



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 122

Record Number: 2019/67

**Costello J.
Power J.
Murray J.**

BETWEEN/

CHRISTOPHER CONNOLLY

APPELLANT

- AND -

BORD NA gCON AND IRISH COURSING CLUB

RESPONDENTS

JUDGMENT of Ms Justice Power delivered on the 30th day of April 2020

1. This is an appeal against the order of the High Court made on 25 January 2019 and perfected on 28 January 2019, wherein Pilkington J. refused the appellant's application for an order of *certiorari* quashing an 'exclusion order' made against him by the first named respondent pursuant to s. 47 of the Greyhound Industry Act 1958 ('the Act'). The trial judge also refused an order of *certiorari* quashing the consent given by the second named respondent (the 'ICC') to the first named respondent, in respect of the making of the exclusion order together with all other reliefs sought by the appellant in his application for judicial review.

Background

2. From an early age the appellant was involved with greyhounds, helping his father and his grandfather who trained and kept such animals. At the age of 12, he began working part-time, as a kennel hand. He left school when he was 16 years old to pursue his 'dream career' in greyhound racing. Having joined the kennels of an established Irish trainer, he was introduced to Mr. Darren McDonald, who is, apparently, a legendary Australian greyhound trainer who invited him to Australia in November 2013. He stayed with Mr. McDonald's family in Victoria for a while and worked as a dog handler. In July 2014 Mr. McDonald offered him a full-time job.
3. Later that year, on 18 November 2014, the appellant was involved in the practice of live animal baiting. He claims that he did so on the instructions of his employer. Although, allegedly, shocked by the practice, he neither confronted his employer nor reported the matter to the appropriate authorities.

Proceedings in Australia

4. On 13 February 2015 he received a telephone call from the Chief Steward of Greyhound Racing Victoria who informed him that his Dog Attendant Licence had been suspended following allegations of live animal baiting, upon which, having been asked, he declined to comment. He left Australia on 4 March 2015 and returned to Ireland.
5. Subsequently, the appellant learnt that on 12 June 2015 the Greyhound Racing Appeals and Discipline Board ('the Disciplinary Board') had found him guilty of breaches of the Greyhound Racing Victoria ('GRV') Local Racing Rule 18.5 and Greyhounds Australasia Rule 86(af) and had imposed upon him a life ban. He did not attend nor was he legally represented before the Disciplinary Board. He appealed the decision to the Victorian Civil and Administrative Tribunal ('VCAT'). It held a hearing on 24 May 2016 at which the appellant was legally represented. On 15 July 2016 VCAT made an order substituting the disqualification period from life to ten years. Five of those years were suspended on condition that the appellant remained of good behaviour. The order recorded that the effective period of active disqualification was from 13 February 2015 until 12 February 2020. It also recorded that the penalty imposed was an aggregate penalty in respect of the three offences to which the appellant had '*recorded pleas of guilty*'.
6. Thereafter, GRV sent the papers concerning the VCAT proceedings to the Board in Ireland. The Board's Regulation and Welfare Department received them on 18 July 2016 and on 26 July 2016 it completed an 'Investigation Application Form' pursuant to s. 43(1) of the Act. That application form was sent to the Board seeking its approval to conduct an investigation into the implications of the outcome of the VCAT proceedings on the Irish Greyhound Industry. It also sought approval for three named individuals to conduct the investigation. As will be seen from the events that followed, the investigation that ensued did not proceed in the manner indicated on the application form, that is, as a three-person investigative team.

The Kennel Hand Authorisation Process

7. On 2 November 2016 the appellant applied to the Board for authorisation in the form of a licence to work as a kennel hand. His application was discussed at a meeting of the Board that was held on 20 January 2017. Paragraph (e) of the minutes of that meeting refers to that discussion and records that the Board was briefed on the background to the appellant and '*reminded*' of the VCAT decision. The minutes also record that the Board was '*reminded*' of its own grant of a s. 43 application (described as '*ongoing*') '*last year*' in respect of those matters. The outcome of the discussion is noted and then the following is recorded:

"Following a discussion on the matter, it was agreed that the DORGC¹ would write to Mr. Connolly stating the facts, asking him to confirm in writing that he is the same person referred to in the Decision and stating that it is the view of the Board

¹ Director of Racing Governance and Compliance

that he may not be a fit and proper person to be authorised as a Kennel Hand, but that the Board would be interested in hearing his views on the matter. It was agreed that the letter should be sent by recorded delivery or courier and that Mr. Connolly should be given 21 days to respond."

8. Accordingly, the Board wrote to the appellant on 25 January 2017. It recalled the statutory obligation on all authorised kennel handlers to satisfy the Board in terms of their fitness to hold authorisation and confirmed the Board's power to refuse authorisation if not so satisfied. Noting the earlier refusal of such a grant by the relevant British greyhound racing authorities and recalling the 'firm intention' of the VCAT that the appellant would not be involved professionally in the industry in Australia, the United Kingdom, the United States or the European Union, the Board indicated its intention to make a decision on the appellant's application and invited his written submissions in advance thereof. The appellant replied pointing out that he had not, as yet, had an opportunity to address any of the tribunals in person 'to talk about this abhorrent event' and to express his 'deep remorse and shame'. He asked for an opportunity to make his application, orally, by way of a meeting.
9. The Board acceded to that request and a meeting with the appellant, lasting an hour and a half, was held on 22 February 2017 in the Killeshin Hotel, Kildare ('the Killeshin interview'). Present thereat were (i) the Board's Director of Racing Governance and Compliance, Ms Hilary Forde; (ii) the Board's Integrity and Welfare Officer, Mr. Enda McCabe; (iii) the appellant and (iv) his friend, Mr. TMR. A memo of that meeting recorded that the appellant set out the circumstances of the live baiting event, the difficulty he had retaining his job thereafter and discussed the imminent broadcasting of a television programme concerning the issue.
10. A Board meeting was held on 24 February 2017. As will be evident later, this meeting was important in terms of the issues raised in this appeal. Paragraph (c) of the minutes of this meeting relates to the Board's discussions on two distinct points arising in relation to the appellant. The first point concerned his application for a kennel hand licence. The minutes record that having heard a detailed account of the Killeshin interview and having discussed the live baiting incident, the Board decided to refuse his application on the grounds that he was not a fit and proper person within the meaning of the relevant regulations.
11. The second point discussed by the Board at that meeting is recorded as 'Section 47 Exclusion Order'. The minutes note:

*"Following **the Board's approval last year of a Section 43 investigation with a view to an exclusion order**, the DORGC agreed to write to Mr. Connolly to advise him the reasons for a Section 47 exclusion order being considered and request his formal representations."* (Emphasis added.)

The minutes then record that 'separate letters' were to be sent to the appellant on the Board's decision regarding the kennel hand licence application and its decision regarding a potential s. 47 exclusion order.

12. Separate letters were sent to the appellant, one on 27 February 2017 and the other on 6 March 2017.
13. In the letter of 27 February 2017, the Board informed the appellant of its decision to refuse his application for kennel hand authorisation. He appealed the decision and a hearing was held on 28 April 2017² at which he was legally represented before what is described in the papers as the 'independent' Control Committee. It upheld the Board's decision.

The s. 43 Investigation Process

14. Meanwhile, the Board's decision regarding a potential s. 47 exclusion order (para. 11 above) was conveyed to the appellant by letter dated 6 March 2017. Two issues appeared in the subject heading of that letter which stated:

"RE: INVESTIGATION OF BORD NA GCON PURSUANT TO SECTION 43 OF THE GREYHOUND INDUSTRY ACT 1958.

RE: IMPLICATIONS OF THE OUTCOME OF THE GREYHOUND RACING VICTORIA CASE OF 'CONNOLLY V GRV STEWARDS' FOR THE INTEGRITY OF THE IRISH GREYHOUND INDUSTRY."

This letter is of some significance in the context of this appeal. It stated:

"Taking into account the seriousness of case that went before the GRV and noting that you are currently employed and working for an Irish Greyhound Trainer, the Irish Greyhound Board / Bord na gCon will carry out a separate investigation pursuant to section 43 of the 1958 Greyhound Industry Act, whereby 'the Board may cause any occurrence brought to its notice in relation to any matter connected with the greyhound industry to be investigated in such manner as the Board thinks proper.

As part of our investigation into this matter we request that you submit your observations in writing in relation to this matter for the attention of the Board of Bord na gCon by 20 March 2017 for their consideration." (Emphasis added.)

The appellant did not reply to the Board's letter of 6 March 2017.

² A reference in para. 15 of the appellant's submissions to this hearing taking place on 28 April 2018 appears to be in error and inconsistent with the date averred to in his affidavit grounding the judicial review proceedings.

15. There is a reference in an email of 12 June 2017 from the personal assistant to the Board's Chief Executive to the Head of Regulation to 'the original s.43 investigation' being carried out 'last year' but stating that the sender was not sure when.
16. The Board wrote again to the appellant on 30 June 2017 in connection with its investigation 'pursuant to s.43' and the implications of the outcome of the VCAT case for the integrity of the Irish Greyhound Industry. The Board referred to its previous notification to the appellant of its intention to have that matter investigated and repeated its request for his written observations. It advised him that as part of its consideration of any such matter investigated pursuant to s. 43, it had powers to make a disqualification order pursuant to s. 45 and an exclusion order pursuant to s. 47 of the Act. The letter then continued: -

"In light of the absence of requested written observations from you on this matter in the aforementioned correspondence dated March 6th 2017, you are further requested to forward any relevant written submissions on this matter within seven days of receipt of this correspondence.

At the end of that period the Board will consider the result of the investigation and whether in the light of the investigation and the observations made by you, the making of any such order is considered appropriate. The Board already has observations submitted by you with regard to your Kennel Hand licence application, and your subsequent appeal to the Control Committee of the Board's decision to refuse you a Kennel Hand authorisation. These observations will be taken into account in the Board's consideration. If the Board proposes to make such an Order you will then be given an opportunity within seven days to make representations in writing to the Board."

17. According to the appellant, this letter, which was copied to the ICC, is also significant in this appeal. One of his core arguments is that the licence application process and the s. 43 process were 'the one thing'. Several observations might be made about this letter. First, it is clear that the Board was writing in the context of the second process discussed at the 24 February Board meeting—the s. 43 investigation—and that this was not its first attempt to engage the appellant in this process by requesting his written observations. Second, the Board was expressly alerting the appellant to the fact that at the end of the stipulated period for forwarding submissions (7 days from the date of the letter) it would consider 'the result' of the investigation and whether the making of an exclusion order was appropriate. Third, the Board refers, specifically, to the appellant's observations in the kennel hand authorisation process and confirms that his observations made during that procedure would be '**taken into account**' in its considerations. As of the date of this letter, the refusal of the kennel hand licence application had issued and an appeal in respect thereof had failed. In the Board's view, two separate processes had been undertaken, the first of which had been completed and the second of which was still underway.

18. The appellant, through his solicitors (hereinafter 'Mr. Linehan'), replied to the Board on 5 and 6 July 2017. The letter of 5 July confirmed that he had preliminary submissions to make in relation to the proposed investigation pursuant to s. 43 of the Act. The letter began by quoting from the preamble to the Act and then noted the purposes for which the statute was introduced. It referred to the appellant's unsuccessful application for kennel hand authorisation noting that the central ground for the refusal was the finding of VCAT. Mr. Linehan then referred to the letter of 6 March 2017 indicating the Board's intention to carry out a s. 43 investigation. He went on to assert that the issue of the VCAT finding '*only came to light*' in the context of the appellant's application for a kennel hand authorisation. This assertion is patently incorrect (see para. 6). Mr. Linehan's letter went on to state that it was '*now grossly unfair*' of the Board to widen the possible sanction on the appellant by initiating an inquiry pursuant to s. 43 of the Act which said proposed inquiry was, in his view, *ultra vires*. Quoting from the VCAT judgment he submitted that the jurisdiction of the Tribunal was confined to Australia and that any attempt to impose the disqualification beyond that jurisdiction was '*aspirational in nature*'. He then concluded with the following: -

"If you persist with your investigation in the context as already outlined, then our instructions are to make whatever High Court application is relevant in order to protect our client's position in this regard."

19. The appellant's solicitors wrote again to the Board on the following day, 6 July 2017. Reference was made to the '*submission sent*' on the 5th inst. which, in essence, '*dealt with jurisdiction*'. Mr. Linehan made additional submissions which were stated to be without prejudice to the issue of whether the investigation was *ultra vires*. These were offered to give an overall profile/picture of the appellant. The letter went on to set out the history of the appellant's involvement in the greyhound industry. It described the duties of his employment as being commensurate with the maintenance, training, seeding and overall care of greyhounds. They also involved taking greyhounds to trials and race meetings at various locations throughout the country and within the British Isles. Mention was made of the number of greyhounds the appellant owned. The letter went on to note that the appellant had been put on notice of the Board's powers pursuant to s. 45 and s. 47 of the Act. It then set out the provisions of s. 45(1) and the provisions of s. 47(1). His solicitor submitted that the general legal doctrine of proportionality must be applied citing a case of *Cox v. Ireland* [1992]. The letter concluded by stating that the appellant would be deprived of his right to work in the only area where he has qualifications and experience and that he would lose his residence as well as his livelihood if the Board were to make an order pursuant to s. 47.
20. On 27 July 2017 the Board met again and item 10 of the minutes of that meeting refers to '*Regulations—IGB Investigation & Implications of Outcome—Mr. Chris Connolly*'. Before the Board were papers contained within what the minutes describe as a '*Board pack*'. These papers were '*taken as read*'. The minutes then record the following: -

"The Board considered once again the incident in Australia, the findings of the Australian authorities, the reasoning for their decision and mitigating factors taken into account, and the submissions made by Mr. Chris Connolly both to the Australian authorities and to the IGB. A detailed discussion on correspondence received from Denis A. Linehan & Co. (Solicitors acting on behalf of Mr. Chris Connolly) was held which considered previous legal precedent and proportionality of forfeit to the offence. After due consideration, the Board decided to proceed with the Exclusion Order and, pursuant to Section 47 of the Greyhound Industry Act, invite further submissions on the matter in respect of that decision from Denis A. Linehan & Co. for the Board's consideration."

It was at this meeting of 27 July that the Board determined that it would proceed with the exclusion order against the appellant and it informed him of its proposal in this regard by letter dated 15 August 2017. The terms of the proposed exclusion order pursuant to s. 47 of the Act were set out therein. The appellant was advised that pursuant to s. 47, written representations on the proposal shall be considered by the Board if received within 7 days. The Board concluded by informing the appellant of the requirement that it obtain the consent of the ICC and of its power to revoke an order having consulted with that body.

21. Mr. Linehan replied to the Board's proposal by letter dated 5 September 2017 stating that for the purposes of s. 47(2) of the Act, the appellant wished to repeat, in full, the submissions contained in their correspondence of 5 and 6 July 2017.
22. A further Board meeting was held on 21 September 2017. The minutes of that meeting note Item 6 (a) as '*Exclusion Order Proposal – Mr. Chris Connolly*' and they record that the Head of Regulations referred to the file '*sent previously for the Board's consideration*' in relation to the appellant's actions in Australia and matters relevant to the exclusion order proposal. The letters received from Mr. Linehan dated 5 and 6 July 2017 were '*circulated again*'. The minutes then state: -

*"Following the Board meeting on 27 July 2017, **the Head of Regulations** informed Denis A. Linehan solicitors of the Board's decision to proceed with an Exclusion Order against Mr. Connolly and invited submissions on the matter for the Board's consideration. A further submission, **as contained within the Board pack**, was received from Denis A. Linehan & Co. which reiterated the contents of previous correspondence. There have been no material changes since July and no further submissions have been received. Having regard to the letter in which Denis A. Lenihan solicitors address jurisdiction, the admitted facts have not changed. On the proposition of Frank Nyhan, seconded by Colm Gaynor, the Board decided to seek the consent of the Irish Coursing Club to make an Exclusion Order under the Greyhound Industry Act 1958 against Mr. Chris Connolly and seek the consent of the Irish Coursing Club."* (Emphasis added.)

23. Following that meeting, the Board wrote to the appellant's solicitors on 5 October 2017. It referred to the previous correspondence and representations in relation to the s. 43 investigation and the implications of the VCAT case for the Irish greyhound industry. It went on to advise that the Board:

"[...] having considered the aforementioned submissions at its meeting on September 21 2017, now proposes to seek the consent of the Irish Coursing Club to the making by the Board of the following Order:-

- *an Exclusion order issued pursuant to s.47 of the Greyhound Industry Act, 1958, prohibiting Mr. Christopher Connolly*
 - *Being on any greyhound racetrack.*
 - *Being at any authorised coursing meeting.*
 - *Being at any public sale of greyhounds."*

24. On the same day the Board wrote to the ICC seeking its consent to the making of an order. The correspondence which then passed between the ICC and the Board is of particular relevance to this appeal and must be considered in some detail. By letter dated 12 January 2018 the ICC replied to the Board. It confirmed that, as part of the deliberations, its Executive Committee had reviewed the VCAT appeal hearing 'as it formed part of the s. 43(1) investigation conducted' by Mr. Enda McCabe, Integrity and Welfare Officer, Mr. Barry Coleman, Welfare Manager and Mr. Michael Falvey, Head Control Steward of the Board. The letter went on to mention certain findings of the VCAT decision and ended by noting that the Board had established an investigation team consisting of the aforementioned personnel. It concluded:

*"The file on this matter included the 'Investigation Team Application Form' detailing the purpose of the investigation **'to investigate the implications of the outcome of the Greyhound Racing Victoria case of Connolly v. GRV Stewards' on our industry which arose as a result of live baiting incidents by the Applicant, Christopher Connolly, conducted at a training track in Australia'** but did not include the outcome of this investigation.*

The file did not include IGB Board's decision and reasons on foot of the investigation report that led to the instigation of the Exclusion Order.

For completeness and fairness, the receipt of these documents will assist the Executive Committee on fully understanding the rationale for the consent request to the Exclusion Order." (Emphasis added)

25. The Board replied to the ICC on 24 January 2018 stating: -

"You will be aware from the file on the matter previously sent to you, the matter of the investigation by the Irish Greyhound Board pursuant to Section 43 of the Greyhound Industry Act 1958 and the outcome of the 'Greyhound Racing Victoria Case of 'Connolly v. GRV Stewards' was considered within the context of a

Kennelhand Authorisation application which was received from Mr. Christopher Connolly.

As part of the investigation of the above matter Mr. Connolly was written to on March 6th 2017 and advised, pursuant to Section 43 of the Greyhound Industry Act 1958 'the Board may cause any occurrence brought to its notice in relation to any matter connected with the greyhound industry to be investigated in such a manner as the Board thinks proper'. **As part of the investigative process**, Mr. Connolly was requested to submit his observations on the published outcome of events in Australia relating to the abhorrent practice of live animal baiting, for the consideration of the Board.

It is noted Mr. Connolly did not respond to this correspondence." (Emphasis in bold added.)

The letter then referred to the Board's consideration of the matter and it listed several issues that were of 'particular relevance' in that regard. Included on that list were the following:

- *the published decisions of the Australian bodies detailing the appellant's role and admissions of guilt in the practice of live baiting;*
- *the appellant's application for a Kennel Hand Authorisation;*
- *correspondence to the appellant relating to that application from the Board's Director of Racing Governance and Compliance in the context of the requirement that the Board be satisfied that he was a 'fit and proper person' to hold such authorisation;*
- *the appellant's written submissions in relation thereto;*
- *details of the Killeshin Hotel interview;*
- *correspondence to the appellant notifying him of the Board's refusal to grant the Kennel Hand Authorisation; and*
- *the decision of the independent Control Committee on the appeal of the refusal to grant the Kennel Hand Authorisation.*

The Board also listed the following matters as having been relevant to its consideration:

- *its correspondence of 6 March 2017 to the appellant requesting submissions from him as part of its investigation into the Australian Racing Regulators' published decisions. (The letter noted that no submissions were received from the appellant.)*
- *further correspondence from the Board to the appellant acknowledging his submissions made during the application for a Kennel Hand Authorisation and inviting further submissions regarding its investigation and assessment of*

implications of 'Connolly v. GRV Stewards' for the integrity of the Irish Greyhound Industry; and

- *submissions received from the appellant's solicitors in respect of these matters.*

The letter continued: -

"It is noted that Mr. Connolly throughout the aforementioned, has admitted guilt in his participation of live animal baiting at Tooridin Schooling Track on November 18th 2014, Victoria, Australia. This evidence is uncontroverted.

As requested, and to assist the Executive Committee, I attach a copy of Bord na gCon Minutes when these matters were considered by the Board. I confirm the file forwarded to the Irish Coursing Club is the full file on the matter, and the same as that considered by the Board at their meeting on September 21st 2017.

I note the significant timespan taken by the Irish Coursing Club to deal with this important matter since my correspondence of October 5th 2017. Given the serious nature of the aforementioned events and proceedings, I trust this matter can be dealt with by the Executive Committee in an expedient manner. I look forward to hearing from you at your earliest convenience."

26. The ICC sought to clarify one particular point in relation to the s. 43 investigation and, in this regard, wrote again to the Board on 15 March 2018 stating:-

"Your file indicated that a three-person investigation team was established to conduct the investigation. It is assumed that the outcome of this investigation formed part of the Board's decision to invoke an Exclusion Order against Mr. Connolly.

It is this report that formed part of my information request in my letter of January 12th.

I await clarification and then the ICC Executive Committee will consider consent at its next meeting."

27. The Board replied by letter dated 22 March 2018 in the following terms: -

"Dear Mr. Histon,

I refer to your letter of 15th March 2018 addressed to Mr. Pat Herbert, Head of Regulation, who is currently on annual leave.

Under the provisions of the Greyhound Industry Act 1958, 'the Board may cause any occurrence brought to its notice in relation to any party connecting to the greyhound industry to be investigated in such a manner as the Board thinks fit.' (Section 43).

The provisions of Section 47 of the Act relate to exclusion orders and set out the arrangements to apply in the event that the Board 'proposes to make or consent to an exclusion order, the Board shall serve notice of the proposal on the person concerned and shall, if any representations are made in writing by such persons within seven days, consider the representations.'

In relation to the three-person investigation team referred to in your letter, this did not proceed and you will note from documentation previously forwarded to you that the Board proceeded in accordance with the requirements of the legislation regarding exclusion orders set out under Section 47."

28. That reply was considered by the ICC at its Executive Committee Meeting of 9 May 2018. A note of the minutes records that: -

"[...] [T]he Committee set up by the IGB did not in fact carry out an investigation. (Copies of IGB Minutes had already been circulated to the Members). Noted current ban in Australia would expire in 2020.

Following discussion, it was decided to give consent to the Exclusion Order against Chris Connolly. It was also agreed that the IGB should consider looking favourably on any request received from Mr. Connolly to reside the Order on the expiration of the ban in Australia."

29. The following day the ICC wrote to the Board consenting to the making of the exclusion order. Whilst recognising that an exclusion order in Ireland is open ended, the ICC observed that the appellant's sanction in the state of Victoria would expire on 12 February 2020. As the exclusion order related directly to the incident which was the subject of the Victorian sanction, the ICC took the view that, subject to the appellant's compliance with the conditions attached to the order, favourable consideration should be given to rescinding it at the time of the expiry of the sanction, if the appellant so requested.

30. On 24 May 2018 the Board made an exclusion order, effective from 25 June 2018, prohibiting the appellant from:

- (a) being on any greyhound race track;
- (b) being at any authorised coursing meeting; and
- (c) being at any public sale of greyhounds.

The appellant was advised of the making of the exclusion order on 25 May 2018 and of the fact that the Board would consider any submissions made in respect of its revocation after the expiration date set down in the judgment of VCAT had passed.

High Court Judgment

31. In the High Court, Pilkington J. considered the parties' evidence and submissions and the application of the relevant provisions of the Act to the facts of the case. In an *ex tempore* judgment delivered on 19 December 2018 she made the following findings:

- (1) that the investigative process was at the request of the Board (p. 22 of the transcript);
- (2) that once the ICC had sought clarification as to whether there had been a three-person hearing and was satisfied with that clarification, no other queries were raised;
- (3) that at no other point was any issue taken, raised or referenced with regard to any alleged failure to hold a s. 43 investigation;
- (4) the fact that a tribunal of inquiry was not summoned in the manner originally envisaged did not, in and of itself, establish that no s. 43 investigation took place;
- (5) that there was, in fact, an investigation process pursuant to s. 43 (see p. 25-27 of the transcript); and
- (6) that the Board was entitled to consider whether it would seek the consent of ICC to the making of an exclusion order pursuant to s. 47.

The High Court judge was satisfied that proper procedure had been maintained at all times and that the appellant had been afforded due process.

Grounds of Appeal

32. Twelve grounds of appeal were advanced in the notice of appeal, many of which overlap.

The appellant claims that the trial judge erred in fact and in law by: -

- (a) *determining that the Board was entitled to rely upon the findings of the 'investigation' purportedly held under s. 43 in circumstances where the 'investigation' relied upon had not been conducted in accordance with the dictates of natural justice and had not been decided objectively;*
- (b) *failing to look at what came before the Board's decision to propose to make an exclusion order under the provisions of s. 47 in order to ensure that an investigation of the type envisaged in s. 43 preceded and in its result grounded the proposal to make an exclusion order;*
- (c) *determining that the investigation notified to the appellant by letter dated 6 March 2017 constituted an investigation into an 'occurrence' within the meaning of s. 43;*
- (d) *failing to follow the established jurisprudence derived from McDonald v Bord na gCon [1965] I.R. 217 that an investigation of the type envisaged in ss. 43 and 44 must precede and in its result ground the proposal to make an exclusion order;*
- (e) *determining that the Board behaved in accordance with the dictates of natural justice when it took the observations the appellant had made as part of his kennel hand authorisation application and subsequent appeal into account in its investigation, despite having advised by letter dated 6 March 2017 that a separate investigation pursuant to s. 43 would be carried out;*

- (f) *failing to determine that the procedure followed by the Board was unfair because it was akin to the procedure set out in s. 47(2) rather than the procedure to be followed when conducting an investigation pursuant to s. 43;*
- (g) *concluding that she was happy that there was an investigative process pursuant to s. 43 and failing to have any or any sufficient regard to the fact that the three person investigation never proceeded, to the fact that the Personal Assistant to the Chief Executive advised the Board's Head of Regulation incorrectly that that original s. 43 investigation had been carried out in 2016, to the fact that the Board had admitted that it had proceeded in accordance with the requirements of s. 47 and to the fact that the separate investigation referred to in the letter dated 6 March 2017 was not an investigation into an 'occurrence';*
- (h) *determining that various correspondence between the parties constituted an investigation complying with the principles of natural and constitutional justice and which met the requirements of s. 43;*
- (i) *permitting the Board to conflate the appellant's application for kennel hand authorisation with the process initiated by the letter of 6 March 2017 in circumstances where the appellant had been informed that 'a separate investigation' pursuant to s. 43 would be carried out;*
- (j) *determining that the Board had complied with the principles of natural and constitutional justice where they had not placed the appellant on notice of the fact that the investigation pursuant to s. 43 was considered within the context of the appellant's kennel hand authorisation application;*
- (k) *failing to quash the exclusion order in circumstances where the Board was obliged to but failed to consider the possibility of limiting the order to one or two of the three activities specified in s. 47; and*
- (l) *determining that there was no basis in legislation or in the caselaw for a requirement that the appellant be allowed make representations to the ICC in circumstances where the consent of the ICC was required before the Board could make an exclusion order.*

Whilst extensive grounds of appeal are advanced and a wide range of issues raised, it appears to me that the central questions to be addressed in this appeal are as follows: (i) whether an investigation pursuant to s. 43 took place sufficient to ground the proposal to make the exclusion order pursuant to s. 47; and (ii) whether the procedure adopted by the Board was a fair one and sufficient to satisfy the requirements of natural and constitutional justice as identified and applied in the case law.

Parties' Submissions

33. The appellant raised four questions which he submitted are the issues to be decided on appeal:

- (i) *Did an investigation of the type envisaged in s. 43 precede and, in its result, ground the proposal to make an exclusion order pursuant to the provisions of s. 47?*
- (ii) *Was the letter of 6 March 2017 the beginning of the investigative process pursuant to s. 43?*
- (iii) *Does an investigation into the implications of the outcome of the case constitute an investigation into an occurrence within the meaning of s. 43?*
- (iv) *Was the Board obliged to consider the option of restricting the exclusion order to one, two or three of the categories of s. 47?*

34. The appellant submitted that an investigation of the type envisaged under s. 43 of the Act did not precede and, in its result, did not ground the proposal to make an exclusion order pursuant to s. 47 of the Act. Relying on *McDonald v Bord na gCon* and the Attorney General [1965] I.R. 217, as authority for his position, the appellant argued that before the finding of any investigation conducted under the Act can be relied upon as a justification for the making of an exclusion order, such an investigation must have been conducted in accordance with the dictates of natural justice and decided objectively. In *McDonald*, Walsh J. had considered what must precede the procedure set out in s. 47 and stated that 's. 47 cannot be read divorced from ss. 43, 44, 45 and 46.' The balance of the appellant's submissions may be summarised thus. Under s. 43 of the Act, the Board may cause 'any occurrence brought to its notice in relation to any matter connected with the greyhound industry to be investigated in such a manner as the Board thinks proper'. As the Act contains no special definition of 'occurrences', the word must be given its natural meaning. Consequently, the subject matter of a s. 43 investigation can only be some happening or incident or event.
35. The letter of the 6 March 2017 stated that the investigation was into the implications of the outcome of the Australian proceedings for the integrity of the Irish Greyhound Industry. Such an investigation is not an investigation into an 'occurrence' as an investigation into 'implications' is not an investigation into a happening or incident or event. Consequently, no s. 43 investigation took place and one was required before the s. 47 process commenced. In the letter of 6 March, the Board requested the appellant to submit his observations, in writing. It was, in reality, requesting the appellant to make the type of representations envisaged under s. 47 (2) of the Act without having carried out a s. 43 investigation. The true nature and extent of the 'investigation' is revealed in the letter of 24 January 2018 from the Board to the ICC. The Board maintained that the investigation commenced 'within the context of a Kennelhand Authorisation application' and, as such, the appellant was wholly unaware that any investigation had commenced at that time. Finally, the application of the *McDonald* judgment means that the Board was obliged to consider the option of restricting the sanction to one or two of the three sanctions identified in s. 47. It had failed to consider that option and the decision to exclude the appellant from all three activities specified in s. 47 was, therefore, fundamentally flawed.

36. The Board submitted that the appellant had not identified any error in the High Court judgment and that the appeal constitutes a re-running of the judicial review application. Its submissions may be summarised as follows. An investigation was conducted prior to the issuing of the exclusion order and it was conducted in accordance with the principles of natural justice. The appellant was put on notice of the investigation and was afforded an opportunity to participate therein. He was also advised, in advance, of the power of the Board to make an exclusion order. He participated in the investigation with the benefit of legal representation and he availed of the opportunity to be heard by way of submissions. Both respondents complied with the process stipulated within s. 47. There is no basis nor merit to the appellant's contention that the subject matter of the Board's investigation did not constitute an 'occurrence' within the meaning of s. 43. Pursuant to s. 43, the Board is given a broad scope and the appellant has wholly misconstrued the Board's investigation. The investigation commenced by letter of 6 March 2017 and this was not in the context of the kennel hand authorisation application, as submitted by the appellant. The Board moved to commence the s. 43 investigation once the kennel hand authorisation application had been determined. The contention that the Board ought to have considered the option of restricting the exclusion order is devoid of any substance nor is it based on any grounds upon which judicial review was sought. It cannot, therefore, be pursued in this appeal.
37. Submissions from the ICC were to the effect that the decision in *McDonald* makes it clear that '*the Board is the only body which is to consider the representations, if any, made by the person affected by the proposed exclusion order*'. Consequently, it had no competence to consider representations made by the appellant. It had carefully considered the file submitted to it by the Board and had satisfied itself that the Board was entitled to make the exclusion order in question. Its consent to the exclusion order, notified to the Board on 10 May 2018, represents a proper and careful exercise of the statutory powers conferred upon the ICC under s. 47(1) of the Act.

Relevant Statutory Provisions

38. Central to the issues arising in this appeal are ss. 43 and 47 of the Act. Section 43 provides:

- "(1) *The Board may cause any occurrence brought to its notice in relation to any matter connected with the greyhound industry to be investigated in such manner as the Board thinks proper.*
- (2) *Where the Board intends to have any matter connected with the breeding, registration, identification or coursing of greyhounds or any matter within the scope of rules made by the Club relating to greyhound racing or to the training of greyhounds for reward investigated pursuant to subsection (1) of this section, the Board shall notify such intention to the Club.*
- (3) *The Club may cause any occurrence brought to its notice in relation to any matter connected with the breeding, registration, identification or coursing of greyhounds or any matter within the scope of rules made by the Club relating to greyhound*

racing or to the training of greyhounds for reward to be investigated in such manner as the Club thinks proper.

- (4) *If a matter is being investigated at the instance of the Board, it shall not be investigated at the instance of the Club and, if the matter is already the subject of an investigation at the instance of the Club, the latter investigation shall cease.*
- (5) *The Club shall communicate to the Board, if so requested, the result of any investigation made at the instance of the Club.*
- (6) *For the purposes of an investigation under this section, the person conducting the investigation may, by notice served on any person, require that person to furnish to him any information which he may reasonably consider necessary and specifies in the notice.*
- (7) *A person who—*
 - (a) *fails or refuses to furnish any information within his knowledge which he is required to furnish under this section, or*
 - (b) *in furnishing any such information, furnishes information which, to his knowledge, is false or misleading in any material particular,*

shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding twenty pounds.
- (8) *The Board may publish in any manner which it considers proper the result of any investigation made under this section.*
- (9) *The Club may publish in any manner which it considers proper the result of any investigation made under this section in relation to any matter connected with the breeding, registration, identification or coursing of greyhounds or any matter within the scope of rules made by the Club relating to greyhound racing or to the training of greyhounds for reward.”*

39. The power of the Board to make an exclusion order is provided for under s. 47 of the Act which provides: -

“(1) The Board, with the consent of the Club, or the Club, with the consent of the Board, may by order (in this section referred to as an exclusion order) prohibit a person from all of the following: -

- (a) *being on any greyhound race track,*
- (b) *being at any authorised coursing meeting,*
- (c) *being at any public sale of greyhounds.*

- (2) *Where the Board proposes to make or to consent to an exclusion order, the Board shall serve notice of the proposal on the person concerned and shall, if any representations are made in writing by such person within seven days, consider the representations.*
- (3) *The Board may, after consultation with the Club, revoke any exclusion order made by the Board.*
- (4) *The Club may, with the consent of the Board, revoke any exclusion order made by the Club.*
- (5) *Where an exclusion order is made by the Board, the Board—*
 - (a) *shall cause notice of the making of the order to be served on the person to whom the order applies, and*
 - (b) *may cause notice of the making of the order to be served on any other persons whom the Board thinks proper to be notified.*
- (6) *Where an exclusion order is made by the Club, the Club—*
 - (a) *shall cause notice of the making of the order to be served on the person to whom the order applies, and*
 - (b) *may cause notice of the making of the order to be served on any other persons whom the Club thinks proper to be notified.*
- (7) *Where a person to whom an exclusion order applies is found on any greyhound race track, any person acting under the direction of the licensee under the greyhound race track licence relating to the track may remove such first-mentioned person therefrom and for this purpose may use such force as may be reasonably necessary.*
- (8) *Where a person to whom an exclusion order applies is found at any authorised coursing meeting, any person acting on the direction of the person holding the meeting may remove such first-mentioned person from the coursing ground and for this purpose may use such force as may be reasonably necessary.*
- (9) *Where a person to whom an exclusion order applies is found at any public sale of greyhounds, any person acting under the direction of the person conducting the sale may remove such first-mentioned person therefrom and for this purpose may use such force as may be reasonably necessary.”*

Legal Principles

40. The principles of natural and constitutional justice and the requirements thereof have long been the subject of consideration by the superior courts. In *Re Haughey* [1971] I.R. 217, Ó Dálaigh C.J. confirmed that Article 40.3 of the Constitution of Ireland provides ‘a guarantee to the citizen of basic fairness of procedures.’ In *Glover v BLN Ltd* [1973] 1

I.R. 388, Walsh J. observed that *'public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures'*. That guarantee to the citizen of basic fair procedures was reiterated in *Kiely v Minister for Social Welfare* [1977] 1 I.R. 267, wherein Henchy J. noted that whilst tribunals exercising quasi-judicial functions are frequently allowed to act informally by receiving unsworn evidence or ignoring courtroom procedures, *'they may not act in such a way as to imperil a fair hearing or a fair result'*.

41. It was this requirement for basic fairness of procedures that was central to the Supreme Court's judgment, eight years earlier, in *McDonald v Bord na gCon*. The applicant in *McDonald* had sought a declaration that s. 47 was repugnant to the Constitution. Delivering the judgment of the court, Walsh J. set out the background to the Act noting that its fundamental purpose was to develop, improve and regulate the greyhound industry. Accepting that an exclusion order could affect the rights of the prohibited person in that it might restrict his existing right to trade or his right to enjoy some benefits contracted for, the learned judge observed that:

"Such a possible result is sufficient to require that the procedure which can lead to that result must conform to the principles of natural justice. In the context of the Constitution natural justice might be more appropriately termed constitutional justice and must be understood to import more than the two well established principles that no man shall be a judge in his own cause and audi alteram partem."

42. Walsh J. then considered the subject of irregularities and abuses within the industry noting that these issues were dealt with in ss. 43 to 47 of the Act. On the specific interplay between s. 43 and s. 47, he stated:

*"When the Board proposes to make or consent to an exclusion order according to the procedure described in s. 47, sub-s. 2, the stage where there is a factual determination in accordance with principles of natural justice has already been passed. **One therefore must look for what comes before this.** Sect. 47 does not itself refer to any other stage of the matter prior in time to the proposal to make or consent to the exclusion order. If, in fact, s. 47 stands alone and there is no earlier stage it would suggest that the Board is entitled to act completely arbitrarily and without reference to the person concerned. One must therefore see if that is borne out by the terms of the statute. In the view of the Court it is not. As has been pointed out earlier in this judgment, **s. 47 cannot be read divorced from ss. 43, 44, 45 and 46. It is quite clear that a decision on the factual determination grounding the proposal to exclude a person must be the result of some form of consideration of the matter.** One must look to the other sections to ascertain if there is any provision made for an inquiry, investigation or consideration of the type which would ordinarily precede such a factual determination. In the view of the Court ss. 43 and 44 provide the answer. **The type of investigation envisaged in ss. 43 and 44, while not confined to***

*matters which must ordinarily or even necessarily lead even to the consideration of making an exclusion order, or confined to what may loosely be referred to as contentious matters, **must precede and in its result must ground the proposal to make an exclusion order under sect. 47.** The wording of the provisions of ss. 43 and 44 does not exclude the application of the principles of natural justice to these investigations. While the Board may determine the manner in which the investigation shall be carried out the clear words or necessary implication which would be required to exclude the principles of natural justice from such investigation are not present in the sections.” (Emphasis added.)*

43. Noting that investigations contemplated by s. 43 of the statute are confined to ‘occurrences’ Walsh J. observed: -

“There is no special definition in the Act of ‘occurrence’ and therefore, giving it the normal or natural meaning, it means that the subject-matter of the investigation can only be some happening or incident or event. Furthermore, according to s. 43, so far as the Board is concerned, it has power to investigate such an event or incident only if it is connected with the greyhound industry. [...] Within these various limitations the incident or event must be one which may reasonably be regarded as injurious to or calculated to injure the greyhound industry in any of the several aspects of it which are dealt with in the Act. While this is not expressly stated in the Act it is a necessary implication because the eventual result may be the imposition of a disability on some person within that industry and, in the absence of contrary indication, that suggests that it is only in respect of some injury or conduct calculated to injure that industry.”

44. The Supreme Court in *McDonald* confirmed that unless it can be expressly read from the statute, the investigating authority cannot be deemed to have conferred upon it an unqualified discretion. The unambiguous wording required for such an authority is not set out in the sections. In these circumstances: -

*“The result or finding of such investigation is one which has imposed upon it an objective condition precedent of fact. Before the finding of any such investigation can be relied upon as the justification for an exclusion order it must have been conducted in accordance with the dictates of natural justice and have been decided objectively. When these conditions have been observed the Board [...] may make the exclusion order provided for by s. 47 **on the result of such investigation** if the matter has been concluded or decided against the person concerned even though the investigation may not have been conducted by the Board [...] itself, but may have been investigated at the direction of the Board [...] or by the authorised officer.” (Emphasis added.)*

45. In the decades since *McDonald*, procedural fairness has been the subject of many cases and was considered, for example, in *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1 wherein Denham C.J. observed that the common law principles of natural justice have evolved into fundamental principles of constitutional law. Procedural justice, however,

does not require that investigations in every case follow precisely the same format. Different cases may, legitimately, involve different procedures. So, for example, in *V.J. v. Minister for Justice and Equality* [2019] IESC 75, O'Donnell J. considered the different approaches taken by the State when dealing with applications for asylum and applications for subsidiary protection. He held that '*what is required is that an applicant must have an opportunity of making his or her case*'. Whether an interview or oral hearing is required depends on the nature of the case made. He was satisfied that applications for subsidiary protection depended on a status the applicants shared with many others, rather than on any of their individual characteristic. '*That feature of the case did not, therefore, require an interview, still less an oral hearing.*'

46. In *A.P. v Minister for Justice and Equality* [2019] IESC 47 Clarke C.J. helpfully summarised at para. 4.3 the type of material to which a person potentially affected by a public law decision is entitled: -

"But it is also clear that a person who may potentially be directly and adversely affected by a public law decision is entitled to be heard in the decision making process and, in that context, will ordinarily be entitled to be informed of any material, evidence or issues which it might be said could adversely impact on their interests in the decision making process. See, inter alia, the judgments of this Court in the State (Gleeson) v Minister for Defence [1976] I.R. 280, Kiely v Minister for Social Welfare [1977] I.R. 267 and State (Williams) v Army Pensions Board [1983] I.R. 308."

Discussion

47. The central questions in this appeal are whether an appropriate investigation pursuant to s. 43 grounded the proposal to make the exclusion order pursuant to s. 47 and whether the procedure adopted by the Board satisfied the requirements of natural and constitutional justice as identified and applied in the case law. In the first instance, consideration must be given to whether the Board's approach was sufficiently compliant with the statute, on the one hand, and in accordance with the procedural stipulations articulated by the Supreme Court in *McDonald*, on the other. The appellant's fundamental complaint is premised on the assertion that the Board did not conduct any or any proper investigation such as to satisfy the requirements of s. 43 before it decided to make an exclusion order under s. 47. In this regard he made several arguments. He submitted that the nature of the s. 43 investigation was unclear and that there was a mixing or fusion of the kennel hand licence process with the s. 43 procedure. He argued that the Board slipped from a s. 43 investigation into a s. 47 process without having completed the former. Fundamental to his criticism of the procedures adopted by the Board was its failure to produce a report or a determination at the end of the s. 43 process, absent which, in his view, the s. 47 exclusion order was bad in law. In all this, he claims that the approach thus taken by the Board failed to meet the standard stipulated by the Supreme Court in *McDonald* as being necessary prior to the making of a s. 47 exclusion order.
48. The Board, on the other hand, submitted that when viewed against the facts of what actually occurred, the appellant's argument constitutes a technical, dry and abstract

discussion about the requirements of due process in the context of ss. 43 and 47 of the Act, without acknowledging the very particular background to the case. That background here is that the appellant had submitted to the jurisdiction of two different competent investigations into the underlying issue of live baiting. The first consideration, in the Board's view, must be the recognition of the fact that the appellant admitted that he was guilty of participating in abhorrent and inappropriate wrongful acts of animal cruelty.

49. In considering the nature of the investigation that occurred in this case, the starting point of any analysis must be the statute itself. The Supreme Court in *McDonald* confirmed that s. 47 cannot be read in isolation or '*divorced from s. 43*'. A perusal of s. 43 discloses that it is drafted in rather broad terms permitting the Board to investigate '*any occurrence*' that comes to its attention, in relation to '*any matter*' connected with the industry. Importantly, the statute confers upon the Board a wide latitude in determining how an investigation is to be conducted. It may investigate '*in such manner as the Board thinks proper*'. Nothing is cast in stone in terms of any prescribed format. Under s. 43(6) a person conducting the investigation may require any person served with notice to furnish to him or her any information which he may, reasonably, consider necessary. The Board also has a wide latitude in determining how to proceed in terms of the publication of the result of an investigation. Drafted in permissive terms, s. 43(8) provides that the Board *may* publish the result '*in any manner which it considers proper*'.
50. In its analysis of the relevant provisions, the Supreme Court in *McDonald* confirmed that what is required under s. 43 is '*some form*' of investigation that complies with the requirements of natural justice. It held that '*a decision on the factual determination grounding the proposal to exclude a person must be the result of **some form of consideration of the matter***'. Thus, neither the Act nor the Supreme Court specifies in any detail the particular type of investigation that is required nor the format which any such investigation must take. Walsh J. noted that it is for the Board to '*determine the manner in which the investigation shall be carried out*' subject only to compliance with the principles of natural justice.

The nature of the investigation

51. In measuring what occurred in this case against the broad statutory provisions and the general stipulations in *McDonald*, a number of observations are apposite. First, the documentary evidence of what '*came before*' the making of the exclusion order demonstrates that, from the outset, the Board, expressly, '*tied*' its contemplation of making a s. 47 order with the requirement to conduct a s. 43 investigation. As early as 24 February 2017, it specifically linked the '*investigation*' and the '*proposal*'. The minutes of its meeting of that date record that '*Following **the Board's approval last year of a Section 43 investigation with a view to an exclusion order***' the Director of Regulations had agreed to write to the appellant '*to advise him (of) the reasons for a Section 47 **exclusion order being considered** and request his formal **representations.***' (Emphasis added.) There was, therefore, a clear link and certainly '*no divorce*' between ss. 43 and 47 in the Board's procedures.

52. Furthermore, the decision on the factual determination which grounded the Board's proposal to exclude the appellant resulted, undoubtedly, from 'some form of consideration of the matter' as required by *McDonald*. The 'form' which the Board's consideration of the matter took can be traced from an analysis of the pertinent facts, several of which are as follows.
53. On receipt of papers from the Australian authorities, the Board's Regulation and Welfare department sought approval for a s. 43 investigation as early as 26 July 2016. Sometime later in 2016 the Board granted that approval (see para. 6). Three months after the request for approval was sought, the appellant applied for a kennel hand licence. Consideration of that application involved a review of the Australian proceedings and a detailed interview with the appellant. At a Board meeting on 24 February 2017 both the kennel hand application and the s. 43 investigation were considered by the Board. Its discussions on both topics were minuted, separately. Separate letters were sent to the appellant concerning the Board's refusal of the kennel hand licence and its proposal to conduct a s. 43 investigation. On 6 March 2017 the s. 43 investigation commenced. The appellant was notified of this and his submissions were sought. The appellant did not reply. On 30 June 2017, a second letter concerning the s. 43 investigation issued. Once again, the Board invited the appellant to make submissions. He made submissions, in writing, on 5 and 6 July 2017. At a Board meeting on 27 July 2017, those submissions were considered together with a significant corpus of other information, which included, the appellant's own admission of having engaged in live baiting. The Board came to a decision on foot of its considerations. That decision, namely, its proposal to make an exclusion order, was noted in the Board's minutes. It was communicated to the appellant on 15 August 2017. He was advised of his right under s. 47(2) to make submissions on the proposal within 7 days. He exercised that right and he made submissions thereon. On 5 October 2017, the Board informed him of its having considered those submissions at its meeting on 21 September 2017 and of its proposal to seek the consent of the ICC to the making of an exclusion order. Following communications between the Board and the ICC, including, the Board's clarification that the originally anticipated 'three-person' investigation did not proceed, the ICC furnished its consent. An exclusion order was made on 24 May 2018.
54. In the course of the hearing, the court's attention was drawn to the Board's own admission to the ICC that the three-person investigation team originally envisaged did not proceed. The ICC's minutes of 9 May 2018 record: '*[T]he Committee set up by the IGB did not in fact carry out an investigation.*' On an initial perusal of the minutes, that reference may be interpreted as meaning that no investigation was carried out. However, having sought clarification, specifically, on the point of the three-person investigation team, it seems to me that a more reasonable interpretation of that minute is that the ICC was recording the fact that 'that' committee (i.e. the three-person investigation team) did not carry out the investigation rather than recording that no investigation whatsoever was carried out. The ICC's minutes go on to note that copies of the Board's minutes had been circulated—thus referencing the Board's minutes as reflecting the outcome or 'result' of

the investigation. Its actions suggest that the ICC believed that an investigation had taken place.

55. In this appeal, the appellant refers, consistently, to documentation from the Board and from the ICC in support of his contention that an investigation of the type envisaged under s. 43 of the Act did not precede the proposal to exclude him. This approach to the evidence is problematic. As a matter of principle and of procedure, it is not appropriate for a party to an appeal to attempt to discount or undermine evidence by reference to the construction of documents in circumstances where that party failed, at trial level, to challenge the person tendering such evidence. The recent judgment of the Supreme Court in *RAS Medical Limited v The Royal College of Surgeons in Ireland* [2019] 1 I.R. 63 supports this view. Clarke C.J. pointed out (at para. 90) that just as it is inappropriate to argue in a trial conducted on oral evidence that the evidence of a witness should not be accepted, either on grounds of lack of credibility or unreliability, without having given that witness a fair opportunity to answer any issues arising in that context, so also is it impermissible to ask a decider of fact (in that case, the trial judge) to determine contested questions of fact on the basis of affidavit evidence or documentation alone.
56. The Statement of Opposition delivered by the Board in this case refers, repeatedly, to an investigation and that Statement was attested to by Mr. Dollard on behalf of the Board. Indeed, Mr. Dollard, in his affidavit sworn on 20 September 2018, avers, specifically, to the fact that the Board 'did conduct the Investigation' (para. 25). The investigation, he avers, 'was communicated under cover of letter dated 6 March 2017' (para. 16). The appellant 'did partake in the Investigation' and written submissions were sent on his behalf (para. 18). His concluding averment was that: '*These Judicial Review proceedings appear to be premised on the mistaken belief that the IGB did not conduct the Investigation. The Applicant is clearly mistaken in this regard*' (para. 32). Mr. Histon swore an affidavit on behalf of the ICC on 28 September 2018 and, in addressing the request for the ICC's consent to the making of an exclusion order he, too, avers, repeatedly, to the s. 43 investigation conducted by the Board. He also lists, in detail, the documents which were contained in the 'investigation file' which the ICC received from the Board.
57. The applicant did not cross-examine any of the respondents' deponents at the trial. It was, in my view, incumbent upon him to challenge their evidence before the High Court before asking this court to discount it by reference to a construction of the documentation in the case. To quote, again, from Clarke C.J. in *RAS Medical*: -

"[I]t is frankly not appropriate for parties to enter into controversy as to the facts contained either in affidavit evidence or in documents which are admitted before the court without successful challenge, without exploring the necessity for at least some oral evidence. If it is suggested that there are facts which are material to the final determination of the proceeding and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested

facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contested fact.” (at para. 93).

The appellant’s failure to cross-examine the respondents’ deponents during the trial precludes him from seeking to undermine their sworn evidence, on appeal, by reference to a construction of the documents in this case.

58. I am satisfied on the evidence that an investigation pursuant to s. 43 of the Act preceded the Board’s proposal to exclude the appellant. The fact that the form which the investigation actually took did not follow, precisely, the format originally anticipated when approval was sought in July 2016 cannot be said, in and of itself, to have undermined or diminished the validity of the investigation that ensued. The Act refers only to *‘the person carrying out the investigation’* and the Board is free to investigate *‘in whatever manner it considers proper’*. The correspondence on file indicates that the Board’s Head of Regulation was *‘the person’* who wrote to the appellant seeking his submissions and who reported matters back to the Board for its consideration and, indeed, Mr. Dollard in his Affidavit of 20 September 2018 avers that *‘the Investigation was conducted by the Regulation Department of the IGB’* (para. 25). What *McDonald* requires is *‘some form’* of consideration. In view of the detailed steps outlined above (para. 53) I cannot find that any adverse consequences for the appellant flowed from the Board’s departure from the originally anticipated format for the s.43 investigation.

Investigating an ‘occurrence’?

59. The appellant argued the investigation which occurred in this case concerned the *‘implications’* of the outcome of the VCAT ruling for the Irish greyhound industry and that, as such, it did not involve an investigation into an *‘occurrence’* pursuant to s. 43. The heading on the Board’s letter of 6 March 2017 referred to two matters—a s. 43 investigation and the *‘implications’* of the outcome of the appellant’s Australian court case for the integrity of the Irish industry. The outcome of that case was that a ten-year disqualification period had been imposed upon the appellant. An investigation into the implications of that ban for the integrity of the Irish industry does constitute an investigation into an event that happened, into *‘an occurrence’*, and the background thereto and implications thereof were matters of interest to the Board in view of its statutory remit. I am satisfied that, contrary to the appellant’s assertion, the investigation which ensued was an investigation into an *‘occurrence’* in accordance with s. 43(1) of the Act.

A fusion of processes?

60. During the course of the hearing counsel for the appellant advanced an argument to the effect that the contours of the s. 43 investigation were unclear and that it was '*up and running*' without the appellant knowing that it had started. In support of this submission, reliance was placed on the minutes of the Board meeting of 24 February 2017. There was, it was argued, a '*mixing of processes*' with the kennel hand authorisation process and the s. 43 investigation being '*the one thing*'. However, an analysis of the minutes of the Board meeting of 24 February 2017 fails to disclose anything to suggest that a s. 43 investigation was '*up and running*' as of that date, but only that 'approval' for such an investigation had been granted. A reminder of this grant had already appeared in the minutes of the previous month's Board meeting. That 'approval' for a s. 43 investigation had been sought in July 2016 upon receipt of the VCAT papers, confirms my view that a s. 43 investigation was contemplated or envisaged by the Board long before it had received the appellant's kennel hand authorisation application. The actual grant of approval for a s. 43 investigation had already been made by the time the Board came to examine the application for a kennel hand licence (see para. 7 above).
61. In support of his contention that both processes were mixed, the appellant also relies upon the Board's letter to the ICC of 24 January 2018 wherein it referred to the matter of the s. 43 investigation as having been considered '*within the context of a kennel handling authorisation application*'. It is true that the Board did use the phrase '*in the context of*' and what, precisely, it intended in so doing is not immediately evident. What is clear, however, is that, throughout its entire dealings with the appellant, the Board regarded the s. 43 investigation as a separate process. The Board minutes of one of its earliest meetings concerning this case, namely, those of 24 February 2017, demonstrate, expressly, that the kennel hand application and the s. 43 inquiry were considered separately by the Board. In fact, they were listed as individually numbered items in the minutes (see para. 11). Those minutes also disclose the Board's resolution to *write two separate letters* to the appellant recording its decision in respect of each issue. The fact that both matters were discussed at the same meeting does not transform them into one and the same thing. The fact that an inquiry into a person's fitness to hold a licence runs parallel to an investigation into the implications of that person's conviction for the integrity of the greyhound industry, does not mean that those matters constitute '*the one thing*'. The fact that each distinct process involved consideration of materials and evidence that were common to both does not, in my view, undermine the validity of either. The first inquiry centred on the appellant's fitness to hold a licence and the second concerned the implications of the VCAT ruling for the integrity of the greyhound industry. Since the subject matter of both inquiries concerned the conduct and character of the appellant, it is inevitable that materials flowing from the live baiting incident would be relevant to both.
62. Viewed in the context of all of the documentary evidence in the case, the Board's correspondence that states that the s. 43 investigation had been considered '*within the context of*' the kennel handling authorisation application, suggests that considerations in each procedure intersected and that both processes occurred or crossed over, one with the other, in terms of time. Two processes running on parallel tracks that intersect and

cross at particular junctions are not reduced to one, by reason of such intersection. This is all the more so where two distinct destinations are identified and, indeed, where those destinations are reached at different times.

63. It must also be acknowledged that the letter of 24 January 2018 contained information concerning matters which related, specifically, to the s. 43 investigation *only*. In particular, the Board referred to its letter to the appellant of 6 March 2017 which was, notably and noted to be, separate from the kennel hand authorisation process (see paras. 11 and 14 above). That letter had requested the appellant to submit his observations regarding the outcome of the Australian decisions for consideration by the Board. In identifying matters that were of 'particular relevance' to the Board's consideration of the making of the exclusion order, the letter of 24 January 2018 listed issues which were common to both processes. However, equally evident is the fact that matters which were distinct from and which post-dated the kennel hand authorisation process were also identified as being of particular relevance to the Board's consideration. Investigating the appellant's fitness to hold a licence, which included affording him an opportunity to make his case both orally and in writing, did not, in my view, have the effect of fusing or overtaking or mixing or diminishing the s. 43 investigation, approval for which had been granted long before the licence application had been made. The appellant's submission that both processes constituted 'the one thing' is, therefore, misconceived.

The absence of a report

64. The appellant submitted that in the context of a power to exclude him from the industry, there is a requirement that a report or an instrument which authenticates the outcome of a s. 43 investigation comes into existence. He argued that the Board had engaged in a s. 47 procedure without completing the process under s. 43. There was, he claimed, 'no outcome' to the investigation, no authentication of a decision, no reportage of the result. Absent an outcome of this nature, the appellant claimed that his right to natural and constitutional justice had been breached. The requirement that there be a 'determination' prior to the making of an exclusion order was underscored, he claimed, by the Supreme Court in *McDonald* where, in considering the procedure prescribed in s. 47(2), it stated:

"This procedure is one for considering representations in writing rather than in the nature of a plea to mitigate the proposed order and is a stage in the proceeding subject to the determination which has led to the point where the Board proposes to make . . . an exclusion order."

The appellant stressed that absent such a 'determination' or 'notation', the exclusion order made against him was invalid. In his view, *McDonald* mandates that before such an order can proceed, the Board must complete a s. 43 investigation in its entirety and must produce an 'adjudication' or 'determination'—an end product, so to speak. He also argued that the result of that investigation must be communicated to the person in respect of whom a s. 47 process is envisaged. In this case, he submitted, the Board having instituted a s. 43 investigation then left it in abeyance. Instead, in its letter of 30 June 2017, it had moved into the s. 47 process without having taken the s. 43 process to its

necessary conclusion. It was not entitled so to do. That letter, he claimed, was a 'step' undertaken pursuant to subs. (2) of s. 47 without the s. 43 process having been completed.

65. The Board argued before the Court that there is no precondition in s. 47 that a s. 43 report be communicated. There is, in fact, no prescribed format at all for a s. 43 investigation. It cannot, therefore, be said that the form of investigation chosen by the Board must result in the issuing of a formal report in the manner contended for by the appellant. What is required, according to the Board, is that there be an investigation that complies with natural justice and a determination upon which a proposal to exclude is based.
66. As evidence of a 'result' of the s. 43 investigation, counsel for the Board referred to the meeting of 27 July 2017 at which the Board had considered the judgment of the VCAT, the Killeshin interview and the submissions it had received from his solicitors. It also considered a body of additional information all of which constituted a file or a collection of records arising out of the s. 43 investigation. Whereas there was no formal document entitled 'Report of Investigation', counsel argued that the Board's minutes of that meeting of 27 July 2017 constitute evidence that the Board had reached a 'result' on the investigation.
67. It must be recalled that the Act itself does not refer to or require the production of a formal report or notation or instrument. What the Act refers to, repeatedly, is the 'result' of an investigation. What falls to be considered then is whether the s. 43 process in this case led to a 'result' which, in turn, grounded the proposal of the Board to make an order under s. 47.
68. To my mind, the appellant is mistaken in his submission that the letter of 30 June 2017 constituted a 'step' in the s. 47 process thereby by-passing the requirement of a 'result' under s. 43. It is evident from that correspondence that the Board was writing a follow up letter to its previous one of 6 March and that it was inviting, once again, submissions from the appellant in the context of its s. 43 investigation. It informed the appellant that at the end of the relevant 7-day period the Board will consider '*the result of the investigation*'. That 'result' was the subject of a detailed discussion by the Board at its meeting on 27 July 2017. By that date, it had received submissions from the appellant's solicitors. All matters that were discussed by the Board in the context of the investigation are listed in the minutes of the Board meeting. It considered the live baiting incident in Australia, the findings of the Australian authorities, the reasoning of those decisions and the mitigating factors that those authorities had taken into account. It also considered all the submissions made by the appellant both to the Australian authorities and to the Board. Legal precedent and 'the proportionality' of the penalty to the offence were also discussed. Furthermore, reference is made in the minutes to the 'file' on the Australian proceedings and to the Board's 'pack' and the papers contained therein. This 'pack' had been sent to the Board prior to the meeting and the papers were 'taken as read'. At the end of the process, the minutes record that '*after due consideration the Board decided to*

proceed with the exclusion order'. The 'result' of the investigation was one that was reached following an in-depth discussion across a range of issues and submissions. The 'result' was evident in the outcome—namely, the decision to proceed with the exclusion order. It is at the end of this process that the 'step' required pursuant to s. 47(2) was taken and not, as alleged by the appellant, on 30 June. On 15 August 2017 the Board wrote to the appellant advising him of its proposal to make an exclusion order and confirming that any written representations thereon would be considered by the Board if received within 7 days.

69. Having regard to the foregoing, whilst accepting that no formal report issued, I am satisfied that there was an investigation, the 'result' of which led the Board to a determination which grounded its proposal to make an exclusion order in respect of the appellant. I am further supported in this view by an averment made by the appellant in his affidavit which was sworn on 23 July 2018 in the context of the judicial review proceedings. He stated (at para. 53):

"It appears from a minute of a meeting of the Board of the first named respondent held on the 27th of July 2017 that the Board, having considered the Section 43 investigation, and the implications of the outcome of the Section 43 investigation, determined to proceed with an Exclusion Order against me."

In circumstances where the Act refers only to the 'result' of a s. 43 investigation and McDonald requires only that the proposal to exclude be grounded on a 'result' as distinct from any formal report or instrument, I am satisfied that a 'result' emerged from the s. 43 investigation in this case and that the Board's proposal to make an exclusion order was based upon that result.

Fair procedures

70. The appellant submitted that he was deprived of fair procedures insofar as the 'result' of any investigation that was conducted under s. 43 was never communicated to him. As noted above, the Act does not contain any requirement that a report representing the result of the s. 43 investigation be sent to the subject thereof nor is there any requirement in the statute that such a subject be permitted to make submissions on the 'result'. Furthermore, a close reading of *McDonald* confirms that what is required is 'a decision on the factual determination grounding the proposal to exclude a person' which 'must be the result of some form of consideration of the matter'. There must be a decision grounding the proposal and that decision must result from 'some form' of consideration that is constitutionally compliant. Nowhere in *McDonald* is it stated, expressly, that the 'result' must be contained in a report and furnished to the subject. What the Supreme Court in *McDonald* held was:

"The result or finding of such investigation is one which has imposed upon it an objective condition precedent of fact. Before the finding of any such investigation can be relied upon as the justification for an exclusion order it must have been

conducted in accordance with the dictates of natural justice and have been decided objectively.”

71. Insofar as the investigation must have been conducted in accordance with natural justice, the question arises as to whether that requirement obliges the Board, in every instance and regardless of context, to inform the subject of a s. 43 investigation of the 'result' thereof before it proposes to make an exclusion order. Since context is crucial in dictating what natural justice requires, it must be considered that not every case will require a separate notification of the 'result' (s. 43) and the 'proposal' (s. 47). In this case, where the core facts were not in dispute, the context was such that there was a thin line between the 'result' of the investigation and the 'proposal' to exclude. Consequently, the right to make submissions under s. 47(2) was sufficient to protect and vindicate the appellant's right to be heard.
72. Admittedly, not every s. 43 investigation will result in a proposal to exclude and, therefore, not every 'result' will trigger a s. 47(2) opportunity to be heard. As Mr. Dollard averred, the Board has a number of statutory powers available to it '*depending on the gravity of the circumstances*' (para. 6 of his affidavit of 20 September 2018). I make no comment as to whether there may, in future, be cases where different facts may lead to a different conclusion as to what natural justice requires. Suffice to say that the context in this case did not give rise to a dual entitlement on the part of the appellant, firstly, to make submissions on the s. 43 'findings' and, thereafter, to make submissions in relation to the Board's proposal. It is difficult to envisage what submissions could have been made in circumstances where the core findings on the appellant's impugned conduct were not in dispute. In this non-contentious case, the appellant had a right to make submissions on the 'result' of the investigation which said result was the decision of the Board to propose an exclusion order. This is, precisely, what the appellant was afforded.
73. It must also be recalled that the facts in *McDonald* may be contrasted with the facts in this case. In *McDonald* the facts were disputed and entries concerning a greyhound's identity card and the dog's true racing history were contested. The 'result' of the investigation clearly came down to a preference of one account over the other. By contrast, the investigation that took place in this case was not directed towards finding out whether or not the appellant had been involved in live baiting and, if so, what the implications of such a finding might be for the integrity of the greyhound industry. The Board had before it the decision of the VCAT and all the factors which that Tribunal had taken into account in deciding to reduce a life time ban to a ten-year period of disqualification.
74. Furthermore, and, in my view, crucially, the Board also had before it the appellant's admission of guilt in respect of his involvement in live animal baiting—a practice which in this jurisdiction is a criminal offence under the Animal Health and Welfare Act 2013. I do not consider that the Board was obliged, purely for the sake of formality, to inform the appellant, separately, of something which he had already admitted as true. To my mind, it would be an artificial exercise for this Court to insist that the appellant ought to have

been apprised, separately, of the investigation's finding in circumstances where that finding, and his own admission of wrongdoing were so closely interlinked.

75. Compliance with fair procedures is not a 'box ticking' exercise. It is about ensuring that a person receives a fair hearing in whatever format that may take (see *V.J. v. Minister for Justice and Equality*). As Costello J. held in *Doupe v Limerick County Council* [1981] I.L.R.M 456, the *audi alteram partem* principle of natural justice:

*"does not require that every administrative order which may adversely affect rights must be preceded by a judicial-type hearing involving the examination and cross examination of witnesses. It requires that adequate notice of the case which an applicant has to meet be given to him and that an adequate opportunity be afforded to answer any objections which may be taken to his application. And it is clear that **the requirements of the rule may be fully satisfied by the adoption of quite informal procedures.** In some cases an applicant may be entitled to make his submissions orally, in others a written submission will meet the requirements of the rule."* (Emphasis added.)

76. One is, therefore, obliged to consider whether the procedures adopted by the Board which led to the making of the exclusion order were fair having regard to all of the circumstances of this case. A considered review of the papers, pleadings and submissions in this appeal discloses that the appellant was afforded ample opportunity on several occasions to put his case before the Board. He availed himself of this opportunity, initially, in the context of the inquiry into his fitness to hold a kennel hand licence. He submitted a statement concerning his application for authorisation. In addition, he was invited to and attended an interview with the Board's Welfare Officers where, once again, he had an opportunity to be heard. Thereafter, he was afforded further opportunities to put his case to the Board in the context of the s. 43 investigation process. He was invited to do so, initially, by letter dated 7 March 2017. He chose not to reply to this letter. He was further invited to make submissions in the context of the s. 43 investigation by letter of 30 June 2017. On this occasion, through his solicitors, he did reply. On 5 July 2017 he made submissions in relation to the Board's jurisdiction and on 6 July he furnished submissions on the substantive issue. Those submissions and all other submissions made by the appellant were considered by the Board at its meeting of 27 July 2017 and the investigation resulted in a decision by way of a proposal to make an exclusion order against the appellant.
77. In the event of the Board proposing to make an exclusion order against the subject of an investigation, that person has a statutory right under s. 47(2) to make submissions to the Board. That is precisely what occurred in this case. By letter dated 15 August 2017 and pursuant to s. 47(2) of the Act, the appellant was advised of the Board's proposal and of his right to make submissions thereon. The requirements of natural justice and of the Act would have been breached had this step not been taken. The appellant availed himself of the opportunity to make submissions which were considered by the Board at its meeting held on 21 September 2017. Following that meeting, the Board wrote to the appellant

on 5 October 2017 advising him of its proposal to seek the consent of the ICC to the making of the order under s. 47. Having sought clarification in relation to the s. 43 investigation, the ICC furnished its consent and an exclusion order was made on 24 May 2018.

Remaining issues

78. For the sake of completeness, two further matters should be addressed. The appellant's contention that the Board ought to have considered the option of restricting the exclusion order is not supported by the Supreme Court's judgment in *McDonald*. In any event, insofar as this submission is not based on any grounds upon which judicial review was sought I am satisfied that it cannot be pursued in this appeal.
79. Insofar as the appellant's submissions on the role of the ICC are concerned, I am satisfied that the decision in *McDonald* confirms that it is the Board which is the only body with responsibility for considering representations, if any, that are made by a person affected by a proposed exclusion order. Consequently, the ICC had no competence to consider representations made by the appellant nor had he any right to make such representations to that body. The evidence establishes that the ICC carefully considered the file submitted to it by the Board and satisfied itself that the Board was entitled to make the exclusion order in question. Its consent to the exclusion order represented a proper and careful exercise of its statutory powers pursuant to s. 47(1) of the Act.

Conclusion

80. I am satisfied that the appellant knew the case he had to meet in the context of the s. 43 investigation. On no occasion throughout the process did he or his solicitors indicate to the Board that he disputed or contested any of the findings of the VCAT at which he was represented and to which he made submissions and before which he had 'recorded pleas of guilty'. In the light of these facts as presented in this appeal, I am also satisfied that the appellant had every opportunity to present his case to the Board and that he was not deprived of his constitutionally protected right to fair procedures in the context of the s. 43 investigation.
81. For the reasons set out in this judgment, I would dismiss the appeal.

Costello J. and Murray J. agree with this judgment.