culminated in a decision to suspend the Student and three other pupils. More specifically, on 29 November 2018, the Principal contacted the Student's father by telephone and indicated that, on the basis of the preliminary investigation, the Student was being suspended from the School from the following morning.

16. A formal investigation, as required under the Code of Behaviour, commenced in December 2018. A letter was sent to the Student's parents on 4 December 2018. The letter indicated that an investigation would be carried out by the Principal in accordance with the Code of Behaviour, which was attached to the letter, and the specific clauses of the policy which had allegedly been breached were set out in an appendix to the letter. The four allegations against the Student were then identified.

17. The letter went on to state that, in accordance with the Code of Behaviour, the Student would be given every opportunity to respond to the alleged behaviour before a decision was made and before a sanction was imposed. It was further indicated that the parents would be invited to a meeting with the Principal in early course. It was stated that the purpose of this meeting was to provide them with an opportunity to give their side of the story and to ask questions about the evidence of misbehaviour, and that it was also an opportunity for them to make their case for lessening the sanction and for the School to explore with them how best to address the Student's behaviour. It was also stated that the matter could ultimately result in expulsion.

18. The School wrote to the Student's parents by letter dated 10 December 2018, and invited them to a meeting at the School on 18 December 2018. The meeting duly took place on 18 December 2018, and a note of the meeting was prepared.

19. The Principal subsequently completed their report and made certain findings. The Principal also made a recommendation to the Board of Management that they consider the expulsion of the student. The key passages from the Principal's report are set out in an Appendix to this judgment.

20. The Student's parents were notified of this recommendation by letter dated 15 January 2019. Thereafter, correspondence ensued between the parents' solicitors and the School. One of the issues which was being pursued in correspondence was whether the constitution of the Board of Management of the School complied with the requirements of section 14 of the Education Act 1998. An objection in this regard formed part of the grounds of challenge put forward in the Statement of Grounds. However, this ground was ultimately abandoned on the second day of the hearing (Friday, 12 April 2019).

21. The correspondence also alleged that there were contradictions or inconsistencies in the Code of Behaviour. A particular concern was raised as to whether expulsion was automatic in circumstances where a student was alleged to have engaged in the supply of drugs. An issue also arose as to whether different considerations applied to a *first time* offence. These two issues were ultimately resolved as follows. First, by letter dated 11 April 2019, the School, through its solicitors, confirmed that the provisions in respect of automatic expulsion would not be applied in this case. Thereafter, counsel on behalf of the School confirmed at the High Court hearing that any decision as to whether to expel the Student would comply with the requirement for *proportionality* under the Code of Behaviour. There was some disagreement at the hearing before me as to whether this second concession was only made for the first time during the course of the hearing, or whether it was implicit in the earlier correspondence.

22. At all events, much of the heat seems to have gone out of this issue in that it is now clear that any hearing before the Board of Management will proceed on the basis that there is no automatic expulsion, and that the factors identified in the Code of Behaviour, including proportionality, are to be applied.

JUDICIAL REVIEW PROCEEDINGS

23. The within judicial review proceedings were instituted by way of an *ex parte* application for leave to apply for judicial review on 11 February 2019. The Student subsequently issued a Notice of Motion seeking to have his suspension lifted. This motion was heard by the High Court (Barrett J.) on 27 March 2019, and a reserved judgment was delivered on 29 March 2019. See *X (A Minor) v. Board of Management of School Z*, unreported, High Court (Barrett J.), 29 March 2019. The suspension was restrained, and the Student returned to school in April 2019.

24. The grounds of judicial review have been helpfully summarised at paragraphs E.36 to E.41 of the Statement of Grounds as follows.

> "Summary of Grounds:
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> > 36. The Respondent Board has not been constituted in accordance with s.14(1) of the Education Act 1998, as amended, and given the description of its corporate structure, created in [Redacted], cannot satisfy the terms of s.14(3) of the said Act. In consequence, the Respondent has no jurisdiction to act as a Board of a recognised

school under the Act;

37. Without prejudice to the foregoing, the correspondence between the parties discloses that insofar as the Respondent is concerned:

(i) The issue of guilt has already been established by [the Principal] to the present satisfaction of the Board; and

(ii) That it has no intention of conducting a hearing at which the evidence collated and relied upon by [the Principal] in reaching their conclusion as to the guilt of the Applicant can be challenged or contested.

38. The Respondent's decision to refuse the Applicant a proper opportunity to challenge the evidence against him was unfair, in breach of fair procedures and its own Code (should same have been properly adopted) and of the Applicant's rights to natural and constitutional justice.

39. The Board has already, on the 17th January 2019, *'met to review the initial investigation conducted by the Principal and satisfy itself that the investigation was properly conducted in line with fair procedures. To this end, the board of management undertook its own review of all documentation and the circumstances of the case in accordance with the expulsion procedures and in line with the NEWB Guidelines'*. The conclusions reached by the Board in this regard were arrived at contrary to fair procedures and without the Applicant's parents having any opportunity to either challenge the course adopted or even know what transpired at that meeting (other than the result).

40. The Board proposes relying on a Code of Behaviour which, in respect of the allegation faced by the Applicant, is unclear and contains mutually inconsistent provisions, as highlighted in the correspondence between the parties, which the Board has declined to clarify;

41. Further, the Board has conducted itself to date in a fashion that would lead an observer to the conclusion that it has pre-judged essential aspects of the process and that the pending hearing does not have the appearance of fairness."

25. Ground E.36 is not now being pursued, having been withdrawn on the second day of the hearing (Friday, 12 April 2019).

CODE OF BEHAVIOUR

26. The key provisions of the Code of Behaviour which are relevant to these proceedings are as follows. The numbering used in the Code of Behaviour, and some other minor stylistic features, have been deliberately omitted, lest the inclusion of same might inadvertently allow the School to be identified.

"Step 1: A detailed investigation carried out under the direction of the Principal

In investigating an allegation, in line with fair procedures, the Principal will:

— Inform the student and his/her parents/guardians about the details of the alleged misbehaviour, how it will be investigated and that it could result in expulsion

— Give the parents/guardians and the student every opportunity to respond to the complaint of serious misbehaviour before a decision is made and before a sanction is imposed.

Parents/Guardians will be informed in writing of the alleged misbehaviour and the proposed investigation in order to have a permanent record of having let them know. This also ensures that parents/guardians are very clear about what the student is alleged to have done. It serves the important function of underlining to parents/guardians the seriousness with which the School views the alleged misbehaviour.

Parents/Guardians and the student will have every opportunity to respond to the complaint of serious misbehaviour before a decision is made about the veracity of the allegation, and before a sanction is imposed.

Where expulsion may result from an investigation, a meeting will take place between the student and his/her parents/guardians. The purpose of this meeting is to provide them with an opportunity for them to give their side of the story and to ask questions about the evidence of serious misbehaviour, especially where there is a dispute about the facts. It may also be an opportunity for parents/guardians to make their case for lessening the sanction, and for the School to explore with parents/guardians how best to address the student's behaviour.

If a student and/or his/her parents/guardians fail to attend a meeting, the Principal will write advising of the gravity of the matter, the importance of attending a re-scheduled meeting and, failing that, the duty of the School authorities to make a decision to respond to the inappropriate behaviour. The School will record the invitation issued to parents/guardians and their response.

Step 2: A recommendation to the Board of Management by the Principal

Where the Principal forms a view, based on the investigation of the alleged misbehaviour, that expulsion may be warranted, the Principal will make a recommendation to the Board of Management to consider expulsion.

The Principal will:

— inform the parents/guardians and the student that the Board of Management is being asked to consider expulsion

— ensure that parents/guardians have records of:

(i) the allegations against the student

(ii) the investigation, and

(iii) written notice of the grounds on which the Board of Management is being asked to consider expulsion.

— Provide the Board of Management with the same comprehensive records as are given to parents/guardians

— Notify the parents/guardians of the date of the hearing by the Board of Management and invite them to that hearing.

— Advise parents/guardians that they can make a written and oral submission to the Board of Management.

— Ensure that parents/guardians have enough notice to allow them to prepare for the hearing.

Step 3: Consideration by the Board of Management of the Principal's recommendation and the holding of a hearing

The board of management will review the initial investigation and satisfy itself that the investigation was properly conducted in line with fair procedures. The board of management will undertake its own review of all documentation and the circumstances of the case. It will ensure that no party who had any prior involvement in the case is part of the board of management's deliberations (for example, a member of the board of management who may have made an allegation about the student).

Where the board of management decides to consider expelling the student, it will hold a hearing. The board of management meeting for the purpose of the hearing should be properly conducted in accordance with board of management procedures. At the hearing, the Principal and the parents/guardians, put their case to the board of management in each other's presence. Each party should be allowed to question the evidence of the other party directly. The meeting may also be an opportunity for parents/guardians to make their case for lessening the sanction. In the conduct of the hearing, the board of management must take care to ensure that they are, and are seen to be, impartial as between the Principal and the student. Parents/Guardians can be accompanied at hearings and the board of management will facilitate this, in line with good practice and board of management procedures.

After both sides have been heard, the board of management will ensure that the Principal and parents/guardians are not present for the board of management's deliberations."

Step 4: Board of Management deliberations and actions following the hearing

Having heard from all of the parties, the Board of Management will decide whether or not the allegation is substantiated and, if so, whether or not expulsion is the appropriate sanction.

Where the Board of Management, having considered all the facts of the case, is of the opinion that the student should be expelled, the Board of Management will notify the Educational Welfare Officer in writing of its opinion, and the reasons for this opinion. The student will not be expelled before the passing of twenty school days from the date on which the EWO receives this written notification.

The Board of Management will inform the parents/guardians in writing about its conclusions and the next steps in the process. Where expulsion is proposed, the parents/guardians will be told that the Board of Management will inform the Educational Welfare Officer.

Step 5: Consultations arranged by the EWO

Within twenty days of receipt of a notification from a Board of Management of its opinion that a student should be expelled, the EWO must:

— make all reasonable efforts to hold individual consultations with the principal,

— the parents/guardians and the student, and anyone else who may be of assistance convene a meeting of those parties who agree to attend.

Pending these consultations about the student's continued education, the Board of Management may take steps to ensure that good order is maintained and that the safety of students is secured. The Board of Management may consider it appropriate to suspend a student during this time. Suspension will only be considered where there is a likelihood that the continued presence of the student during this time will seriously disrupt the learning of others, or represent a threat to the safety of other students or staff.

Steps 6: Confirmation of the decision to expel

Where the twenty-day period following notification to the Educational Welfare Officer has elapsed, and where the Board of Management remains of the view that the student should be expelled, the Board of Management will formally confirm the decision to expel, this task will be delegated to the Chairperson and the Principal. Parents/Guardians will be notified immediately that the expulsion will now proceed. The Parents/Guardians and the student will be told about the right to

appeal and will be supplied with the standard form on which to lodge an appeal. A formal record will be made of the decision to expel the student."

ADEQUATE ALTERNATIVE REMEDY

27. Before turning to consider the substance of the application, it is necessary to address first the threshold issue of whether judicial review is an appropriate remedy. Notwithstanding that the School is what would be colloquially described as a private fee paying school, there is a public law element to the proceedings. The School is a "recognised school" within the meaning of the Education Act 1998, and as such receives public funding.

28. A "recognised school" is required to fulfil a number of statutory requirements in respect of the expulsion of students. First, the school must publish the policy of the school relating to the expulsion and suspension of students. (Section 15(2) of the Education Act 1998). Secondly, the school must prepare a code of behaviour which must specify *inter alia* the procedures to be followed before a student may be suspended or expelled from the school concerned. Such a code of behaviour shall be prepared in accordance with such guidelines as may be published by the Child and Family Agency (formerly, the National Educational Welfare Board). (Section 23 of the Education (Welfare) Act 2000). Thirdly, the school is required to notify the Educational Welfare Officer before expelling a student. A student shall not be expelled from a school before the passing of twenty school days following the receipt of a notification by an Educational Welfare Officer. (Section 24 of the Education (Welfare) Act 2000).

29. A decision to permanently exclude a student from a school is subject to an appeal to the Secretary General of the Department of Education and Skills (Section 29 of the Education Act 1998). (This section has been subject to significant amendment under the Education (Admission to Schools) Act 2018, but the relevant provisions have not yet been commenced).

30. As appears from the foregoing, the exclusion of a student from a "recognised school" is subject to regulation under statute, and, as such, has a significant public law element. A decision to exclude a student is, in principle, amenable to the High Court's supervisory jurisdiction by way of judicial review. A question arises, however, as to the *timing* of any application for judicial review, and, in particular, as to whether a student is required first to exhaust his or her statutory right of appeal under section 29 of the Education Act 1998.

31. Judicial review is a discretionary remedy, and it is well-established that a court is entitled to withhold relief in circumstances where there is an adequate alternative remedy available to an applicant. An authoritative statement of the principles in this regard is to be found in the judgment of the Supreme Court in *EMI Records Ltd. v. Data Protection Commissioner* [2013] IESC 34; [2013] 2 I.R. 669. Clarke J. (as he then was) stated at [41] that the overall approach is clear, and that the default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned.

32. Clarke J. went on to explain that one of the factors to be considered in determining whether an appeal represents an adequate alternative remedy will be the scope of the appeal process. See paragraphs [46] to [48] as follows.

> "As already noted, one of the most common bases on which the courts have been persuaded to accept that judicial review may, in the circumstances of an individual case, be the appropriate remedy, notwithstanding the availability of a statutory appeal, is where aspects of the right of appeal are found to be inadequate to allow all of the issues which the aggrieved party legitimately wishes to raise to be determined. The reason for this is obvious. The whole point of an appeal system is that an aggrieved party is entitled to seek to have the appellate body concerned review the initial decision in accordance with the scope of the appeal provided for. However, the scope of appeal can vary from case to case. *In some circumstances the appeal amounts to a complete re-hearing so that what transpired before the body making the initial decision is almost irrelevant save as to background.** In some cases an appeal will lie against the full decision save that the appeal will be conducted on the basis of the evidence or materials considered at first instance and, frequently, therefore, by affording significant weight to the assessment of the facts by the first instance body.
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> More restrictively still, an appeal may only lie on a point of law so that much greater weight may be attached to the decision at first instance. There can, of course, be variations on those themes. The type of appeal which may lie can, therefore, fall somewhere along a broad spectrum. It follows that the issues which can be canvassed on appeal are likewise varied. In addition, the extent to which an appellate body can involve itself in a consideration of the adequacy of the process by which the original decision was made or other issues which typically arise in judicial review proceedings concerning the lawfulness of the original decision can vary considerably.
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> It follows that a court, when considering whether an appeal is an adequate remedy, is required to analyse the complaints made by a party seeking judicial review and determine whether, in the light of those complaints, the appellate body in question can consider same and, if they be made out, provide an appropriate remedy. Even if the appellate body has a sufficiently broad jurisdiction, there may be cases where, looking at the process as a whole, a party might nonetheless be said to have been deprived of their legal entitlement by being required to pursue an appeal from a fundamentally defective first instance determination, thereby depriving the party concerned of their statutory entitlement to both a hearing and an appeal."
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> *Emphasis (italics) added.

33. It is necessary, therefore, to consider the scope of the statutory appeal provided for under section 29 of the Education Act 1998.

34. The current version of section 29 of the Education Act 1998 insofar as relevant provides as follows. (As noted earlier, the amendments provided for under the Education (Admission to Schools) Act 2018 have not yet been commenced).

> "29.— (1) Where a board or a person acting on behalf of the board—
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> (a) permanently excludes a student from a school, or
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> (b) suspends a student from attendance at a school for a period to be prescribed for the purpose of this paragraph, or
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> (c) refuses to enroll a student in a school, or

(d) makes a decision of a class which the Minister, following consultation with patrons, national associations of parents, recognised school management organisations, recognised trade unions and staff associations representing teachers, may from time to time determine may be appealed in accordance with this section,

the parent of the student, or in the case of a student who has reached the age of 18 years, the student, may, within a reasonable time from the date that the parent or student was informed of the decision and following the conclusion of any appeal procedures provided by the school or the patron, in accordance with section 28, appeal that decision to the Secretary General of the Department of Education and Science and that appeal shall be heard by a committee appointed under subsection (2).

(2) For the purposes of the hearing and determination of an appeal under this section, the Minister shall appoint one or more than one committee (in this section referred to as an 'appeals committee') each of which shall include in its membership an Inspector and such other persons as the Minister considers appropriate.

(3) Where a committee is appointed under subsection (2) the Minister shall appoint one of its number to be the chairperson of that committee and who, in the case of an equal division of votes, shall have a second or casting vote.

(4) In hearing and determining an appeal under this section an appeals committee shall act in accordance with such procedures as may be determined from time to time by the Minister following consultation with patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers and such procedures shall ensure that—

(a) the parties to the appeal are assisted to reach agreement on the matters the subject of the appeal where the appeals committee is of the opinion that reaching such agreement is practicable in the circumstances,

(b) hearings are conducted with the minimum of formality consistent with giving all parties a fair hearing, and

(c) appeals are dealt with within a period of 30 days from the date of the receipt of the appeal by the Secretary General, except where, on the application in writing of the appeals committee stating the reasons for a delay in determining the appeal, the Secretary General consents in writing to extend the period by not more than 14 days.

(4A) The National Educational Welfare Board may, at the hearing of an appeal brought by a parent or student against a decision to which paragraph (a) or (c) of subsection (1) applies, make such submissions (whether in writing or orally) to the appeals committee, as it considers appropriate.

(5) On the determination of an appeal made under this section, the appeals committee shall send notice in writing of its determination of the appeal and the reasons for that determination to the Secretary General.

(6) Where—

(a) an appeals committee upholds a complaint in whole or in part, and

(b) it appears to the appeals committee that any matter which was the subject of the complaint (so far as upheld) should be remedied,

the appeals committee shall make recommendations to the Secretary General as to the action to be taken.

(7) As soon as practicable after the receipt by the Secretary General of the notice referred to in subsection (5), the Secretary General—

(a) shall, by notice in writing, inform the person who made the appeal and the board of the determination of the appeals committee and the reasons therefor, and

(b) in a case to which subsection (6) applies, may in such notice give such directions to the board as appear to the Secretary General (having regard to any recommendations made by the appeals committee) to be expedient for the purpose of remedying the matter which was the subject of the appeal and the board shall act in accordance with such directions.

(8) The Minister, in consultation with patrons of schools, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, shall from time to time review the operation of this section and section 28 and the first such review shall take place not more than two years from the commencement of this section.

[*The next two subsections concern appeals in the case of a school which is established or maintained by an Education and Training Board*]

(11) The Secretary General may, in accordance with sections 4(1)(i) and 9 of the Public Service Management Act, 1997, assign the responsibility for the performance of the functions for which the Secretary General is responsible under this section to another officer of the Department of Education and Science.

(12) For the purposes of subsection (1)(c), 'student' means a person who applies for enrolment at a school and that person or his or her parents may appeal against a refusal to enroll him or her in the same manner as a student or his or

her parents may appeal a decision under this section."

35. The scope of the appeal provided for under section 29 has been considered by the Supreme Court *in Board of Management of St. Molaga's National School v. Secretary General of Department of Education and Science* [2010] IESC 57; [2011] 1 I.R. 362, [24] to [28] ("*St. Molaga's*").

> "Taking an overview of s. 29 it is clear that the words 'appeal' and 'appeals' are dominant. They appear 21 times, excluding references to 'appealed' and 'appeals committee'. Further, the decision making body is called an 'appeals committee'.
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> The words in s. 29 are very clear. The term 'appeal' is not obscure. It has a plain meaning in relation to procedures. The concept of an appeal is a full hearing on the merits with the jurisdiction to make a determination on the issues raised. An appeal goes beyond a review of a decision making process.
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> As the words of s. 29 are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law.
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> Consequently, the appeals process enables the appeals committee to have a full hearing on the matter and if so determined to replace its judgment on the matter for that of the board and to make such recommendations as it considers appropriate. Such a decision is anticipated as a possible outcome of an appeal by the section itself, in the provisions enabling a Secretary General to require a board to remedy a situation in accordance with the recommendation of an appeal committee.
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> Thus the jurisdiction of an appeals committee is not limited to a review, for example, of the lawfulness or reasonableness, of a decision of a board of management."

36. As appears, the Supreme Court has held that a section 29 appeal is a full hearing on the merits with the jurisdiction to make a determination on the issues raised. The appeal goes beyond a review of a decision-making process.

37. Although the statutory appeal at issue in *St. Molaga's* was an appeal against a decision under section 29(1)(c), i.e. a refusal to enrol a pupil, the principles apply equally to an appeal against expulsion or suspension. See *S.C. v. Secretary General of Department of Education and Skills* [2017] IEHC 847.

38. The gravamen of the Student's complaint in the present case is that the proposed hearing before the Board of Management has been contaminated as a result of what is said to have been an overreaching by the Principal of their function. More specifically, it is asserted that the Principal impermissibly made "findings of fact" to the effect that the allegations of misconduct against the Student were substantiated. This is said to represent a usurpation of the functions of the Board of Management. The failure of the Board of Management (i) to reject the Principal's report as unfair, and (ii) to identify a proposed procedure whereby the "evidence" against the Student can be questioned is also criticised.

39. These asserted deficiencies in the decision-making process are all matters which are capable of being remedied by an appeal pursuant to section 29 of the Education Act 1998. Such an appeal is, as explained by the Supreme Court in *St. Molaga's*, a full hearing on the merits with the jurisdiction to make a determination on the issues raised.

40. Of course, on the facts of the present case, the statutory right of appeal under section 29 has not yet arisen precisely because the Student instituted the within proceedings on a pre-emptive basis, prior to the Board of Management making a decision on whether or not to expel him from the School. The effect of the judicial review proceedings has been to stay the making of any decision by the Board of Management. There is thus no "decision" yet for the purposes of section 29(1)(a).

41. There are cogent reasons—grounded in both principle and pragmatism—as to why the courts should exercise restraint before entertaining judicial review proceedings in matters of school discipline. First and foremost, the courts should have regard to the fact that the Oireachtas has provided a statutory appeal process. This appeal involves a *de novo* hearing before a specialist committee appointed by the Minister for Education and Skills. This committee will have expertise in educational matters in the form of an Inspector as member. The appeal procedure also provides for the possibility of what might be described as mediation.

42. Secondly, the statutory appeal process is likely to be more expeditious than legal proceedings. As appears from section 29(4), appeals are normally to be dealt with within a period of 30 days from the date of the receipt of the appeal by the Secretary General. This is a timescale which the courts will rarely be able to match. This can be illustrated by the chronology in the present case. The Board of Management had scheduled its hearing for 13 February 2019. The Student instituted the within proceedings by way of an *ex parte* application for judicial review on 11 February 2019. An application for an interlocutory injunction was heard and determined in the final week of March 2019. See *X (A Minor) v. Board of Management of School Z*, unreported, High Court (Barrett J.), 29 March 2019. The substantive hearing took place over three days, commencing on 11 April 2019, with the hearing continuing into the Easter Vacation to accommodate the urgency of the case. This judgment is being delivered on 17 April 2019. Notwithstanding that this case has been prioritised, the resolution of same has still taken far longer than the 30 days prescribed under section 29(4). Moreover, it should be borne in mind that—irrespective of which way the case had been decided—the conclusion of the legal proceedings would not mark the end of the disciplinary process. The disciplinary process has been stayed pending the determination of the legal proceedings. The disciplinary process will resume once the legal proceedings are concluded. All of this means that yet more time will elapse before finality is achieved.

43. Thirdly, the pursuit of legal proceedings necessitates both the school and the parents incurring significant legal costs. The present case, for example, has already involved four days of hearing before the High Court (one day on the interlocutory injunction hearing, and three days on the substantive hearing). The legal costs incurred by the parties are likely to run to a six figure sum.

44. Were it to become standard practice for aggrieved students and their parents to institute judicial review proceedings in preference to exercising their statutory right of appeal under section 29 of the Education Act 1998, this might have a chilling effect upon schools in the discharge of their disciplinary functions. The board of management of a school might well hesitate before deciding to expel a student lest this result in the school being exposed to significant legal costs. Even were a school to successfully defend legal proceedings, there would be no guarantee that it would recoup its legal costs from the other side. The court might decide to make no order for costs, or the parents might not be a mark for costs. It is preferable, therefore, that disputes in disciplinary matters

should normally be dealt with by way of the inexpensive statutory appeal process.

45. For the avoidance of doubt, it should be noted that the above observations are made in respect of the legal costs associated with judicial review proceedings in general. The observations are not intended to refer to the financial position of the School and Parents in the present case, nor to pre-empt what order the court might make in respect of legal costs.

STUDENT'S POSITION IN RESPECT OF STATUTORY APPEAL

46. The stance adopted by the Student in respect of the existence of a statutory right of appeal under section 29 of the Education Act 1998 has shifted considerably during the course of the proceedings. The original position of the Student, prior to the proceedings, had been to acknowledge that he did have a right of appeal. The Student, through his father, had exercised his right of appeal against his initial *suspension* from the school by submitting an appeal to the Secretary General on 14 January 2019. This appeal was pending at the time the application for leave to apply for judicial review was made. The appeal was ultimately dismissed on 5 March 2019.

47. For the purposes of the judicial review proceedings, however, the Student adopted the position that the Board of Management of the School was not properly constituted, and argued that this had the legal consequence that the Board's decisions were not amenable to appeal. At one stage, leading counsel for the Student went so far as to suggest that the School had no jurisdiction to expel any student. This radical position was subsequently abandoned on the afternoon of the second day of the hearing (12 April 2019), and Ground E.36 is not being pursued.

48. The Student now accepts that a decision to expel him would be amenable to statutory appeal, but maintains that such an appeal does not constitute an adequate alternative remedy. Counsel submitted that the appeal process would itself be contaminated by the defects alleged in the disciplinary process to date. In particular, it is suggested that because the Principal's report and purported "findings of fact" would be before the Appeals Committee, this would contaminate the appeal process.

49. It was further suggested that the appeal would be an appeal on the papers only, and that statements from persons other than the parties would not be permitted save in exceptional circumstances.

50. Counsel made reference in this regard to a Circular Letter (Ref. M48/01) *Appeal Procedures Under Section 29 of the Education Act, 1998.* This Circular Letter is dated August 2001. Paragraph 26 reads as follows.

> "26. The parents, student (if over 18), and, where the EWS makes an appeal in accordance with its power under section 26 of the Education (Welfare) Act, 2000, a representative of the EWS, may attend the hearing as, or on behalf of, the appellant. The board of the management may designate two of its members, or one of its members and the school principal, to attend the hearing on its behalf. Subject to the prior consent of the Section 29 Appeals Committee, either party to the appeal may also be accompanied at the hearing by not more than two persons nominated by them for this purpose. Persons accompanying either party to the appeal will not be permitted to make statements at the hearing, save in exceptional circumstances where the Section 29 Appeals Committee gives its consent."

51. Counsel suggested that the Appeals Committee might consider itself bound by the procedures prescribed under the Circular Letter notwithstanding the delivery of the judgment of the Supreme Court in St. Molaga's, and further suggested that a party before the Appeals Committee might have to challenge the Circular Letter by way of judicial review.

52. With respect, I cannot accept these arguments. To do so would necessitate this court taking as its starting point an *assumption* that an Appeals Committee, which is charged with making a decision on a statutory appeal, would ignore a judgment of the Supreme Court which is directly on point. This would be contrary to the general principle of administrative law that statutory bodies are presumed to act in a lawful manner. It would also be contrary to the approach actually taken by the Appeals Committee in this very case. It is clear from the decision on the Student's own appeal against his *suspension* that the Appeals Committee is conscious of its statutory obligations in this regard. The Appeals Committee's decision of 5 March 2019 (which has been exhibited as part of the papers for the interlocutory injunction) expressly cites the judgment in *St. Molaga's*.

53. In the unlikely event that an Appeals Committee did not properly comply with its obligation to conduct a full hearing, then its decision would be liable to be set aside on judicial review. Leading counsel for the School, Mr Frank Callanan, SC, helpfully referred me in this regard to the judgment of the High Court (Ní Raifeartaigh J.) in *S.C. v. Secretary General of the Department of Education and Skills* [2017] IEHC 847. The judgment emphasises that an Appeals Committee is not in any way bound by the findings of the board of management against whose decision the appeal is being taken; and that the Appeals Committee's hearing is supposed to be a *de novo* hearing. The High Court set aside the decision of the Appeals Committee in that case precisely because the decision of the Appeals Committee did not clearly separate itself from the first-instance decision by the board of management. The language used in the Appeals Committee's decision suggested that there was an inter-relationship between the Committee's own decision and that of the board of management, whereas its own decision should have been wholly independent.

54. (As an aside, I should say that I do not accept the suggestion made by counsel on behalf of the Student that the very fact that the Appeals Committee in *S.C.* erred is indicative of a general misunderstanding on its part of its appellate jurisdiction. Whereas it is unfortunate that the Appeals Committee erred in that case, the jurisdiction exercisable under section 29 is well defined in the case law. It cannot be presumed that the Appeals Committee would disregard this case law. All decision-making tribunals will err from time to time—even Homer nodded—and the fact that a particular panel erred in a particular case is not proof of a systemic failure. If anything, the correct inference to be drawn from *S.C.* is that, in the event of an error in approach on the part of an Appeals Committee, same will be readily corrected by the High Court on judicial review).

55. The scope of the statutory appeal under section 29 is clear, and the suggestion that the Appeals Committee's jurisdiction is constrained by what occurred at first-instance before a board of management is incorrect. Similarly, the suggestion that the Appeals Committee's decision-making would be *contaminated* by virtue of the Principal's report and recommendation—which contains the impugned "findings of fact"—being included in the materials which would be before the Appeals Committee, is not accepted. The precise purpose of an appeals process is to allow *erroneous* decisions of first-instance to be corrected. This presupposes that an appellate tribunal is capable of having sight of an erroneous decision without being contaminated by same. The complaint made in the present case is that the findings of fact are not justified on the evidence. As it happens, the findings of fact in this case are recorded in the Principal's report, and the Student says that this should not have happened. But the logic of the Student's argument would extend to a case where findings of fact had been made by a board of management, and a student wishes to challenge those. In such a case, the findings of fact of the board of management would be before the Appeals Committee, and it cannot realistically be suggested that this would contaminate the appeal process.

56. Before concluding this discussion of alternative remedies, brief reference should be made to the approach adopted by the Court of Appeal of England and Wales in *Regina (DR) v. Head Teacher of St George's Catholic School* [2002] EWCA Civ 1822 ("*St George's Catholic School*"). The relevant national legislation provided for an appeal against a decision by the school's governing body to exclude a pupil to an independent appeals panel established by the local educational authority. On the facts, the claimants had exercised their statutory right of appeal to the independent appeals panel. The claimants then sought to challenge that second stage decision by way of judicial review; and as part of their case sought to rely on alleged deficiencies at the first stage hearing before the governing body of the school. The alleged deficiencies included *inter alia* that at the end of the hearing before the governing body the head teacher remained in the room and spoke to one or more members of the committee; that documents were only made available to the claimant's father the day before the hearing; and that the governing body refused to allow the claimant's father to put in statements made by fellow pupils of his son.

57. The Court of Appeal held that any alleged unfairness at stage one had been cured by the appeal to the independent appeals panel, and that the unfairness could not subsequently be relied upon in a challenge to the second stage decision.

> "37. […] The true position is this: the court's task in cases like the present is to examine and construe the statutory scheme as a whole so as to discern from it Parliament's intention. The effect of the 1998 Act is to establish, in contested cases of permanent exclusion, a three-stage procedure: decisions successively by the head teacher, the governing body and the IAP (although the first two stages can sensibly be regarded as a single process given that any case of permanent exclusion is automatically referred to the governing body). Plainly Parliament did not intend either hearing (or, indeed, the head teacher's initial decision) to be unfair. But that is by no means to say that Parliament intended a pupil aggrieved by the head teacher's or governing body's decision then to invoke the court's supervisory jurisdiction rather than proceed to appeal. It is, on the contrary, clear that Parliament intended the aggrieved pupil to seek his remedy before the IAP. In one sense, of course, he then obtains no redress for the earlier unfairness. But what he does obtain is a fresh and fair decision on the merits of the case by a statutory body custom-built for the purpose. The IAP is a tribunal entirely independent of the head teacher and the governing body. It has expertise in the matter of school discipline — is, indeed, trained for the purpose (see para 20 of Annex D). It entertains the appeal on a *de novo* basis to the extent of hearing all the evidence for itself. It enjoys full powers such as enable it to make a final decision to reinstate which is then binding on all parties. And it operates within an appropriately tight timetable."

58. On the facts of *St George's Catholic School*, the claimants had exercised their right of statutory appeal, and only moved to challenge by judicial review the second stage decision of the independent appeals panel. The Court of Appeal considered what the position might have been had the claimants sought judicial review at the first stage, i.e. judicial review of the decision of the governing body.

> "45. I would therefore hold that the claimants' rights to a fair determination of their respective cases against permanent exclusion were satisfied in each case by the IAP hearing and determination. I recognise that, had they not appealed and instead sought judicial review of the (assumed to be) flawed decisions by the governing body, the more difficult question would then have arisen as to whether the court should properly exercise its supervisory jurisdiction or should rather leave the claimants to their right of appeal under the statute. For my part, whilst conscious of the risk that, were the courts never to permit such challenges, governing bodies might come to be regarded (and to regard themselves) as for all practical purposes immune from the review jurisdiction (see Lord Oliver's speech in the *Leech* case [1988] AC 533 referred to in para 26 above), I would expect cases where review is thought appropriate to be very few and far between. Save in a case where the governing body is plausibly said to have acted quite improperly, or where the court's guidance on some real point of principle is required or, as in *R v Newham London Borough Council, ex p X* [1995] ELR 303, where not merely was permission to move for judicial review granted but also interim relief to enable the pupil to return to school to pursue his GCSE course work, the court's proper response will almost always be to leave the claimant to his statutory remedy."

59. If similar principles were to be applied to the present case, then the application for judicial review should be refused.

60. Counsel on behalf of the Student, Mr Feichín McDonagh, SC, sought to distinguish the judgment in *St George's Catholic School* on the basis that the claimants there had exercised their statutory right of appeal, and the appeals were found to be fair. The effect of the appeal had been to set aside the first-instance decision, and counsel submits that it is unsurprising that the claimants could not then rely on alleged unfairness at first-instance. Counsel referred in this regard to *State (Keeney) v. O'Malley* [1986] I.L.R.M. 31 and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483. Reference was also made to Hogan & Morgan, *Administrative Law in Ireland* (Round Hall, 4th edition, 2010), §16–182, and the discussion therein of *Stefan v. Minister for Justice* [2001] IESC 92; [2001] 4 I.R. 203.

61. This submission to the effect that a party who has pursued a right of appeal cannot subsequently seek to challenge the first-instance decision is correct insofar as it goes. However, I think that the judgment in *St George's Catholic School* is more nuanced. The Court of Appeal in England and Wales addresses the question of whether an alleged unfairness at the first-instance is cured by a fair hearing at the appellate stage, and concludes that it can be. The approach in this regard appears to be broadly similar to that of the Supreme Court in *EMI Records Ltd. v. Data Protection Commissioner*.

62. Moreover, the type of considerations relied upon by the Court of Appeal in *St George's Catholic School* at paragraph [37] of the judgment as pointing in favour of a statutory appeal, e.g. the independence, expertise and expedition of the appellate body, apply equally to an appeal under section 29 of the Education Act 1998. See paragraphs 41 to 44 above.

63. If anything, the presumption in favour of pursuing a statutory appeal is stronger under Irish law in circumstances where the legislation is not prescriptive as to the procedures to be adopted at first-instance. In contrast to the English legislation at issue in *St George's Catholic School*, the Education Act 1998 does not lay down a procedure for the first-instance decision. Of course, section 23 of the Education (Welfare) Act 2000 does require a "recognised school" to prepare a code of behaviour in accordance with the NEWB Guidelines.

CONCLUSION ON ADEQUATE ALTERNATIVE REMEDY

64. In all the circumstances, I am satisfied that the existence of a statutory right of appeal represents an adequate alternative remedy, and that the Student is not entitled to relief by way of judicial review.

JUDICIAL REVIEW IS PREMATURE

65. The above finding in respect of adequate alternative remedies is sufficient on its own to dispose of these proceedings. However, lest I am incorrect in this finding, I propose to address the separate objection that—even if judicial review were to be an appropriate remedy—the application in the present case is in any event *premature*. The disciplinary process is still in train, and no substantive

hearing has yet taken place before the Board of Management. Still less has a decision actually been made to expel the Student.

66. The Supreme Court in *Rowland v. An Post* [2017] IESC 20; [2017] 1 I.R. 355 ("*Rowland*") indicated that a court should only intervene in an ongoing disciplinary process where it was clear that the process has gone wrong; that there is nothing that can be done to rectify it; and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law. See paragraphs [11] to [14] of the judgment as follows.

> "However, it seems to me that the underlying principle behind *Becker v. St Dominic's Secondary School* [2006] IEHC 130, (Unreported, High Court, Clarke J., 13 April 2006) is equally true in the context of a full hearing of an application designed to prevent any ongoing process from continuing. In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned.
>
> Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded.
>
> However, the practical consideration which leans against a court interfering with an ongoing process may point in the opposite direction in a limited number of cases *where the conduct of the process, up to the point when the Court is asked to review it, is such that it is clear that the process has gone irremediably wrong.** In such a case, rather than the practicalities pointing to letting the process come to its natural conclusion and, if necessary, being reviewed by a court thereafter, those same practicalities point to stopping the process and thus saving all concerned from engaging in what must necessarily turn out to be the fruitless exercise of continuing a process whose conclusions if adverse are almost certain to be quashed."
>
> *Emphasis (italics) added.

67. As the judgment in *Rowland* indicates, an application for judicial review will generally only be appropriate where a disciplinary process has gone irremediably wrong. I propose now to apply this test to the School's disciplinary process, by reference to the grounds of challenge pleaded in the Statement of Grounds.

68. The Statement of Grounds advances two broad objections to the disciplinary process. First, complaint is made that the hearing before the Board of Management will not allow the Student to properly question the evidence. Secondly, complaint is made that the Principal has usurped the Board's role by purporting to make "findings of fact". It is said that the existence of these findings, and the Board's decision of 17 January 2019 that the investigation complied with fair procedures, gives rise to objective bias, i.e. a reasonable observer would think that the Board has pre-judged essential aspects of the disciplinary process. Each of these complaints is addressed under separate headings below.

(i) Procedure before the Board of Management

69. The judgment in Rowland is especially apposite to the circumstances of the present case. One of the curiosities of this case is that the Student has failed to articulate what precisely it is that he says that fair procedures require. Counsel on behalf of the Student sought to deflect this by suggesting that it was a matter for the Board of Management to put forward proposals for the procedure to be adopted.

70. With respect, I do not think that this is correct. The onus of proof lies with an applicant in judicial review proceedings. If an applicant wishes to allege that a procedure is unfair, then he or she must identify the nature of the *deficiency* in the procedure complained of, and indicate what the minimum requirements to ensure fair procedures would involve. There is also an expectation that an applicant will seek to engage with the decision-maker before having resort to the courts.

71. The Student and his parents were perfectly entitled to make submissions to the Board of Management as to why it is that they say that the proposed procedure would be unfair, and, in particular, to identify any further steps required. For example, if the Student had wished to make an argument to the effect that there should be cross-examination of the other students, then this should have been expressly raised in correspondence in the first instance.

72. The issue of whether or not cross-examination should be allowed is not dealt with definitely in the Code of Behaviour. Rather, whether or not such a right to cross-examination exists will have to be determined on a case by case basis. It will be necessary to have regard to considerations such as, on the one hand, the fact that most students will be minors and that the introduction of an overly formal decision-making process may undermine the objective of ensuring discipline in schools. As against this, the adverse consequences for a pupil of being expelled must also be considered. The difficulty in this case, of course, is that because the Student moved for judicial review prematurely, the *inter partes* correspondence had not reached a stage where these issues could have been teased out sensibly.

73. On the facts of the present case, the pre-litigation correspondence rests with the letter of 6 February 2019 from the Board of Management.

> "We advised you of the names of those who will be in attendance at the Hearing in our last letter. If there is any evidence which [the Parents] wish to rely upon which they feel has not been investigated and/or any questions which they want to have put to other parties, you might please outline same so that [the Principal] can investigate same and/or put questions to other parties and thereafter prepare a supplemental report for the Board, which will also be provided to [the Parents]. To this end, the Hearing scheduled for 13 February would have to be postponed until such time as such an investigation had been conducted. In addition, if there are witnesses that [the Parents] wish to bring to the Hearing, this will be accommodated, provided the names of those whom the parents propose to call as witnesses have been notified to the Secretary of the Board three working days in advance of a Hearing."

74. This letter sought to engage with the Parents on the procedure to be adopted at the hearing before the Board of Management. Crucially, the letter indicated that the hearing scheduled for 13 February 2019 would have to be postponed. No substantive response was ever made to this letter and, instead, the Student instituted these judicial review proceedings by way of an *ex parte* application for leave on 11 February 2019.

75. During the course of the hearing before me, counsel was coy as to what precisely it is that the Student says must be done to ensure fair procedures. Counsel was keen to stress that his client was not "wedded to" the notion that there had to be cross-examination of the other pupils. It was suggested, for example, that the members of the Board of Management might instead interview the other pupils (in the presence of the Student's parents).

76. The very fact that these matters are in a state of flux confirms the wisdom of the approach of the Supreme Court in *Rowland*. It is precisely because the details of the procedure to be adopted at the hearing before the Board of Management have not yet been finalised, that the application for judicial review is premature. The Student should instead have taken the obvious step of engaging with the Board of Management in correspondence, and then attending at a rescheduled hearing. If, following the conclusion of the disciplinary process, the Student considered that he had not been afforded fair procedures, then at that stage he could seek to challenge the decision. As indicated earlier, such a challenge should be pursued by way of an appeal pursuant to section 29 of the Education Act 1998. Lest I am incorrect in this, then the Student would be entitled to apply for judicial review but only once the disciplinary process had concluded. As matters currently stand, however, the application for judicial review is premature.

(ii) Principal's findings give rise to objective bias

77. An allegation of pre-judgment has been pleaded in the Statement of Grounds. This allegation is predicated on the decision made by the Board of Management at its meeting on 17 January 2019 to the effect that it (the board) was satisfied that the investigation in the case of each of the four students was properly conducted in line with fair procedures. The Board also decided in each case to consider expulsion and to hold a hearing. See Minutes of Meeting (Book of Pleadings Page 514 of 526).

78. In order to understand this ground of challenge, it is necessary to recall the provisions of Step 3 in the Code of Behaviour as follows.

> "The board of management will review the initial investigation and satisfy itself that the investigation was properly conducted in line with fair procedures. The board of management will undertake its own review of all documentation and the circumstances of the case. It will ensure that no party who had any prior involvement in the case is part of the board of management's deliberations (for example, a member of the board of management who may have made an allegation about the student).
>
> Where the board of management decides to consider expelling the student, it will hold a hearing. […]"

79. The argument on behalf of the Student appears to be that, by making an interim decision to the effect that the investigation carried out by the Principal was fair and in accordance with the Code of Behaviour, the Board of Management is to be seen in some way as having formed a view as to the *substance* of the case. In particular, it is suggested that the Board of Management should have immediately recognised that the Principal's report and recommendation were flawed because they contained findings of fact. This is put forcefully in the Student's written legal submissions as follows (page 24).

> "67. The Board at a meeting on the 17th of January 2019, appears to have decided that notwithstanding the fact [the Principal] had usurped the function of the Board in terms of deciding if the allegations made had been substantiated, that in fact the investigation had been properly conducted in line with fair procedures.
>
> 68. It follows that either the Board did not appreciate that their function had been usurped or that they simply chose not to acknowledge same. It is a cause of concern for the Applicant that Mr […] has not even mentioned in his affidavit the fact that [the Principal] went beyond what was envisioned by the Code of Behaviour and made findings of fact.
>
> 69. Further, it is impossible for the Court to know what matters were taken into account by the Board of Management in deciding this issue. The minutes of a Board meeting are an official record of the meeting. They are expected to accurately reflect the meeting. The minutes provided to the Applicant do not provide the Court with any details about the nature, course or conduct of the meeting despite repeated requests for same by the Applicant solicitor."

80. See also page 28 of the written legal submissions.

> "82. The Board says that notwithstanding the clarity of the fact-finding conducted by [the Principal] and notwithstanding the clear findings of guilt recorded at some length in [their] Report to the Board of Management, that the Board is not constrained by such findings of fact and that it is open to the Board to reject such findings.
>
> 83. This is a surprising contention given the present state of administrative law. How precisely it is suggested that the process has not been tainted by objective bias by virtue of the Board having delegated its fact-finding to [the Principal] is not explained. Likewise, the Board does not explain how it proposes to conduct a hearing which could lead to the allegations which, as matters stand, have been substantiated to the satisfaction of [the Principal], being found not to have been substantiated, without the Board having available to it any evidence whatsoever other than [the Principal's] report, [their] findings of fact and the documentation generated in the course of [their] investigation which have led [them] to make those findings of fact. In *Prendiville v Medical Council** the principle of 'no bias' was held to be violated when five members of the Fitness to Practice Committee took part in the meeting of the Medical Council (of which they were also members) which confirmed the Committee's recommendation regarding professional conduct."
>
> *Footnote omitted.

81. With respect, I do not think that these arguments are well-founded. As appears from Step 3 of the Code of Behaviour, all that is required of a Board of Management at that stage in the process is to satisfy itself that the investigation was properly conduced in line with fair procedures. In circumstances where the Student has not alleged any particular unfairness in the manner in which the investigation had been carried out, the decision of the Board of Management of 17 January 2019 is hardly surprising. The Principal had engaged in extensive interviews and spoke to all of the relevant parties. Moreover, the nature of the allegations and the statements of the opposing parties were made available to the Student and his parents. All that has happened so far is that the Board of Management has indicated that this procedure appears to have been in line with fair procedures. It is clear from the correspondence, however, that the Board of Management has not reached any final conclusions in this regard nor decided whether the allegations are

substantiated. See letter of 6 February 2019 from the School to the Student's solicitor.

82. More generally, I do not accept that the making of "findings of fact" by the Principal has contaminated the disciplinary process. There is no doubt that the decision as to whether or not to make an expulsion resides exclusively with the Board of Management (subject always to the statutory right of appeal to the Secretary General under section 29 of the Education Act 1998). It is also beyond doubt that the Board of Management must itself decide whether the allegations are substantiated. These matters are expressly provided for at Step 3 of the "Procedures in respect of Expulsion" under the Code of Behaviour.

83. The Board of Management's role in this regard is not undermined by dint of the Principal having set out their "findings" as part of the report on the "detailed investigation". In this regard, it is salutary to recall the narrow compass of the factual dispute in this case, and the manner in which the Principal sets out their rationale. The structure of the Principal's report identifies the issues in respect of which there is a factual dispute, and, in particular, identifies that the Student disputes the central allegation that he supplied a controlled drug to a fellow student. The Principal then sets out their reasoning for reaching their findings, by reference to *inter alia* the (separate) interviews with the two pupils and their parents, and by reference to inferences which the Principal has sought to draw from the surrounding circumstances.

84. It will be obvious to members of the Board of Management upon reading the report that there is a factual dispute in respect of a number of key matters, and that the findings of fact by the Principal are based largely on inferences. The members of the Board of Management will have the primary materials, e.g. the witness statements, available to them. This is not a scenario where a "secondary" fact is baldly stated in a report as if it were a "primary" fact without any explanation. Nor is it a scenario whereby material which was improperly obtained—for example, by way of a covert recording—has been presented to the Board of Management.

85. Accordingly, the interim decision of the Board of Management that the investigation had been carried out in line with fair procedures is unimpeachable, and could not reasonably be said to give rise to objective bias.

CONCLUSION ON PREMATURITY

86. For the reasons set out above, and having applied the test in *Rowland*, I am satisfied that the application for judicial review is premature. This finding of prematurity is made without prejudice to the primary finding of this judgment, namely that an application for judicial review should be refused as a matter of discretion given the existence of the statutory right of appeal under section 29 of the Education Act 1998.

WHETHER PRINCIPAL ENTITLED TO MAKE FINDINGS OF FACT

87. As set out above, I have concluded that the application for judicial review should be dismissed on the basis, first, that there is an adequate alternative remedy available by way of appeal under section 29 of the Education Act 1998, and, secondly, that the application for judicial review is, in any event, premature. These conclusions are sufficient to dispose of the judicial review proceedings.

88. However, lest this matter be appealed and out of deference to the detailed submissions made by counsel, I propose to address briefly the question of whether the Principal was entitled to make findings of fact.

89. Mr. McDonagh, SC, on behalf of the Student submits that it was impermissible for the Principal to make what counsel characterised as "findings of fact" in respect of the alleged misconduct. Counsel emphasises that the Code of Behaviour expressly states that the Board of Management will decide whether or not the allegations are substantiated, and it is submitted that the Principal has usurped this role. It is further submitted that this has contaminated the decision-making process.

90. Mr McDonagh, SC encapsulated the argument as follows in his closing submissions. Counsel submitted that the Board of Management has been provided, by the Principal in their report, with a template for an adverse finding against the Student. Counsel, having noted the acknowledged involvement of the School's solicitors in preparing the report, described this as a "legally advised construct" for fact-finding handed to the Board of Management on a plate. Counsel objects that the Board of Management's only answer to all of this is to say that it is not bound by the Principal's fact finding but it is not going to hear any evidence called by the Principal.

91. Counsel has cited a number of judgments from employment law in support of his argument. Reference was made in particular to *O'Sullivan v. Mercy Hospital Cork Ltd*. [2005] IEHC 170; *Minnock v. Irish Casing Co. Ltd.* [2007] 18 E.L.R. 229; *O'Brien v. AON Insurance Managers (Dublin) Ltd*. [2005] IEHC 3; and *McLoughlin v. Setanta Insurance Services Ltd.* [2011] IEHC 410.

92. Having carefully considered this case law, I am satisfied that it does not create a "bright line" rule to the effect that it is impermissible for a person carrying out an inquiry or investigation at the first stage of a two-stage disciplinary process to make "findings of fact". Rather, the principle established appears to be that if a finding is to be made at the first stage, then the first stage will trigger a requirement for fair procedures. See *Minnock v. Irish Casing Co. Ltd.* [2007] 18 E.L.R. 229 at 231/2.

> "[…] As has been pointed out in some of the authorities, the range of preliminary inquiries that can be conducted may flow from one end of the scale where there is a pure investigation where no findings of any sort are made on behalf of the enquirer other than to determine whether there is sufficient evidence or materials to warrant a formal disciplinary process, and it seems clear on all the authorities that that type of pure investigation which does not involve any findings is not a matter to which the rules of natural justice apply and is not a matter therefore which the courts should interfere with. The fact that an employee may be obliged as a matter of his contract of employment to assist in any such investigation does not confer on it the status of an inquiry which carries with it an obligation to act in accordance with the rules of natural justice.
>
> At the other extreme there are inquiries which can make formal findings which may, for example, be part of a statutory process or the like in respect of which it does appear on the balance of authorities to be settled that the rules of natural justice do apply, and it may well be that in those circumstances the court would need to consider whether it is appropriate to intervene by making an interlocutory order where a case has been established that there has been a significant flaw in the process."

93. See also *O'Sullivan v. Mercy Hospital Cork Ltd*. [2005] IEHC 170.

> "In between those two extremes may be a variety of forms of preliminary enquiry which may vary as to their formality in the sense of whether they are a formal and necessary step to a subsequent stage in a disciplinary process. They may also vary as to the extent that the inquirer may be authorised to make findings. It may well be that the extent (if any) to

which any or all of the rules of natural justice may apply to such inquiries may vary depending on the nature and purpose of the enquiry involved."

94. There is also much force in the submission by Mr Callanan, SC, on behalf of the School, that these cases turn on their own facts, and, in particular, necessitate a close reading of the particular employment contract, disciplinary code or terms of reference at issue. I also accept counsel's submission that considerable care should be taken before importing employment law principles into school disciplinary procedures. School discipline requires consideration of wider issues such as the need to protect the school community and other minors.

95. The starting point for an analysis of the Student's complaint must be the terms of the Code of Behaviour. The "Procedures in respect of Expulsion" have been set out at paragraph 26 above. As appears from Step 1 and Step 2, a "detailed investigation" is to be carried out under the direction of the Principal. Fair procedures are to be complied with: the student/parents are to be informed of the alleged misbehaviour; how it will be investigated; and that it could result in expulsion. The student/parents are to be given every opportunity to respond to the complaint of serious misbehaviour before a decision is made about the veracity of the allegation, and before a sanction is imposed. Express provision is made for a meeting to provide them with an opportunity to give their side of the story and to ask questions about the evidence of serious misbehaviour, especially where there is a dispute about the facts.

96. Step 2 provides that where the Principal forms a view, based on the investigation of the alleged misbehaviour, that expulsion may be warranted, the Principal will make a recommendation to the Board of Management to consider expulsion.

97. The argument that the Principal was not entitled to reach findings of fact is not borne out by a reading of the Code of Behaviour. The Principal is required to direct a "detailed investigation" and to produce a recommendation.

98. Nor can I accept the argument that the Principal's role is confined to forming "a view on whether a *prima facie* case for expulsion had been made out". (See applicant's written submissions, page 17). (At one stage, counsel on behalf of the Student appeared to go so far as to suggest that the Principal might be required to recommend the consideration of expulsion even in circumstances where they did not think that an expulsion would be merited). The Code of Behaviour envisages that the Principal has an important role in maintaining discipline in the school, and that as part of this function, they may recommend that the Board of Management consider expulsion. The Code of Behaviour does not envisage that the Principal will be *neutral* on the question of whether the particular student should be expelled. Rather, it is expressly provided for at Step 3 that the Principal will "put their case to the Board of Management" in the presence of the student/parents.

99. Against this background, the criticism of the report on the basis that it sets out the Principal's findings is untenable. As pointed out by counsel for the School, the logic of the Student's argument is that the report of a detailed investigation would be characterised by a "blank zone of reasoning" whereby the rationale for making the recommendation to consider expulsion would be omitted.

100. There is no inconsistency between the Code of Behaviour providing that the Principal has a role in recommending expulsion, and providing that only the Board of Management has the authority to expel a student, and that this authority is reserved to the Board of Management and will not be delegated. (See relevant part of the Code of Behaviour, Book of Pleadings, page 105 of 526).

CONCLUSIONS

101. I have concluded that the application for judicial review should be dismissed on the basis, first, that there is an adequate alternative remedy available by way of appeal under section 29 of the Education Act 1998, and, secondly, that the application for judicial review is, in any event, premature.

102. Accordingly, I make an order dismissing the application for judicial review in its entirety. I will hear counsel on what consequential orders, if any, are required. In particular, I will hear counsel on the question of legal costs.

APPENDIX

EXTRACTS FROM PRINCIPAL'S REPORT

Having carried out a thorough investigation, including speaking with [the Student] in the company of his parents, speaking with his parents and speaking with other students and their parents; I make the following findings:-

[The Student] breached [the Code of Behaviour] as follows:-

> (i) He had cannabis in his possession in [the School] which he brought into [the School] in or around October/November 2018. I am making this finding as [Student X] indicated that the Student supplied him with cannabis in [the School] and in order to do this, [the Student] would have had to bring the drugs into [the School] and would have to have them in his possession. I make this finding on the balance of probabilities. In making this finding, I am taking into account that Student X's account of the matter has remained steadfast throughout the process and that he volunteered the information that he had purchased drugs from [the Student] in [the School] even though he had nothing to gain from this as [the School] was unaware of this until Student X volunteered the information. On the other hand, [the Student's] account has not been consistent. At the meeting on 27 November 2018, the answers which [the Student] gave were vague, for example, when asked whether he had a conversation the previous Thursday with [a School] student about going out for a smoke he replied '*I had rugby training and study' and when asked 'Did it happen at some stage?*', he replied, '*I maybe had a conversation but I didn't do anything'* and when then asked whether he was saying he didn't do it last week but that he had a conversation, his response was '*Did it near the start of the year but not lately, I am focusing on rugby*'. When it was put to him that a student said that [the Student] had spoken to him and said *'Do you fancy going for a smoke?*', he responded '*Yeah, but it would have been at the weekend but within my friend group*' whereas later in the meeting when [the Year Head] asked '*Last week when you suggested about going to smoke dope, where did you have it?',* [the Student] responded '*In a Ziplock bag kept out in the woods'*. In addition, at the meeting on 18 December 2018, when he was asked '*Have you ever talked about offering someone cannabis?*', he responded '*No. Only about going for a smoke after school'.* When it was put to him that the answers he gave at the meeting of 29 November, about going out for a smoke were vague, he indicated '*I did have a conversation about going out for a smoke'.* As the answers given by [the Student] were vague and not consistent, I have taken the view that the account given by Student X is more credible than that given by [the Student].
>
> (ii) He approached Student X while in [the School] asking him whether he wanted to buy cannabis and while in [the School] supplied circa €20 worth of cannabis to Student X, a student in [the School] in or around October/November

2018. I make this finding on the balance of probabilities as I have found Student X to be a more credible witness than [the Student]. I am also taking into account that the explanation which Student Y gave to Student X for taking X's schoolbag on 22 November 2018 was that [the Student] owed [Student Y] money and that [the Student] would provide drugs to the value of the €25 euros by [Student Y]. At the meeting on 17 December 2018, Student X stated that '[*Student y] said that [the Student] owes him money, he did not say for what. He said that he thought [the Student] was selling me more weed and that's why he took the money from my bag'*. While Student Y later denied having referred to drugs, I accept that the foregoing was stated to Student X by Student Y. It has also been confirmed by [the Student] and Student Y that they had spoken about where to get drugs, for example, at a meeting with Student Y on 26 November 2018, in response to a question from [the Year Head] as to whether he had a conversation about drugs with [the Student], [Student Y] responded *'Never about supplying, more about where he would get them'*. While Student Y's father subsequently disputed this wording at the meeting on 18 December 2018, both [the Year Head] and [XX] are fully satisfied that this was is what Student Y stated. Student Y also confirmed that he asked Student X how much he paid [the Student] for the drugs. At the meeting on 18 December 2018, I put it to Student Y that Student X had said Student Y had asked Student X how much Student X had paid [the Student] for weed. Student Y responded *'I think I may have asked him that. I overheard [the Student] talking about it. When I asked him if he was sure, he responded "I'm pretty sure"'*. I am also taking into account that that [the Student] appeared to have access to drugs and it was confirmed by his parents at the meeting on 26 November 2018 that they had found 'weed' on him at home and his mother had indicated on 14 November that they had found what she described as 'gear' in his room. It is accepted that this information was given in the context of [the Student] being a user of drugs, but it also shows that he had access to drugs and he did confirm that he could source drugs. Student Z also stated at the meeting on 17 December 2018 that he heard [the Student] mention cannabis and say that he sold cannabis.

(iii) Approached Student X while in [the School] on 22 November 2018 and asked him whether he wished to go out to smoke cannabis. I make this finding as outlined above.

(iv) Brought cannabis to smoke with friends which he hid *'out the back of the school'*. I uphold this finding as [the Student] had confirmed that he did smoke cannabis with his friends at the back of the school and that he had stored drugs there which his father had confiscated.

The Grounds on which the Board of Management is being asked to consider Expulsion.

Having carried out a thorough investigation, the Principal formed the view based on the investigation of alleged misbehaviour that expulsion may be warranted and is making a recommendation to the Board of Management to consider expulsion on the grounds that [the Student's] continued presence in [the School] constitutes a real and significant threat to the safety of students in [the School] as he approached another [school] student in [the School] and offered to sell drugs to him, he brought into and was in possession of €20 worth of cannabis in [the School] which he supplied to the [school] student and that €20 worth of cannabis was consumed by [the Student], he also asked the same student to go smoking 'weed' with him on 22 November 2018, while that student was in the [school] and he also appears to accept that he was smoking cannabis while in [the School's] uniform as in his email dated 2 December 2018, he stated that he was sorry for what he been doing in his school uniform.