THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW

H.JR.2024.0000971

BETWEEN

PATRICK MCGREAL

INTENDED APPLICANT

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT & HERITAGE OF IRELAND

INTENDED RESPONDENT

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED ORALLY AND EX TEMPORE ON 31 JULY 2024[1]

Introduction

1. This is my judgment in Mr McGreal's application for an *ex parte* injunction in judicial review proceedings in which leave to seek judicial review has not yet been granted or refused. Mr McGreal, a lay litigant, presented his application courteously and calmly. He seeks to restrain the Minister's intended temporary accommodation of applicants for international protection at Dundrum House Hotel, Dundrum, County Tipperary. That premises has, for the last two years approximately, been used to house Ukrainian refugees from the Russo-Ukrainian war. Essentially, Mr McGreal impugns the legality of, and the Minister's reliance on, the Planning and Development (Exempted Development) (No. 4) Regulations 2023 ("the Regulations") which render the temporary accommodation in certain types of premises of applicants for international protection exempted development within the planning code such that change of the use of such premises to such use is not required. He seeks to have the Regulations quashed.

2. For present purposes I accept that the prospect arises of the arrival of at least some such applicants for international protection to Dundrum House Hotel in the immediate future, whether tomorrow or in the days following. I accept for the purposes of this application, that the prospect is relatively imminent. In those circumstances, I heard Mr McGreal's application for an *ex parte* injunction this afternoon, and I deliver this judgment on an urgent basis accordingly. However, that I have delivered judgment urgently does not of itself imply that the circumstances disclosed in the application are themselves urgent, and that is something I will

[1] This written version of my ex tempore oral judgment is prepared from the transcript of the judgment delivered orally. The text has been edited and amended somewhat for clarity of exposition in written form of the reasons for my decision. I have not substantively altered meaning. I have added some headings to assist navigation of the judgment, though they are for general guidance only and are not exclusively determinative of the following content. I trust this approach will assist the parties and others similarly situated.

consider in this judgment.

3. I want to express my strong view at the outset that the part of the community of Dundrum which has opposed the arrival of applicants for international protection at Dundrum House Hotel and supports these proceedings has, in an important sense, done the right thing in, as I understand it, confining themselves in the first instance to peaceful protest and in the second instance to proceedings before the Court. The right to peaceful protest is vital to a democracy. The requirement that disputes be resolved in courts rather than on the streets, and that the decisions of those courts be accepted, even when disliked, are equally vital to a democracy.

4. However, it is a notable peculiarity of these proceedings that the applicant, Mr McGreal, is not from Dundrum or in any substantive way connected with Dundrum. He lives in County Westmeath, far from Dundrum. He will, as far as I can see, in no practical sense whatsoever - or at least none that he could point to - be affected by the arrival of applicants for international protection at Dundrum House Hotel, either urgently in the short term or in any longer term. His reason for taking these proceedings is grounded, he says, in a general concern, on effectively a national basis, at what he sees as the illegality in planning law of the intended accommodation of those applicants at the hotel as an example of a more general national phenomenon.

5. It is important to reflect that as a legal challenge these proceedings, which I will describe further in due course, are entirely grounded in planning concerns. The question is, it seems, whether there is support in planning law for the accommodation of applicants for international protection at Dundrum House Hotel. Clearly, for example, if the planning permission for the hotel included provision that would allow the accommodation of applicants for international protection at Dundrum House Hotel, the entire legal basis of the present case would fall away. So, fundamentally, what I'm really concerned with is planning law.

6. Mr McGreal’s concerns as to illegalities, as he sees them, are in themselves and in general terms commendable. But such concerns do not in the abstract accord standing to issue proceedings. The courts are not available for the debate and decision of abstract legal propositions. The courts deal with factual situations requiring resolution in accordance with law. There are many reasons for that which I won't go into, but that's certainly a very strong principle upon which the courts act. You can't just walk into a court and say, "I think this statutory instrument is illegal in the abstract" and expect the court to decide it. You can walk into a court and say, "I think there are practical events taking place on foot of that statutory instrument, whatever it may be, which I say is illegal, and therefore I want that legality decided." And that perhaps distinguishes these proceedings from other proceedings which Mr McGreal has already brought, as he says himself, and in which he has been refused relief as to a similar challenge to the Regulations. It seems, as I understand it, that he was refused that relief in those other proceedings in part because it was relief sought on an abstract basis, unconnected to specific underlying facts.

7. Turning to the narrative in this case, it seems that Mr McGreal learnt of the protests in Dundrum and, on his own initiative as far as is known, travelled there to meet members of the local community to advise them of his views as to the illegality of the Regulations. He denies giving them legal advice and, of course, for an

unqualified person to give legal advice can be distinctly legally problematic. As to his denial in that regard, I confess that I have my doubts but I will not pursue them now. But it is difficult to see Mr McGreal, taking his earlier ill-fated proceedings into context, as other than on the lookout for a local dispute as a hook on which to hang the advancement of his more general agenda, in addressing what he sees as the illegality of the Regulations.

8. I want to make clear that I am very reluctant to discount the expressed fears, set down by affidavit on oath, of 230 members of a small community such as Dundrum. I don't doubt that those fears are genuinely expressed, though that factor does not of itself determine their basis in fact, their validity or their weight. But in that light I confess that I do not understand why, if the issue is the alleged and urgent harm which will be caused to the community of Dundrum by the arrival there of these applicants for international protection, those 230 members of that community who swore affidavits are not themselves applicants in these proceedings. As far as I am aware, there was no impediment to each of them signing on as an applicant in these proceedings. I confess that I don't know why that was not done and why instead Mr McGreal, who has no direct interest in the community of Dundrum, is instead prosecuting these proceedings. But standing to litigate planning matters is liberally granted and, whatever my doubts, I don't base my resolution of the application before me on any general view that Mr McGreal lacks standing.

The Applicable Law Generally

9. Before I turn to the facts of the case, I must discuss the law which governs the circumstances in which injunctions are granted and refused in what are called public law disputes. This is a public law dispute, because it is a challenge to an instrument of delegated legislation. It's different in that respect from, for example, an action in private law claiming damages for injury or alleging breach of contract. There is a difference between the two forms of law.

10. In public law we are concerned with decisions, typically decisions challenged, which are decisions taken by state authorities in the performance of their public functions. The Minister is such an authority. Special rules apply to the grant of injunctions in such cases, and they are set out in the **Okunade**[2] decision, which Mr McGreal perfectly properly drew to my attention. In that case, Mr Justice Clarke explained the underlying problem and the practical law applicable.

11. I should say of course that the context is one in which injunctions are sought early in proceedings - long before the trial of those proceedings. Only at the trial will the parties finally find out who's right or wrong. Whatever decision I now make, there will be a risk of injustice to somebody. There is a sense in which one might say that to grant such an injunction is to put the cart before the horse, but the law provides that it can be done. In any event, the circumstances in which it can be done have to be considered carefully, for reasons which Mr Justice Clarke explained. He said:

[2] Okunade v Minster for Justice Equality and Law Reform [2012] IESC 49, [2012] 3 I.R. 152, [2012] 10 JIC 1602 (Clarke J.).

> *"……. the problem stems from the fact that the court is being asked, on the basis of limited information and limited argument, to put in place a temporary regime pending trial in the full knowledge that the court does not know what the result of the trial will be. It seems to me that, recognising that a risk of injustice is an inevitability in those circumstances, the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice."*

12. I pause to observe that Mr. Justice Clarke was dealing with an *inter partes*, interlocutory, application. The problem of limited information and limited argument is appreciably exacerbated in *ex parte* applications such as this, in which only one side is heard. Though the problem is tempered somewhat by the *ex parte* applicant's duty of full disclosure to the Court, and by the fact that the Court grants an *ex parte* injunction only for the shortest possible period, until the matter of an injunction pending trial can be litigated as between the parties. Mr. Justice Clarke continued:

> *"… in many situations it is necessary to decide what is to happen in the intervening period pending a trial or other determination (or indeed an appeal) when, by definition, it is not possible to decide what the ultimate outcome will be."*

I cannot decide now what the ultimate outcome will be.

13. Mr. Justice Clarke continued:

> *"All such cases involve the risk that, when the dust has settled, it will be seen that some person or body has suffered either by the intervention of the court or, equally, by its non-intervention. However the only way to remove that risk of injustice would be by deciding the case, issue or appeal immediately. The whole problem is that that process takes time. ……. the court must, in all cases, , act so as to minimise the risk of injustice."*

14. If granted, an injunction here would be "pro tem" only. The risk of injustice at issue in the present case is that occurring between the injunction or its refusal now and the next occasion, on an interlocutory motion or at a trial, on which the matter comes back before the Court.

15. As to the factors at play in discerning the least risk of injustice, Mr Justice Clarke said the following:

> *"As to the overall test, I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings, the court should apply the following considerations:*
> *(a) The court should first determine whether the applicant* [Mr McGreal in this case] *has established an arguable case; it not the application must be refused ...."*

So the first question is whether Mr McGreal has established an arguable case. That's not a very high hurdle, but it is a hurdle. I'll come back to that in due course.

16. Mr Justice Clarke continued as to the questions arising if the case is arguable:

> *"(b) The court should consider where the greatest risk of injustice would lie* [in either the grant or the refusal of the injunction]. *But in doing so the court should:*
> *(i) Give all particular weight to the orderly implementation of measures, which are prima facie valid:.*
> *(ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made;"……*

17. These are observations particular to public law litigation as I've described it above. And applying them to the present case, the Regulations with which we're concerned are *prima facie* valid. They benefit in judicial review from what is called the presumption of validity. The starting point of analysis in all judicial review is that the impugned public decision, in this case the Regulations, is valid. And there is a public interest flowing from that presumption that, ordinarily, the State should be allowed to proceed with the orderly implementation of such decisions, until and unless it is shown that they are invalid. That's not necessarily or by any means the only consideration relevant to the grant or refusal of an injunction pending trial, but it is a weighty consideration.

18. Applying it to present circumstances, and as the Regulations with which Mr McGreal is concerned designate as exempted development changes of use of premises of listed kinds to the accommodation of international protection applicants, the Court can and should have regard to the public interest in the operation of that particular scheme of accommodation of applicants for international protection, the facilitation of which is the clear object of the Regulations.

19. Mr Justice Clarke said also that the court should *"give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of proceedings*." Here one can make a similar observation that the State has determined, as I think is inevitable, that there is a public interest in the accommodation of those seeking international protection and that is a factor to which I must give some weight.

20. As against that, and lest it be thought that all the factors listed by Mr Justice Clarke weigh only in one direction, he identified also the necessity of giving *"all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful."* This requires that I take into consideration in the balance of assessment of the least risk of injustice, the many concerns which have been expressed to me on affidavit, by those who have sworn affidavits in these proceedings. I don't want the impression to go abroad that those concerns are not a factor for consideration in the decision I have to make or that in any degree I have not considered them. I have. I'll come to them in more detail in due course.

21. In addition, Mr Justice Clarke said: "*the court should, in those limited cases where it may be relevant, have*

regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages" given by the applicant for an injunction. Mr McGreal submitted, and I agree, that the question of the adequacy of damages isn't really significant in this case. The disadvantages and consequences likely to be suffered by the party which might lose this application but win at trial, aren't such that damages would be likely either to be awarded or in any event to be satisfactory in remedying any disadvantage which is ensued.

22. Finally, Mr Justice Clarke said that, "*subject to the issues arising in judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case.*" I'll come to that issue in due course.

The Hearing of the Application and the Basis of the Proceedings

23. The hearing of this application started at 2:00 p.m. and ended at about 4:20 p.m. It is now 9:05 p.m. I have since the hearing spent my time reading the papers and considering what I ought to do. I should say that Mr McGreal drew my attention, without elaboration or submissions, to the case of ***Heneghan***[3] - a case which relates to the constitutionality of the current constitution of the electorate for Seanad Éireann. This question was long ago the subject of a constitutional amendment, resulting in Article 18.4.2 of the Constitution. The complaint in *Heneghan* was that the constitutional amendment in question had not been carried into practical effect. I'm not going to say much about that decision for the following reasons. Mr Justice Murray introduces his judgment with the words: "*this is an important and difficult case.*" Mr Justice Hogan commences: "*this appeal raises a novel and important issue...*" Lengthy, erudite and highly complex judgments ensue. It simply has not been possible for me to consider those judgments in their length and complexity in the time available to prepare this judgment against the prospect, as I am told, that events may occur tomorrow of urgent concern to Mr McGreal. Also, I haven't been able to do so in the absence of any argument by Mr McGreal as to the significance of *Heneghan* to the present case. It may be that at interlocutory hearing of an injunction application in this case Mr McGreal will wish to revisit the *Heneghan* decision. All I can say for the present is that I simply have not been able to do more than a very brief review of the judgments in *Heneghan* which hasn't revealed to me what, if any, significance that decision has to my present decision. I'm afraid that is an aspect of the imperfection of a system in which judgments of this kind have to be prepared at very short notice, in conditions of urgency.

24. I come now to the legal basis of the action launched by Mr McGreal. The essential legal dispute canvassed in the papers is that the Regulations are invalid and should be quashed. Those regulations introduce a new class of exempted development in planning law, that is to say, a form of development which does not need planning permission and therefore need not go through the delay, but also and significantly, the public participation processes, required to obtain planning permission. Essentially, the Regulations provide, that, subject to conditions not here relevant, a change of use of many and various types of premises, including hotels, to their temporary use for and behalf of the Minister for Children, Equality, Disability, Integration and Youth to

[3] Heneghan v. Minister for Housing, Planning and Local Government & Others [2023] IESC 7, [2022] 1 I.L.R.M. 323, [2022] 2 JIC 1002.

accommodate or support displaced persons or persons seeking international protection is exempted development and so does not require planning permission. Put more briefly, the Regulations render exempt development the change of use of a hotel to the temporary accommodation of persons seeking international protection. It is pursuant to the Regulations that that Minister will, it seems inevitable, consider the accommodation at Dundrum House Hotel of persons seeking international protection to accord with planning law. As I say, this is a planning law case.

25. The quashing of the Regulations as illegal would, it seems clear, represent a considerable impediment in practical terms to such accommodation. I am satisfied that Mr McGreal's aim is a general aim of frustrating accommodation, in reliance on the Regulations, of persons seeking international protection. That phrase "in reliance on the Regulations" is important. Mr McGreal repeatedly invoked concerns expressed in nationwide terms and, as he volunteered, has been stymied in other proceedings he has brought challenging the Regulations in the abstract. He professes that his concerns are as to the legality, as opposed to the substance, of accommodation of persons seeking international protection. I confess to appreciable doubts in that regard, given what I will later describe as his response to the question what, as a practical matter, the Government should do if the injunction he seeks is granted and it is faced with the necessity of dealing with the presence in the State of persons seeking international protection who would, but for the injunction which he seeks, have been accommodated in Dundrum House Hotel.

26. Leaving that doubt aside and assuming his concern at a national level for the legality of the Regulations, and even though he has a national rather than a local aim, Mr McGreal declined in argument to face up to the clear wider practical implications, beyond Dundrum, of the injunction which he seeks. If it is granted, it will inevitably cast into grave, practical and immediate doubt, ministerial capacity to rely on the Regulations in accommodating persons seeking international protection anywhere in the State. And an oddity of Mr McGreal's position was that his concern is clearly with the use of the Regulations anywhere in the country, but he declined to engage in those implications, saying that what he's concerned with here is only Dundrum House Hotel. There was some discussion between him and me on that question and that is ultimately my impression.

Whether Mr McGreal has a Stateable Case

27. I turn to the question, the first question posed in *Okunade,* whether Mr McGreal has a stateable case in law for the relief which he seeks, by way of quashing the Regulations. Mr McGreal impugns the Regulations on the basis both that the Minister exceeded his statutory powers in making them (the "*vires"* argument) and that the Regulations are invalid as in breach of provisions of the Constitution (the "constitutional" argument).

28. As to the *vires* argument, it is important to say that the Regulations are made in exercise of the ministerial powers created by sections 4.2 and 2.6.2 of the Planning and Development Act 2000 ("PDA 2000"). Section 4.2 entitles the Minister to make regulations providing for any class of development to be exempted development, where he is of the opinion that by reason of the size, nature or limited effect on its surroundings of development belonging to that class, the carrying out of such development would not offend against the principles of proper

planning and sustainable development. The Regulations recite that the Minister has in fact formed that opinion, which is a necessary prerequisite for the valid adoption of the Regulations within the power created by section 4.2. Section 2.6.2 provides a more general power to make regulations under the PDA 2000. It's relevant here because it specifically provides that regulations made under section 4.2 shall not be made until a draft thereof has been approved by resolution of both Houses of the Oireachtas. The Regulations have been approved by such resolutions. So, on their face - *prima facie* - these are regulations validly made on foot of a statutory power of the Minister to make them.

29. Nonetheless, Mr McGreal asserts that the Regulations are *ultra vires* the PDA 2000. He says so for three reasons - though in fact I'm not sure whether he made the first point. But in case I missed it I will attribute it to him. He says;

- first, that the Regulations exclude public participation in the planning applications, which would arise but for the Regulations, in respect of proposals to use premises for accommodation of persons seeking international protection.

- secondly, that the Regulations offend section 10 PDA 2000, as to the required content of development plans.

- third, that the Regulations exclude public participation in respect of the procedures under section 20 PDA 2000, for the adoption of local area plans, as they might relate to the identification of premises for the accommodation of persons seeking international protection.

30. It is important to say that these arguments are framed at a high level of generality, such that it is impossible to confine their application, if they are valid arguments, to the specific case of use of premises for accommodation of persons seeking international protection. If these arguments are correct, they would in reality invalidate all forms of exempted development. Or perhaps more accurately, on a narrower view, they would in reality invalidate all forms of exempted development created or provided for by regulation as opposed to by primary legislation. The Act provides for certain specific categories of exempted development, but the majority of categories of exempted development are provided for by Articles 6 to 10 of the Planning and Development Regulations 2001 (“PDR 2001”) and the schedules to those regulations. Those schedules contain long lists of types of exempt development created by statutory instrument, not by the PDA 2000 and that is where, in reality, most often you go to find exemptions. The logic of Mr McGreal's argument is that if the Regulation is invalid by reason of the three considerations I have just indicated, so too must all categories of exempted development created by any regulation. And I should say that the creation of exempted development categories by regulation has a lineage going long further back than the PDR 2001. The creation of categories of exemption by regulation has been a commonplace of planning law for decades and has never been doubted, as far as I am aware, by reference to the considerations identified by Mr McGreal.

31. But in any event, and leaving that consideration aside, the more important point is that the PDA 2000, like any Act, must be read as a whole. One cannot call in aid one section of an Act to invalidate another. The fact is that the PDA 2000, in sections 4.2 and 2.6.2, specifically allows for the creation of classes of exempted

development by regulation. There really isn't any getting around that, at least insofar as concerns a *vires* argument based on other provisions of the very same Act. The PDA 2000 explicitly provides for the making by the Minister of regulations providing for new forms of exempted development, as a result of which, all the consequences of which Mr McGreal complains - the three that I have described - would apply in every case. Yet despite these consequences, that is what the PDA 2000 provides. In my view, the *vires* arguments are not arguable and they do not provide the basis for any *ex parte* injunction.

32. I turn now to the constitutional arguments. Mr McGreal says in argument that the Regulations offend various articles of the Constitution, to which I will briefly refer. The first is Article 6 of the Constitution. In fact, Article 6, as far as I could see, and I may be mistaken in this respect, is not pleaded, but it's invoked orally by Mr McGreal. If it's not pleaded, it's not in the case and that's the end of the matter.

33. But lest I'm wrong in that respect, and I've missed it in the papers and in any event having some regard to the possibility of amendment of the proceedings, I note that Article 6 provides that;

> *"All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good."*

And secondly it provides that the powers of government *"are exercisable only by or on the authority of the organs of State established by this Constitution."*

Certainly in the absence of argument by Mr McGreal more specifically related to that article, but in any event, I simply do not see how Article 6 of itself could be considered to require invalidation of the Regulations. Article 6 simply doesn't have a grip on that question in my view. I reject as unstateable his argument based on Article 6.

34. Mr McGreal next relies on Article 15.2.1 of the Constitution. It provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas. But of course there is also provision for what is called delegated legislation, which is a commonplace of the legal system and the constitutional order in Ireland, and of which the Regulations are an example. The law as to the powers of Ministers to make delegated legislation, such as the Regulations, is well known as, in general terms, are its limits. It is not permitted that delegated legislation would offend the reservation by Article 15.2.1 of the sole and exclusive power of making laws to the Oireachtas. But it will be readily apparent that if you simply say that as a statutory instrument is a law it necessarily follows that all statutory instruments are invalid and that is certainly not the constitutional position. In my view there is little prospect of the case succeeding in this regard.

35. The system of exempted development and the power to make regulations in that regard is, as I have said, established for many decades. The PDR 2001 creates many exemptions, as I've said. The Regulations in any event are narrow in scope and are time-limited. First, they are narrow in scope in that they are limited to the accommodation of a very particular, identified and, in the great scheme of things, relatively small cohort of people - though I appreciate that the numbers, in absolute terms, are greater than some might like as arriving

all together in a small community. Second, they are time-limited because, though I don't need to go into the details, the Regulations by their terms come to an end at a certain point in time and stipulate that the accommodation which they render exempted development is temporary accommodation.

36. In this case, the democratic safeguard of a positive resolution of both Houses of the Oireachtas is also in place. That is the highest form of supervision which enables the Oireachtas to police respect for its prerogatives of legislation, as created by Article 15.2.1. So, I respectfully reject the proposition that there is a stateable basis for challenging the Regulations on the basis of Article 15.

37. I come next to Article 40 of the Constitution which is invoked by Mr McGreal as to the personal rights of citizens. The first thing I may say is that the personal rights of Mr McGreal do not seem to be engaged at all. He lives elsewhere. He has repeatedly declined to indicate that the accommodation of applicants for international protection in Dundrum has any practical effect on his life or, with one posited exception, his personal rights. In my view, none of his personal rights are even arguably affected. His asserted positive personal right to ensure legality in an abstract and general sense is not, in my view, a right protected by Article 40. And Mr McGreal did not bring to my attention any authority to the contrary. Further, Mr McGreal, as the only applicant in these proceedings, may not rely on what the law calls a *jus tertii*: that is to say, an allegation of breach of the rights of other persons. Damage to the rights of others is not a ground upon which, in my view, Mr McGreal can obtain the injunction he now seeks. Those who wish to assert their rights in litigation and wish them to be given weight in litigation must themselves litigate.

38. However, in case I am wrong about that, I am of the view that there is no evidence that the constitutionally protected litigable personal rights of any other persons, as pleaded in the statement of grounds which I have considered, are engaged either.

39. For example, and it is only an example, there is a pleaded assertion that Article 40.4.1 guarantees that no citizen shall be deprived of his personal liberty, save in accordance with law. I cannot see how in any conventional understanding of the guarantee against unlawful deprivation of personal liberty, the rights of either Mr McGreal or any of those who have sworn affidavits supporting his application are at all engaged by the prospect of accommodation of applicants for international protection in Dundrum House Hotel. The particulars of this allegation are that "*The gaps in community service provision and integration will indirectly impact the personal liberty and rights of both the displaced persons and asylum seekers* [again a *jus tertii*] *and the local community. The inability to access essential services or participate fully in the community is an indirect deprivation of personal liberty*." I know of no basis in law upon which such pleas could ground a stateable action as to the right not to be deprived of one's personal liberty, which essentially addresses the question of improper imprisonment and other forms of detention of citizens.

40. Article 40.5 of the Constitution, which enshrines the inviolability of the dwelling of every citizen, which shall not be forcibly entered, save in accordance with law, is also pleaded. The statement of grounds goes on to say:

> *"the temporary accommodation arrangements enabled by the regulations may raise concerns about the potential for intrusion into the private dwellings of citizens, even if indirectly. The lack of clear safeguards and consultation processes in the regulations are failing to adequately protect this fundamental right to the inviolability of the home."*

What is that saying? It is saying, if I can make any sense of it, that applicants for international protection are more likely to be burglars than those staying in the hotel as guests or than the Ukrainian people who are staying there at the moment. I lend no weight to that assertion. So, I reject as unstateable the reliance on Article 40 of the Constitution .

41. Article 45 of the Constitution is pleaded. It relates to directive principles of social policy. This case is, if one can sensibly refer to different levels of unstateability, the least statable of all. That is because Article 45 reads as follows - which I'm sure Mr McGreal must have known: "*The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and they shall not be cognisable by any Court under any provisions of this Constitution*." In other words, it is simply not competent to plead the inviolability of a statutory instrument before the Courts of Ireland, by reference to Article 45.

42. What follows from these conclusions is that I reject the claim for an injunction, on the basis that the legal arguments made are unstateable.

Ex Parte Relief - Urgency & Irreparable Harm

43. However, I may be wrong. And against that possibility I have considered the other criteria which apply to the grant or refusal of such an injunction. The first of those I want to deal with relates to the fact that, as discussed with Mr McGreal, this application was made *ex parte*, that is to say, without notifying the Minister and enabling the Minister to come to court and argue the matter against Mr McGreal.

44. First, it is not permissible that the Courts would allow advantage to a party by virtue of his coming into court *ex parte*, as compared to a situation in which that person's opponent had been put on notice. Such advantages do on occasion arise and the system isn't perfect, but the general proposition must be that Mr McGreal should be at no advantage, by reason of his making an *ex parte* injunction, over the position which would have arisen had he put the Minister on notice.

45. Injunctions can be granted *ex parte* without the other side being heard. But I have not heard what the Minister might say against the grant of this injunction. He might, for example, disagree with the facts alleged by Mr McGreal. He might seek to introduce evidence of other facts not referred to by Mr McGreal. I'm not saying that these are facts which Mr McGreal ought to have referred to, in compliance with his duty of full disclosure

on an *ex parte* application. I'm simply saying that the Minister may know relevant facts of which Mr McGreal is unaware. And those other facts could affect a decision whether to grant an injunction. It is essential to the fair administration of justice that, where possible, both sides be heard before the Court makes important decisions. Anyone with a basic sense of fairness will understand why that is so. So *ex parte* injunctions are possible, but they are very much the exception to the normal rule.

46. That being so, an applicant for an ex parte injunction must explain why it was not possible to put the other side on notice before seeking such an injunction. The matter must not merely be urgent: it must be so urgent as to justify a one-sided hearing. The matter must not merely raise a prospect of harm to the applicant, it must raise the prospect of irreparable harm occurring within the time it would take to hold a hearing on notice. So, the vital issue as to harm in an ex parte injunction is not the prospect of long-term harm, medium-term harm or even relatively short-term harm. It is the prospect of immediate harm or harm in the short period which might be required to arrange a hearing on notice. Not only that, but this harm would have to be, in that period, irreparable.

47. It is my practice to press parties so that they can best make their arguments and understand and so address what's concerning me. I pressed Mr McGreal on this issue. I did not receive from him what I considered to be a satisfactory answer as to the urgency of the matter. He said, at least to my recollection, nothing as to having put the Minister on notice of this matter, either formally or informally, and as to why he couldn't have procured a motion on notice, in time as it were, to seek the injunction.

48. In part, I take into account the observation that the prospect of the arrival of applicants for international protection to Dundrum tomorrow was a prospect which only became apparent in the last day or so. But there is no doubt that the general prospect of their arrival, at some point, has been known for weeks. At any time in those weeks Mr McGreal or anyone else could have sought an injunction on formal or even informal notice to the Minister rather than seeking it only now and *ex parte*. One cannot, in seeking an *ex parte* injunction, invoke an urgency created by one's own inaction. Those who, as it is said, sleep on their rights, often find that their rights will not be vindicated as they might otherwise have expected that they would be – **Donohue**.[4] I emphasise that my invocation of this principle is specific to the *ex parte* nature of the present application and to the consideration that an earlier application could have been moved on notice. It will be for the judge deciding any application for interlocutory relief to decide if the principle applies in that circumstance.

49. I will come in due course to the considerations which have been articulated by way of concerns about what may happen in Dundrum if applicants for international protection arrive there. But I am firmly of the view that even if such prospects are real no case has been made out that they are prospects such that in the interim between now and an interlocutory hearing involving the Minister, those harms will have occurred at such a level of severity or with such a level of irreparability as to justify the grant of a one-sided injunction.

[4] Donohue v. Armco Inc [2000] 1 All ER (Comm) 641. I referred orally to the principle that one may not sleep on one's rights. I have added reference to Donohue as authority for that proposition. In that case the Court of Appeal of England and Wales observed that "An injunction is an equitable remedy, and equity has never come to the assistance of those who sleep on their rights."

50. That is a further basis upon which, if I am wrong in my earlier conclusion as to the stateability of the case, I reject this application. It simply doesn't have the necessary urgency - either by reference to any prospect of irreparable harm in the short period which it will take to put the Minister on notice and fight an interlocutory injunction or in as much as, in general terms, the prospect of the arrival of these applicants at Dundrum has been known of for weeks.

Other Matters including the Least Risk of Injustice

51. I want to turn now to some other and particular aspects of the present case. It is clear that Mr McGreal, who is not from the community - who lives in Westmeath - and many members of the community of Dundrum are strongly opposed to the apparently intended and possibly imminent use of Dundrum House Hotel by the Minister as a centre for the reception or for the accommodation of applicants for international protection.

52. I do not seek to contradict anybody in the general observation that an influx of relatively large numbers of new and temporary residents in a small community has the capacity to change that community in greater or lesser degree. Whether that is a good or a bad thing, or somewhere in between, is a manner upon which opinions may legitimately vary and on which, obviously, members of that community are entitled to their view and to careful consideration of that view.

53. It is clear from the affidavits which I have read that many people in the community are fearful of the prospect. Though whether those fears are objectively likely to be borne out in practice is perhaps another matter. To some people, new arrivals in a community are a welcome reinvigoration. To others they are a threat to be feared. I have considered the report of a local doctor who expresses concerns as to community anxiety about safety and security in the absence of background security checks on applicants for international protection. But it's not apparent to me, as far as is apparent from his report, that those are concerns which would not apply to any Irish person moving to Dundrum without background security checks, and yet any Irish person may do so. But, and I'm referring now to a concept which was apparent in the affidavits which I have read, as a general legal proposition, communities may not as a matter of legal right vet or veto the arrival of those who seek to live amongst them, whether they be Irish citizens (most of whom are unvetted), EU citizens (most of whom are unvetted), stateless persons or others.

54. None of this is intended to dispute that it is clear that, failing adequate consultation and preparation in cooperation with local communities, those communities are likely to feel disempowered and not listened to by what they see, rightly, as external forces changing the community in which they have happily made their lives. It is not for the Courts to make decisions which ultimately must address those complex social issues. The solutions for those issues are political, not legal. That is not to say, of course, that if there was a legal case for striking down a statutory instrument, the Courts would not have a role. And the accommodation of applicants for international protection is required by law and may raise legal issues. But the more general societal issues

are political.

55. As I've said, it would be unreal not to recognise that the arrival of large numbers of people to live in small communities may appreciably change those communities. However, it seems fairly clear that the number of new residents is not the issue in the present case, as they will essentially replace Ukrainian refugees who have been *in situ* for the last two years or so. I'm told by Mr McGreal that these Ukrainian refugees were welcome and became valued members of the community, other than for some reservations as to their entitlement to work and perhaps the amount of social welfare payments they received (although the Ukrainian refugee situation I think has changed recently in that regard). Though I pressed Mr McGreal, I found it difficult to ascertain from him what, in his view, are the relevant differences of their effect on the community, in real, practical and immediate terms as opposed, in terms, to legal status, between Ukrainian refugees and applicants for international protection.

56. As stated earlier, I was asked to read some of 230 supportive affidavits. As Mr McGreal accepted, it was impractical to imagine that in the time available I could read all of them. He chose affidavits for me to read as, I can only infer, representative of the case he wished to make. I read all of the affidavits which he asked me to read. They varied in their content, but one, as I noted in discussion with Mr McGreal, feared that "*the influx of Irish people that are not of Irish origin into a small Irish village would cause a lot of unrest*." Another was concerned at the potential lack of "*vetting*", which was put in the context of the vulnerability of young females in the community and an assertion that the female members of the community would have to be on "*increased alert*." No factual basis was stated for those fears. Another deponent recited the fear of having met three foreign men in a wood and stated that she would never walk in the wood again. I emphasise that nothing I say should doubt her fears as genuine. More generally, I in no way seek to diminish the proper concerns of all members of society as to the particular dangers which women can face in a variety of circumstances. I do not want anyone to conclude that I am not conscious of those particular concerns of which we are reminded in the media, and by events which occur daily in the other major courthouse in this city. However, the fact is that this event in that wood necessarily occurred before the arrival in Dundrum, of the applicants for international protection. And, I suggest, it might properly be characterised as the lady in question having met in the wood men who were unknown to her, rather than foreign men.

57. Though Mr McGreal sought to assure me of their common humanity, neither he nor the affidavits I read explained how Ukrainian refugees and applicants for international protection differed in their personal attributes and characteristics, such that more or less equal numbers of either represented, in the one case a welcomed addition to the community, and in the other case an urgent and immediate threat of irreparable harm to it. I simply didn't receive what I consider to be a sensible answer to that question. It may be that there are people thinking: "well sure, everybody knows what the differences are." Well, if they do, that needs to be expressly articulated in evidence, not left to judges to infer.

58. I should add that, of course, any group of people, citizens or refugees, men or women, locals or foreigners, is likely to include offenders. It is readily apparent that we don't need foreign people to supply offenders in Ireland. We have a homegrown supply as the media repeatedly informs us. Sadly, I'm afraid that is an inevitable

and indelible part of life. It has never been otherwise in the history of humankind. If it proves in due course that applicants for international protection accommodated at Dundrum House Hotel commit offences, they will be dealt with in the ordinary course of law. A risk that any such offences might occur is not, in my view, a basis for an injunction in this case.

59. Mr McGreal sought to assure me that in part his action was prosecuted, and his pleadings say the same, out of a concern for the well-being of the applicants for international protection as to, for example, the quality of their accommodation. I find this difficult to accept. He was unable to explain satisfactorily why accommodation satisfactory to house Ukrainian refugees would be likely to be unsatisfactory to the needs of applicants for international protection, save for an entirely unverified assertion that applicants for international protection would be housed at the hotel in vastly lesser quality of accommodation by way, he suggested, of overcrowding, than had been made available to the Ukrainian refugees.

60. In my view, Mr McGreal's professed concern for the well-being of the applicants for international protection rings hollow in the context of his suggested solution to be effected by the Government, to the practical problem of their accommodation, if an injunction was granted. Mr McGreal is of the view that those applicants for international protection should be forthwith sent back to the countries whence they came, which, in his view the Government could do "tomorrow".

61. Mr McGreal did not address the question how his proposed solution could be reconciled with the State's legal obligations as to the reception of applicants for international protection. Nor, perhaps more importantly and if he wants to talk about common humanity, did he address the problems underlying those obligations: that, at least presumptively, some of those applicants for international protection are in need of the protection to which their title refers: protection from persecution and worse in the very countries to which he would, tomorrow, return them.

62. I reject Mr McGreal's assertion of concern for the rights of the applicants for international protection as motivating in any degree his prosecution of these proceedings. And if I am wrong in that rejection, he is in any event not entitled to litigate them as they are, as I have said in respect of others, a reliance on a *jus tertii* - rights of third parties whom he does not represent.

63. The loss of Dundrum House Hotel as a hotel both for local use and for use as a tourist amenity is, I note, a matter of concern to the opponents of accommodation of applicants for international protection there. I can quite understand that concern, but the reality appears to be that it has been to some greater or lesser degree out of use as a hotel already for some years. It has been used as an accommodation centre for Ukrainian refugees. I do not entirely discount the possibility that the ending of its use for Ukrainian refugees might have brought it back into use as a hotel but there is no evidence on that one way or the other. I am obliged to act on evidence, not on speculation. In any event, I do not see that any such prospect could appreciably contribute to the immediate and irreparable urgency required to justify the grant of an *ex parte* injunction.

64. Concerns were also and understandably addressed to infrastructure deficits in the area, but they hardly arise as a matter of immediate and irreparable urgency pending an interlocutory application.

65. I repeat that I don't see that in the interim between now and an interlocutory injunction, any irreparable harm could be done by the refusal of an injunction to the legitimate interests of Mr McGreal.

66. Turning back to *Okunade*, in my view the weightier considerations here, in considering the risk of injustice, are the weight to be given to the orderly implementation of measures *prima facie* valid, that is to say the Regulation, and of the scheme in which the Regulation was made and of the scheme of accommodation of international protection applicants, which obligation of accommodation is an obligation of the State. The risk of injustice posed by interrupting the operation of a presumptively valid statutory instrument and thereby interrupting the Government's fulfilment of its public duties as to accommodation of applicants for protection, pending an interlocutory hearing, readily outweighs any risk of irreparable harm to Mr McGreal's legitimate interests - and I see none because he has no personal or practical interest in the events in Dundrum. If, which I am not convinced, I should weigh also in the balance of the risk of injustice the interests of those many who have chosen to swear supportive affidavits but are not applicants in these proceedings, I would, I emphasise, come to the same conclusion.

67. If the outcome of these proceedings at trial some distance hence in time is ultimately that the change of use of Dundrum House Hotel to accommodate applicants for international protection proves to have been illegal as an unauthorised development, then there will be one of two results. The development may be regularised by planning permission being obtained or perhaps by some other regulatory course. In that event, and by reference to the legal concerns here expressed, (as I have said, this is a planning case) no one will have any cause for complaint because the planning position will have been regularised.

68. If, on the other hand, the planning position is not regularised, then the use will remain unauthorised, and it will have to cease. And whatever about the likely actions of private parties or the like, in a circumstance in which a minister of the Government is told by the Courts that he has relied upon an invalid statutory instrument such that a use which that minister is making of premises in an unauthorised use, I cannot assume that a minister faced with such a circumstance would continue in such an illegality.

69. So if this case succeeds, and one way or the other, either by regularisation in planning terms of the use of the hotel or by the departure of the applicants for international protection from the hotel, the legal problem upon which the case is based will have been solved. And I see no evidence that in the interim between now and then, irreparable harm will have been done to the community of Dundrum. It is evidence, objective evidence that I must act upon. I see assertions, I see fears, but I cannot see evidence of irreparable harm.

Summary Conclusion

70. So, in summary, I reject the application for an *ex parte* injunction, because;

- I do not consider the case stateable in law;

- I consider that the urgency necessary to an *ex parte* - a one-sided - injunction has not been shown;

- On the evidence, I see no risk of irreparable harm to relevant interests pending an application for an interlocutory in junction:

- On *Okunade* principles, I take the view that the public interest in the operation of the scheme represented by the Regulation and by the State's obligations to accommodate international protection applicants outweighs any other interests which have been brought to my attention, such that the least risk of injustice lies in refusing the injunction.

David Holland
31/7/24 (oral ex tempore)
30/8/24 (written)