UNAPPROVED

THE COURT OF APPEAL

CIVIL

[2022 No. 237]

The President **Neutral Citation Number [2023] IECA 52**

Edwards J.

Whelan J.

BETWEEN

THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL

RESPONDENT

AND

ENOCH BURKE

APPELLANT

JUDGMENT of Mr Justice John Edwards delivered on the 7th day of March 2023.

1. I have had the opportunity of reading in draft the judgment which has just been delivered by the President, and I fully concur with his analysis and conclusions. I also have had the opportunity to consider in draft the judgment which is shortly to be delivered by Ms Justice Whelan and again I fully concur with her analysis and conclusions. However, I wish to add some observations of my own.

2. I wholeheartedly endorse the President's approach of identifying what this appeal is about and what it is not about. As he rightly points out the appeal is not fundamentally about transgender people, or issues of gender identity; nor is it fundamentally about the appellant's constitutional rights to freedom of expression, freedom of conscience and the right to free profession and practice of his religion. That is not to say that such matters are irrelevant to the

litigation. They are all part of a tapestry that forms the backcloth to the present proceedings, but they are no more than that. What the appeal is about is whether injunctive relief, both interim and interlocutory, was properly granted by the High Court against the appellant to restrain his attendance at the school in circumstances where he had persisted in so attending notwithstanding having been placed on administrative leave in the light of certain alleged misconduct said to have been committed by him up to that point in the context of an ongoing dispute between him and the school as to a matter of policy, which misconduct the respondent alleges was unacceptable, disruptive and inimical to the orderly running of the school; and whether the High Court was also correct to refuse him certain relief that he was seeking.

3. The backcloth to which I have referred has been very well described by the President in his judgment and it is unnecessary for me to repeat the detail of it. What is clear is that Mr Burke, a teacher in the respondent school, has deeply held religious beliefs, integral to which is the biblical teaching that at the creation of humanity God created two genders, man and woman, and that a person's gender is assigned to them by God at conception and manifested at birth by their biological sex. He does not therefore recognise or accept that people can have a gender identity different from the gender that they were thought to have at birth. He does not accept that it is possible to be transgender, and refers pejoratively to the expressed belief of people who hold a contrary view as "transgenderism", which he characterises as being an ideology in total conflict with Christian belief.

4. While there is no doubting the sincerity of Mr Burke's views, his views are not views that are universally shared in society, even amongst those with Christian belief. Contrary views are widely held. As the President has rightly pointed out the secular State recognises the possibility of change of gender in the Gender Recognition Act 2015. Given that this

legislation is expressive of current State policy, it is, I believe, valuable to recall the background to the enactment of that legislation.

5. In *Foy v An t-Ard Chlaraitheoir, Ireland, and the Attorney General; and Others as notice parties* [2002] IEHC 116 the applicant, Dr Foy, whose biological sex at birth had been considered male, sought a finding in the High Court that at birth she was born female but suffered from a congenital disability which at the time was neither identifiable nor discoverable. That disability, which is now known as Gender Dysphoria or Gender Identity Disorder, meant that although psychologically female her biological make up, both internal and external, was that of a male person. Pursuant to such a finding if granted, she then sought an order, in effect to correct the original entry recording her birth in the Registry of Births, substituting "female" for "male" under the heading "Sex", and substituting under the heading "Name", the first names "Lydia Annice" instead of Donal Mark". If, however, such a finding was not obtainable, she alleged that in the alternative the existing legal regime infringed her constitutional rights to privacy, dignity and equality as well as her right to marry a biological male. In support of her claim she relied, *inter-alia*, upon case law from the European Court of Human Rights.

6. McKechnie J, although he accepted that the applicant was genuinely suffering from Gender Dysphoria or Gender Identity Disorder, held that the failure of the Oireachtas to make provision for the amendment of birth certificates to reflect a change of gender did not infringe the applicant's right to dignity as the State had a legitimate interest in recording a person's gender at date of birth. Moreover the law also had to take account of the rights of other parties derived from their relationship with the applicant, whose rights could be affected by making the proposed changes to the birth certificate.

7. That, however, was not the end of the matter, as McKechnie J relates in his judgment in follow-on and related litigation, - see the conjoined judgments in *Foy v An t-Ard*

Chlaraitheoir, Ireland, and the Attorney General, and Ors (No's 1 & 2) [2007] IEHC 470, subsequently reported at [2012] 2 I.R. 1. McKechnie J records:

> "2. On the 30 July 2002, Dr. Foy filed a Notice of Appeal to the Supreme Court. By the time the appeal came on for hearing, on 8th November, 2005, there had been three significant changes in the legal landscape. Firstly, some short time after the 9th July, 2002, the European Court of Human Rights, in abandoning and indeed in reversing its declared jurisprudence up to then, unanimously held, in the case of a male-to-female post operative transsexual, that by reason of its legal regime (being one comparable to that of this jurisdiction), the United Kingdom was in breach of both articles 8 and 12 of the European Convention of Human Rights, 1950 (see the decisions in the cases of *Goodwin v. United Kingdom* [2002] 35 E.H.R.R. 447 (*"Goodwin"*) and *I .v. United Kingdom* [2003] 40 E.H.R.R. 967 (*"I"*)). Secondly, on 31st December, 2003, the rights contained in this International Convention ("The Convention" or "the ECHR") became part of the domestic law of this State via the enactment of the European Convention on Human Rights Act, 2003, ("The Act of 2003" or "the 2003 Act") and thirdly, a new system of Civil Registration was introduced by the Civil Registration Act, 2004, ("The Act of 2004" or "the 2004 Act"); which in the process repealed all existing primary and secondary legislation in this area.
>
> As a result of these events the applicant wished to raise these new issues on her appeal. However since such matters were not, and could not have been, dealt with by this court in July, 2002, the Supreme Court remitted the case back so that a decision could be made at first instance on these points. Hence this second judgment in the first set of proceedings.
>
> 3. By letter dated 21st November, 2005, Mr. Michael Farrell, Solicitor wrote to An tArd-Chláraitheoir on behalf of the applicant seeking to have the "mistake" in the

> record of her birth corrected so as to reflect her "true and actual" female gender as well as changing her name from "Donal Mark" to "Lydia Annice". He also sought the issue of a new birth certificate reflecting these corrections in respect of his client. The case made in support of this application was then outlined and included references to the Act of 2003 and to the *"Goodwin"* and the *"I"* decisions, both of which were delivered in 2002. … By way of response dated 23rd December, 2005, the first named respondent denied that there had been any "mistake" in the record of Ms. Foy's birth and accordingly refused her application. Being dissatisfied, the applicant exercised her right under s. 60(8) of the Civil Registration Act, 2004 to appeal to this Court from that decision. Hence the second set of proceedings."

8. In this renewed and further litigation Dr Foy sought an order setting aside the refusal of the first defendant to rectify the Register of Births; a declaration that such refusal was *ultra vires* the powers of the Registrar General under ss 63 and 64 of the Act of 2004; a declaration that such statutory provisions constituted a breach of Articles 40.1 and 40.3 of the Constitution and articles 8, 12 and 14 of the European Convention on Human Rights 1950; and a declaration pursuant to s 5 of the Act of 2003 that such provisions insofar as they failed to allow for the rectifications sought, were incompatible with articles 8, 12 and 14 of the European Convention on Human Rights 1950.

9. The High Court, in issuing a Declaration Of Incompatibility pursuant to s 5 of the Act of 2003, held (as summarised in the headnote to the report in the Irish Reports):

> "1. That ss 25, 63 and 64 of the Act of 2004, by reason of their failure to respect the private life of the plaintiff, constituted a breach of the State's obligations under article 8 of the European Convention on Human Rights 1950, but that the State retained a margin of appreciation as to the most appropriate method by which the plaintiff's rights could be vindicated.

Goodwin v United Kingdom (App No 28957/95) (2002) 35 EHRR 18 and *I v United Kingdom* (App No 25680/94) (2003) 36 EHRR 53 approved;

2. That the failure of the State, through the absence of having any measures to honour the rights of its citizens under the European Convention on Human Rights 1950, was as much in breach of its responsibility as if it had enacted a piece of prohibited legislation.

3. That there was an independent obligation on a court, when an issue was raised upon which it was obliged to adjudicate, to reach its decision in a manner which reflected the law, and to do so, if possible, by providing a resolution to the complaints litigated by the parties.

4. That, being a post-1937 Statute, the Act of 2004 had attached to it the presumption of constitutionality and, as a corollary of that, there was a further presumption that the Oireachtas intended that proceedings, procedures, discretions and adjudications which were permitted, provided for, or prescribed by an Act of the Oireachtas, were to be conducted in accordance with the principles of constitutional justice.
East Donegal Co-Operative Livestock Mart Ltd v Attorney General [1970] IR 317 applied.

5. That, where two or more constructions of a statutory provision were reasonably open, one of which was constitutional and the other, or others, which were not, and where the suggested construction was one that was reasonably open on the wording of the section in question, looked at in the context of the statutory provision as a whole,

it must be presumed that the Oireachtas intended only the constitutional construction, and the court, when adjudicating, should favour such a construction.
McDonald v Bord na gCon [1965] IR 217 applied.

6. That, in construing a statutory provision within the meaning of s 2 of the Act of 2003, the Oireachtas intended the courts to go much further than simply applying traditional criteria, such as the purposeful rule or the giving of ambiguous words a meaning which accorded with rights under the European Convention on Human Rights.

7. That the application of s 2 of the Act of 2003 could not extend to producing a meaning fundamentally at variance with a key or core feature of the statutory provision or rule of law in question; it could not be applied *contra legem*, nor could it permit the destruction of a scheme or its replacement with a remodelled one; and a given legal position might be so well established that it became virtually immutable in the landscape.

8. That a court, when adjudicating on any issue, must be in a position to apply legal principles which existed at the time of the dispute, subject only to any contrary direction expressly provided for.
Dublin City Council v Fennell [2005] IESC 33, [2005] 1 IR 604 applied; *Carmody v Minister for Justice* [2005] IEHC 10, [2005] 2 ILRM 1 distinguished."

10. Significantly, although the State initially lodged an appeal against the granting of the Declaration Of Incompatibility with the European Convention on Human Rights, it withdrew

its appeal on that and all other issues in the litigation in 2010, and the Declaration of Incompatibility became final. In early 2011 the government also set up an inter-departmental 'Gender Recognition Advisory Group' (GRAC) to advise on the legislation that would be required in order to recognise transgender persons in their preferred gender, and this group reported some months later. The report was criticised in some quarters as not going far enough.

11. When by January 2013, there had been no publication of Heads of a Bill, and no further developments, Dr Foy issued yet further proceedings in the High Court, known as the *Foy No. 3* case. The new proceedings sought:

- a declaration that the Irish government was under a legal duty to make provision for issuing her with a new birth certificate;
- a declaration that the failure to do so was in breach of her rights under Articles 3 (inhuman and degrading treatment) and 13 (right to an effective remedy) of the ECHR; and
- a declaration that, if the ECHR Act could not provide an effective remedy for the now admitted violation of her rights and if the government could simply ignore a Declaration of Incompatibility issued by the courts, then the Act itself was incompatible with the ECHR.
- damages for the continuing breach of her rights following the High Court decision in 2007.

12. In July 2013, some 20 years after Dr Foy's first application for a new birth certificate and nearly six years after the Declaration of Incompatibility, the government published the Heads of a Gender Recognition Bill.

13. The Heads of the proposed Gender Recognition Bill were discussed by an all-party Oireachtas Committee in October 2013.

14. In December 2013 the International Commission of Jurists was granted leave by the High Court to intervene in the *Foy No.3* case on the issue of the obligation on states to provide effective domestic remedies for violations of the ECHR.

15. The Report of the Oireachtas Committee was published in January 2014. It called for a number of changes to make the Bill more inclusive. Revised Heads of the proposed Gender Recognition Bill were approved by the Cabinet in June 2014 and the matter was then referred to the parliamentary draftsman's office for detailed legislative drafting.

16. However, the High Court had fixed the 4th of November 2014 to hear the *Foy No.3* case. Three weeks before that date the two sides engaged in settlement talks. After intense discussion and a couple of adjournments, terms were agreed. The State agreed to pay a sum in compensation for the breach of Dr Foy's rights through the failure to recognise her female gender. The terms were announced in court on the 28th October 2014, and it was agreed that the case would be adjourned until the 29th January 2015 to allow time for the government to deliver on its commitments. Counsel for the State confirmed in open court that *"It is the firm intention of the Government to secure the enactment into law of the Gender Recognition Bill 2014. This would enable the Plaintiff to obtain a new birth certificate reflecting her female gender in accordance with the legislation...." ".... [I]t is the expressed intention of the Government to publish the Bill by the end of the year." "It is the firm intention of the Government to introduce the Bill into the Oireachtas and have it enacted as soon as possible in 2015"*.

17. The Gender Recognition Act 2015 was duly enacted on the 22nd of July 2015.

18. The purpose of this excursion into legal and political history is to emphasise, were there to be any doubt about it, that in Ireland by 2022, the secular State recognised transgender people and the possibility of changing one's gender identity, and to illustrate how that had come about. Further, as Whelan J points out and addresses more fully in her

judgment, the State has also legislated in the Education Act 1998 to encourage within schools policy principles of, *inter alia*, inclusion and equality. In the circumstances there can be no doubt that in so far as the respondents school's policy is to be inclusive, and to recognise and support a student desirous of transitioning to a new gender identity, such a policy is consonant with widely held, and arguably mainstream, views on such matters in Irish society. As the President put it, against the background of the statute law of the State, the decision of the Principal and of the school to offer support to the student in that respect was *"in no sense an outlier"*. However, it must be emphasised that we live in a democracy and do not have thought control, or thought police who are concerned to promote only policy deemed acceptable to the majority, and suppress dissenting views. It is possible to respectfully disagree with, and express disagreement with, widely held and mainstream views, and indeed the right to so do, subject to possible limitations necessitated by the need to maintain public order and morality, enjoys constitutional protection.

19. Returning then to the case at hand, it is therefore hardly surprising in a situation where a student of the respondent school, with parental support, had informed the school that they intended to make a transition in their gender identity and wished thenceforth to be known by a different name to their given name, and to be referred to by the "they/them" pronouns, that the school was anxious to support the pupil in question. This was manifested, *inter-alia*, by a request from the Principal to staff sent by email on the 9th of May 2022 requesting that they address the student by their proposed new name and refer to the student using the student's preferred pronouns. The school's decision in that regard was consistent with its stated policy of being inclusive, concerned to promote the welfare of students as a paramount consideration, and where one of its core objectives, expressly stated in the school's Admissions policy, is to ensure that each young person's *"experience of their time in school is accepting, happy and positive"*. Whatever the views of Mr Burke, the school seemingly

does not regard its decision to support the student in question as being inconsistent with its Christian ethos (it is a school under Church of Ireland patronage), and I am prepared to infer that instead they likely regard it as reflective of Christian values such as loving one's neighbour and exhibiting respect for and generosity towards others.

20. The relevance of all of this to the proceedings at hand is that the appellant, upon learning of the Principal's request, although he characterises it as a "demand", sought to intimate a conscientious objection to doing what he was being asked to do. That objection, as articulated in detail by him in exchanges with the Court at the hearing of this appeal, is as follows:

> *"I would have been obliged to acknowledge and confess that the student concerned was no longer a* [gender specified] *student by using a new name and they pronoun. And just to finish, this I could not do as it's against my conscience firstly and the explicit tenets of my Christian faith. No. 2 it contradicts my own well informed and reasonable convictions and opinion. And No. 3 it contravenes the integrity and honesty expected of a teacher in my profession. And this new bearing witness, and I'm drawing a parallel here with the bearing witness of faith, of a religious faith, a Christian faith, this would have taken place on a regular basis, perhaps during a roll call, in interactions with the student, in written documentation, in staff meetings, and it would have amounted to a continual ongoing denial of my Christian faith. That's the bare facts of the matter."*

21. Conscientious objection on either social or religious grounds, whether in respect of a legal obligation in civil society, or a workplace requirement, or non-legally binding community or societal or even commercial expectations, is not a new phenomenon either in this jurisdiction or in other parts of the world. Examples would include a doctor or nurse who does not wish to provide, or to participate in, a legal and clinically appropriate treatment or

medical procedure, such as an abortion or a sterilisation, because it conflicts with their personal beliefs or values. Similarly a citizen may resist submitting to military conscription, or perhaps a civil servant may refuse to perform same-sex marriage ceremonies.

22. In terms of conscientious objection on religious grounds to community or societal expectations one need only think of the celebrated case of Eric Liddell, the British Olympic champion whose story featured majorly (albeit with some dramatic licence) in the 1981 award-winning film produced by David Puttnam, entitled, *"Chariots of Fire"*. A true story in its essentials, and perhaps better described in Duncan Hamilton's 2017 biography of Liddell, entitled *"For the Glory: The Untold and Inspiring Story of Eric Liddell, Hero of Chariots of Fire"*, the aspect of Liddell's life which is of interest is the fact that though he was selected to compete for Great Britain in the 100 metres sprint at the 1924 Olympic Games, and was indeed the favourite to win the gold medal, he ultimately steadfastly asserted a conscientious objection to competing in that race in circumstances where a number of the qualifying heats were scheduled to be held on a Sunday. His objection was based upon his religious conviction (he was a devout Christian of the Scottish Evangelical tradition) that to do so would represent a failure to keep holy the Sabbath day as commanded in the fourth of the ten Commandments. Ultimately, an accommodation was arrived at which respected his objection, and still allowed him to compete at the games, namely that he would switch events from the 100 m sprint race to the 400 m middle distance race, neither the heats for which nor the final of which was being run on a Sunday. He ultimately won a gold medal for Great Britain in the 400 m event.

23. An even more recent example, involving a conscientious objection to having to provide a service, notwithstanding a contractual obligation entered into and commercial expectations, is provided by a recent case in a neighbouring jurisdiction that received much publicity, where an evangelical Christian baker refused on conscience grounds to fulfil an

order for a wedding cake for a same-sex couple that was to be emblazoned with the message "support gay marriage".

24. Conscientious objections are to be taken seriously. Beliefs sincerely held are to be respected, whether they be on social or religious or other principled grounds. All the more so, where the beliefs on which the objection is founded, and the right to express them, are supported by personal rights guaranteed to the citizen under the Constitution, and perhaps also under international instruments. However, nobody has a monopoly on rights and rights such as freedom of conscience, the right to free profession and practice of religious belief, and freedom of expression are not wholly unqualified rights. Further, those rights may intersect with the same or other rights, arising under the Constitution or otherwise, of others who do not share their beliefs.

25. It is also to be observed in this context that in very many instances where conscientious objections are registered, there is engagement between the parties aimed at seeing if an accommodation can be arrived at, which on the one hand sees the objector's position, and rights, respected, and on the other hand facilitates in so far as possible the operations of the employer, or other entity, whose actions / requirements / policies are considered objectionable. The accommodation arrived at in Eric Liddell's case well illustrates the point. In the Film *Chariots of Fire*, another athletics competitor, Lord Lindsey, interrupts a meeting of the British Olympic Committee at which the impasse concerning Liddell's conscientious objection to competing on the Sabbath is being discussed to propose, *"Another day, another race"*, a suggestion which is subsequently embraced by both sides as being a viable accommodation.

26. It is lamentable that there has seemingly been no such engagement in the present case and that matters have escalated so rapidly. However, as the President records, the e-mail correspondence from the Principal to the appellant of the 10th of May 2022, while not inviting

in express terms an engagement with a view to possibly arriving at an accommodation that would respect the parties' respective views, did at least leave open that possibility in saying to the appellant *"if you are not willing to include [name] in your classroom going forward, please make an appointment to see me at our mutual convenience."* Unfortunately, however, the appellant did not pursue the suggested appointment, and did not manifest any willingness to explore if, or exhibit any openness towards exploring whether, a possible accommodation could be reached. Rather, he opted to resolutely stand on his perceived rights.

27. Even accepting, as the Court must do, that the appellant has constitutionally protected rights to freedom of conscience, to freely profess and practice his religious beliefs, and to freedom of expression, the exact parameters of such rights have not been fully explored or determined in constitutional jurisprudence, and the fact that he enjoys such rights does not automatically mean that the school's adoption of a policy decision to support a transitioning student in the manner in which they have done so necessarily engages those rights, or any of them. Equally that fact would not automatically imply that his said rights, or any of them, even if engaged, have been or may be breached, nor automatically imply that his conscientious objection to the school's policy decision must trump the school's policy. Whether any of that could ultimately be said to obtain will inevitably be heavily evidence dependent, and involve determination of issues of law and fact incapable of resolution in the context of an interim or interlocutory application. As already stated, the present appeal is not about such issues, but it might arise at some point in the future that a court properly seized of such issues will have to engage with them and resolve them. Without being taken as expressing any view on how they might be resolved were that to arise, I have no doubt that both sides would be capable of making detailed and complex arguments in support of their respective positions.

28. What then are the parameters of the present case? As is usual the proceedings were commenced by Plenary summons, dated in this instance the 30th of August 2022, and the General Indorsement of Claim to that document pleads:

> "The plaintiff's claim is for:
>
> 1. A declaration that the defendant is on paid administrative leave pending the outcome of a disciplinary process;
> 2. A declaration that the decision to put the defendant on paid administrative leave is lawful;
> 3. An injunction restraining the defendant from attending at the premises of Wilson's hospital school for the duration of his paid administrative leave;
> 4. An injunction restraining the defendant from attempting to teach any classes or any students at Wilson's hospital school for the duration of his paid administrative leave;
> 5. An injunction restraining the defendant from failing to comply with the directions of the plaintiff board;
> 6. An injunction restraining the defendant from trespassing on the property of Wilson's hospital school;
> 7. Damages for trespass;
> 8. Damages for breach of contract
> 9. Interest
> 10. Such further or other reliefs as this Honourable Court deems fit;
> 11. Costs.

29. The application for an *ad interim* injunction was grounded upon an affidavit of the Chairman of the Board of Management of Wilson's Hospital School ("the Board" or "the Board of Management"), a Mr John Rogers, sworn on the 30th of August 2022 and documents

exhibited thereto. Mr Rogers affidavit sets out (*inter alia*) the background to the matter, including the school's policy decision to support the previously mentioned student, and following upon that the email exchanges and other interactions between the Principal and the appellant. It further describes complaints by the Principal to the Board in a report prepared by her and submitted to them concerning the appellant's conduct at an event on the 21st of June 2022 to commemorate the founder of Wilson's Hospital school. It describes subsequent events including the invocation by the Principal of Stage Four of the Department of Education and Skills Circular 49/2018, and the making by the Principal of the said report to the Board; correspondence between the Chairman and the appellant arising from this; the proceedings at a meeting of the Board on the 22nd of August 2022, attended by the appellant, in relation to the question of whether he should be placed on paid administrative leave; the decision to place the appellant on paid administrative leave pending a disciplinary hearing and the communication of that decision to him; and the appellant's conduct subsequent to that, including his persistence in attending at the school despite having received a formal direction not to do so. Concern was expressed that:

> *"[i]n light of the repeated actions of the defendant in attending the school I and the other members of the plaintiff board were very concerned about what will occur when the students return to school. A substitute teacher has been engaged to cover the defendants classes while he is on administrative leave. Some of the defendants classes timetabled for this Wednesday the 31st of September. I and other board members are concerned that the defendant will insist on attending his classes which would be incredibly destructive for the students involved at the start of the new academic year. In light of these real and genuine concerns I felt I was left with no option but to write to the defendant by letter dated 26 August 2022 seeking written confirmation that he would cease to attend the school."*

The affidavit goes on to state that the written confirmation sought was not forthcoming. Finally, the deponent averred that damages would not be an adequate remedy and gave an undertaking on behalf of the plaintiff as to the payment of damages in the event of any injunction granted being found to have been unwarranted.

30. That, in summary, was the basis on which the plaintiff's claim was pleaded, and the evidence that was before Stack J when she was asked to grant the *ad interim* injunction. In my assessment she manifestly had good grounds for the granting of the *ad interim* injunction and the relevant test was met in all respects. I agree with the President that a High Court judge rendering an *ex tempore* judgment following an *ex parte* application made to her for such an injunction is not required to reference all of the relevant legal principles governing the granting of such relief. Applications for *ad interim* injunctions in the High Court are routine matters. Such injunctions represent a cross jurisdictional civil relief that can be granted in a myriad of contexts. They arise in so many areas of legal practice, e.g., in planning law, in immigration law, in administrative law, in chancery, in commercial law, in family law, and in general common law, to name but some of those areas, that it can be asserted with confidence that every judge is well familiar with the legal test to be satisfied. Accordingly, Stack J was only required to give brief reasons for her decision. I am satisfied that her reasons were cogent and sufficient in the circumstances of the case. While they did not explicitly address the issue as to whether there was a fair issue to be tried, the circumstances as set out in the pleadings and in the grounding affidavit were such that it was manifest that that aspect of the test was capable of being satisfied and she would not have been greatly troubled with that. In any event, it was implicit from the questions that she asked of counsel for the school as to the basis on which the injunction was being sought that she was considering the issue of whether there was a fair issue to be tried. She asked counsel, *"I presume that it is on the basis that a teacher has an implied licence to go on to the property*

of the school which when they're on administrative leave is necessarily withdrawn", to which she received the response, *"Indeed, It is to -- it is called at paid administrative leave. It is in any other employment context would be called* (sic) *paid suspension pending the outcome of the disciplinary process."* Her further remarks when giving her ruling that, *"if he is on paid administrative leave then his authority to teach students or indeed to enter onto the school premises is necessarily abrogated by that. I know that Mr Burke seems to be challenging the lawfulness of that, but for the moment it stands until there is some kind of order setting it aside"*, satisfy me that she duly considered and was satisfied that there was a fair issue to be tried. That she also took time to look at the handwritten notes of the meeting held to consider whether the appellant should be placed on administrative leave, and stated in doing so that it was, *"just to get a feel for the alleged conduct of the defendant, and whether obviously that feeds into the urgency and the requirement of the relief"*, is indicative to me that she was also considering the balance of convenience. Further evidence of that is to be found in the question posed by her to counsel for the school in which she asked, *"would it be fair to say that the injunction is directed at the manner in which Mr Burke expresses his views rather than the actual views themselves?"*

31. In the circumstances, the appellant's complaints with respect to how Stack J dealt with the proceedings are not substantiated in my judgment.

32. As to why constitutional issues, or alleged breaches of a party's constitutional rights, do not arise for consideration on this appeal, no such issues had been pleaded by the appellant, or raised by him by way of affidavit, at relevant times. The application for an ad *interim* injunction before Stack J was, of course, *ex parte* and the appellant was not represented at that hearing. However, the point is well made by the President that Stack J, in granting interim relief against the appellant, made provision for him to come back before the

court in advance of any interlocutory hearing, should he wish to do so, for the purpose of applying to have the *ad interim* injunction lifted. He did not avail of that opportunity.

33. Nor did he seek at the interlocutory application before Barrett J, when he was on notice, and where the respondent was relying upon essentially the same evidence, to put any pleading or affidavit evidence of his own before the court asserting that his constitutional rights had been breached, and would continue to be breached, or even might be breached, if the injunction were continued and more particularly, if that was his position, to establish the facts on which he would relying in saying that his constitutional rights had been breached, and would continue to be breached, or might be breached, if the injunction were continued.

34. Again, I agree both with the President's conclusions, and with Whelan J's conclusions, with respect to how Barrett J dealt with the matter. Barrett J expressly references the components of the relevant test and expresses himself satisfied that there was a fair question to be tried, and that the balance of convenience favoured the granting of an injunction. I respectfully adopt and approve of the very detailed legal analysis as to the correct legal test and how it applied, which Ms Justice Whelan has engaged in in her judgment, based on the Supreme Court's decision in *Merck Sharpe and Dohme Corporation v Clonmel Health Limited* [2019] IESC 65. Further, I endorse her explication as to why the English case of *Hubbard v Vosper* [1972] 2 Q.B. 84, which Mr Burke relies upon, does not assist him in the circumstances of the case. Barrett J was also satisfied as to what he characterises as the *"adequacy of damages"* issue, by which he clearly meant that he was satisfied that damages would not be an adequate remedy for the plaintiff. He further noted the undertaking as to damages that had been provided by the school.

35. The respondent complains that the judge was wrong to say that *"there's no prejudice to Mr Burke in terms of the injunction that was being sought, he continues to be paid and I accept that what is before me today is not about, it's not a trans-gender issue, it simply an*

application for [an] *interlocutory injunction."* However, the judge was clearly referencing "financial*"* prejudice, and the absence of such prejudice "*in terms of the injunction … being sought",* which was to restrain him from attending at the school, attempting to teach classes at the school, or interfering with the substitute teachers duties and teaching, for the duration of his paid administrative leave. The appellant rightly and understandably makes the point that any person who is the subject of a suspension from work, or placed on administrative leave, whether justified or unjustified, is prejudiced in a real way by the very fact of such a measure having been imposed. However, the injunctions being sought by the plaintiffs were not for the purpose of placing him on administrative leave. He was already on administrative leave, and would remain so whether or not the interlocutory injunctions sought were granted to restrain him from attending at the school, attempting to teach at the school, or interfering with a substitute teacher's duties and teaching, until a challenge to the lawfulness of that placement, in whatever forum it might be brought, had been determined (it is indeed noteworthy that no such challenge had been brought as of the date when the matter was before Barrett J). Rather, the injunction was to restrain him from attending at the school and engaging in the other conduct specified in circumstances where there was an extant, albeit not yet legally tested, placement of the appellant on administrative leave with a consequential withdrawal *pro temp* of his licence to be on the school premises.

36. Insofar as the appellant complains that Barrett J was wrong in stating that *"what's before me today is not about, it's not a transgender issue, it simply an application for* [an] *interlocutory injunction",* the High Court judge was absolutely correct. As I stated at the start of this judgment there is of course a background to the matter, in which the appellant's views concerning, and the registering by him of a conscientious objection to, the school's policy to support a student who was transitioning from one gender identity to another, undoubtedly features, but the injunction applications were not about that. Rather, they were about the

appellant's determination to attend the school, and the disruptive effect on students and on the school's activities of his doing so, in circumstances where, pending a disciplinary hearing, he had been placed on paid administrative leave, and his licence to attend the school withdrawn *pro temp*.

37. Mr Burke did later file a counterclaim in the proceedings, and an affidavit in support of his counterclaim, on the 12th September 2022, in both of which documents he challenges the lawfulness of the decision to place him on paid administrative leave, asserts breaches of his constitutional rights and claims, *inter-alia*, a declaration that the disciplinary process being conducted by the plaintiff, including the placing of the defendant on administrative leave, is in breach of, and unlawful interference with, the defendant's rights under Articles 40.6.1°i, 44.1 and 44.2 of the Irish Constitution. However, these were not claims that had either been pleaded, or in respect of which evidence had been proffered, at any hearing before either Stack J or Barrett J. Those judges were required to address the legal controversies presented to them on the basis of the pleadings and the evidence before them and that alone. I am satisfied that in both cases they did so appropriately and conscientiously and in accordance with their constitutional declarations.

38. It is no coincidence that the counterclaim just alluded to was filed on 12th of September 2022. That was the date on which the appellant moved an application *ex parte* Dignam J, seeking injunctions in his favour. The background to this was that a disciplinary hearing into the appellant's conduct was scheduled to take place at the Mullingar Park Hotel, Co Westmeath, on Wednesday, 14 September 2022. The injunctions sought by the appellant in the *ex parte* docket lodged by him in were these terms:

> "1. An injunction restraining the Board of Management of the plaintiff, its servants or agents, from holding the disciplinary meeting at Mullingar Park Hotel, Co Westmeath, on Wednesday, 14th September 2022 or any other date,

2. An injunction restraining the Board of Management of the plaintiff, its servants or agents from putting the defendant on paid administrative leave, or from continuing to put the defendant on paid administrative leave,

3. An injunction restraining the Board of Management of the plaintiff, its servants or agents, from the conduct of any disciplinary or investigation process in respect of the defendant,

4. An injunction restraining the board of management of the plaintiff, its servants or agents, from dismissing the defendant."

39. Dignam J., having noted that the school had indicated that they would not be proceeding with the disciplinary hearing scheduled for Wednesday, the 14th September or any other disciplinary process steps, and that if they later proposed to do so, they would give Mr Burke three days' notice of such a proposal, considered that it was unnecessary for him to grant any orders in the terms of those sought at paragraphs 1, 3 and 4 of his *ex parte* docket. Insofar as the relief sought at paragraph 2 was concerned, he indicated that he would allow that to proceed and adjourned it to be heard two days later on the 14th of September 2022 at 2pm, with liberty to the plaintiff to file a replying affidavit. The adjourned aspect was duly heard by Ms Justice Roberts.

40. The appellant's Notice of Appeal seeks to appeal against Mr Justice Dignam's said order and asks the Court of Appeal to grant him the injunctive reliefs sought by him at 1, 3 and 4 of his *ex parte* docket. However, at the appeal hearing, having been confronted with an enquiry from the court as to whether, in circumstances where he was seeking positive orders from the court, it was his intention to continue to act in contempt of the earlier orders, and being unwilling to commit himself not to do so, he adopted the somewhat "Delphic" position that he was no longer seeking the injunctive reliefs sought by him at 1, 3 and 4 of his *ex parte*

docket, and simply wished this Court *"to review whether it was correct for Judge Dignam to do what he did."* It may be observed at this point that the appellant adopted a similar position with respect to the order of Ms Justice Roberts made on the 14th of September 2022, which he has similarly appealed.

41. I have no hesitation in expressing the view, and in agreeing with the President, that Mr Justice Dignam was entirely correct to adopt the approach that he did. The High Court is not there to decide issues that are moot. If it is clear that injunctive relief is not necessary, because the same end would be achieved by the honouring of formal undertakings given to the court by the party against whom it had been intended to seek the injunction, then a court is absolutely entitled in the exercise of its legitimate discretion to refuse to embark upon the matter. A litigant, such as the appellant, is not entitled to use the *ad interim* or in *interlocutory* procedure for seeking injunctive relief as a collateral means of ventilating wider issues or pursuing other reliefs. He or she will not be precluded from pursuing such wider issues or seeking those other reliefs, assuming they are pleaded, at the appropriate time. However, they are matters for the trial of the action. Court time is a scarce resource and judges dealing with interim and interlocutory applications are both entitled, and I would go so far as to say obliged, to insist that applications for such relief will only be entertained where it is appropriate and necessary to do so. In light of the undertakings that were given in this litigation on the12th of September 2022, it was not necessary for the High Court to entertain applications for injunctions in the terms of paragraphs 1, 3 and 4 of the *ex parte* docket that had been lodged, and the High Court judge was entirely correct to decline to do so.

42. Insofar as the proceedings before Ms Justice Roberts were concerned, in circumstances where she refused to grant the relief sought at paragraph 2 of the *ex parte docket*, and the appellant has appealed that refusal, it seems to me that he cannot have it both ways. He is either seeking positive relief from this court in substitution for the refusal of that

relief by the court below, or he is not. He is not entitled to cynically ask this court to review whether the court below was correct or not in its approach, while at the same time saying that he is asking for no positive intervention, particularly in circumstances of having been apprised by the court that it might not be disposed to proceed to hear his appeal, which is pleaded in terms of requesting positive orders from the Court of Appeal, unless he was prepared to commit to desisting from acts of contempt during the currency of the appeal, which commitment he was not prepared to give. The position he now adopts borders on an abuse of the process. However, be that as it may, as I understand that he is no longer seeking a positive intervention in respect of Roberts J's judgment and order, I consider it neither necessary nor appropriate to proceed as he would wish and will confine myself to offering two brief observations.

43. My first observation is that I entirely endorse the President's view that in so far complaint is made about Roberts J expressing acceptance, in the course of considering the balance of convenience, that the school had been concerned (*inter alia*) to comply with, what is characterised by the judge as, *"their legal obligations under the Equal Status Act 2000"*, in circumstances where counsel for the school has now accepted before this Court that that Act in fact had no relevance, it is a matter of little consequence and would certainly not of itself serve to undermine Roberts J's order.

44. What the school was concerned with was adopting an inclusive approach. Whether that was mandated by the school's ethos, by the statute erroneously nominated as being applicable, or by some other instrument, or simply reflected a desire on the school's part to conform with policy positions adopted by others in that respect in other spheres, e.g. State policy on recognition of gender identity, or possibly some combination of those things, is really neither here nor there. The relevant fact to be taken into account in determining the balance of convenience, which Roberts J clearly did take into account, is that (for whatever

reason) the school had adopted an inclusive policy and had determined to be welcoming of, and supportive to, the student who had expressed an intention to transition to another gender identity. In assessing the balance of convenience the key fact was that this was stated school policy. The reason why it had adopted such a policy was a secondary or collateral issue and essentially irrelevant to the injunction application.

45. The only other observation I would make is that Roberts J was entirely right in stating that, *"[w]hile Mr Burke is entitled to hold whatever religious beliefs he wishes, and I have no doubt they are very genuinely held, there is no attack on those religious beliefs simply by placing Mr Burke on paid administrative leave pending an investigation process"*. There was no evidence before the court that the constitutional rights identified by Mr Burke in his counterclaim as rights to be enjoyed by him, were even engaged by the placing of him on administrative leave, much less breached. There was no evidence whatever that he was placed on administrative leave because of the views that he holds, or because he maintains a conscientious objection to the school's inclusive policy. Rather, the gravamen of the complaint received by the Board of Management, and the ostensible basis of the decision to put him on administrative leave, was that he had misconducted himself in how he had sought to ventilate and publicise his grievance, doing so at times and places and in a manner that was considered inappropriate and disruptive and inimical to the orderly running of the school. While the appellant has, in pleading his counterclaim, asserted breaches of the identified constitutional rights in connection with his placement on paid administrative leave, those were issues that did not arise for consideration at the hearing of the injunction application before Roberts J., having regard to the nature of the claims being made (which would involve resolving controversies arguably incapable of resolution in the context of a claim for *ad interim* injunctive relief, such as the parameters of the constitutionally protected rights being relied upon) and the evidence adduced before her. Rather they are matters that may or may

not arise for consideration by whatever judge hears the trial of the action in due course, depending on the evidence adduced at the trial.

46. In conclusion, I would also dismiss the appeal.