

**THE HIGH COURT
JUDICIAL REVIEW**

[2020 No. 533 JR]

BETWEEN

ELIJAH BURKE

APPLICANT

AND

THE MINISTER FOR EDUCATION

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 19th day of August, 2020

Introduction

1. The Covid-19 pandemic has caused dramatic and far-reaching effects on the working, social and family lives of people living in this country. These effects are the result of the various measures that have been taken to prevent and limit the spread of the virus. In the absence of an effective treatment or vaccine, the measures taken are directed towards reducing the assembly and movement of people with the aim of reducing or eliminating the virus.
2. Some 62,000 students were due to sit the Leaving Certificate in 2020. This obviously involved the congregation of significant numbers of people in close proximity in an indoor setting. As the date for the commencement of the Leaving Certificate approached, it was apparent that, though the spread of the virus had been significantly reduced in the community, for reasons of public health, the examination could not take place. For the first time in the history of the State, the Leaving Certificate, due to start in June, 2020, was cancelled.
3. The Leaving Certificate has a central role in the Irish education system. For those who wish to go forward to third level education, the results of the Leaving Certificate are, for the most part, a basis for entry into a particular course and a subsequent career. The importance of the results of the Leaving Certificate cannot be overstated for young people who wish to pursue a particular career or, indeed, for more mature people who may wish to embark on a new and different career. Without a Leaving Certificate, the class of 2020 would have been left stranded so it was imperative that an alternative system be devised to give an accurate assessment, as far as possible, of the standards achieved by exam candidates in various subjects.
4. It is difficult, if not impossible, to replicate the fairness of the Leaving Certificate exam. Students doing the Leaving Certificate exam come from various and diverse backgrounds. Families of some students have the financial means to provide additional education by way of grinds. Other families who do not have such financial means may, with great sacrifice, pay for grinds. Many other families simply cannot afford this. However, at the end of the day, all students do the same exam. The correction of each subject in the Leaving Certificate is done entirely anonymously and according to guidelines which, prior to their adoption, have been considered in detail by relevant experts.

5. The alternative system devised and adopted by the respondent involves the giving of a calculated grade to each student in their chosen subjects. The first step in the giving of a calculated grade is the award of an estimated percentage mark in each subject by a teacher involved in the education of the student. The awarding of an estimated percentage mark necessarily involves knowledge of the capacity and ability of the student in question requiring a lookback at relevant past performance. Having awarded an estimated percentage mark, there is a further "*alignment process*" within the school. After the alignment process, there is a further standardisation process carried out by the Department of Education. Ultimately, a calculated grade is awarded.
6. Not all candidates for the Leaving Certificate attend a school that has numerous staff members, a vice principal(s) and a principal. A number of candidates for the Leaving Certificate (the precise number is not entirely clear but it only makes up a small percentage of those doing this exam) educate themselves, attend "*grind schools*" or, like the applicant, are home educated. To enable such persons to be awarded a calculated grade, the respondent published "*a guide to calculated grades for out of school learners*". This document will be considered in some detail later in the judgment.
7. The awarding by a teacher of an estimated percentage mark to a student requires the exercise of professional judgment. Should the teacher in question have a conflict of interest, for example, being a relative of the student involved, it clearly would not be appropriate for that teacher to award an estimated mark. As to how this issue is addressed is central to this application for judicial review.

The Applicant

8. The applicant is the youngest of ten children, all of whom have been educated at home by their mother, Ms. Martina Burke. Eight of the applicant's siblings had average points in their Leaving Certificates of 520. All have obtained first class honours degrees in the fields of their choice, being: law, arts, education, journalism, economics, science and mathematics. Two have postgraduate degrees from Oxford and the London School of Economics. One is graduating with his PhD in mathematics this year.
9. In his education at home, the applicant states that he followed the Department of Education curriculum and that his home schooling was very similar to in-school teaching. Each day, the timetable was structured to begin at 9:00am and usually finished around 4:00pm. Each day, some six/seven subjects were covered. The applicant's academic calendar was the same as all other secondary schools, including midterms and bank holidays.
10. In his grounding affidavit, the applicant stated that he studied consistently and diligently throughout this Leaving Certificate cycle and hopes to attend NUI Galway to study Biomedical Science or History (with Music). The points required to attain a place in these courses were 533 and 318 respectively last year. On his past performance in mock exams, the applicant expected to obtain the required points.

11. The applicant has always been involved in music and has completed all grades in classical piano. The applicant's achievements in music are evidenced by the fact that he was the overall classical piano cup winner on three different occasions in the Ballina Féis. He was the winner of the RIAM National Composing Competition for three years and has his compositions published in the yearly RIAM Piano Album for Different Grades (2017, 2019, 2020). The applicant is currently studying for an associate diploma in piano teaching.
12. As for extracurricular activities, the applicant took part in public speaking competitions and was the overall winner of the Mayo Association Dublin Inaugural Debating Competition in 2017.
13. The applicant's mother, his teacher, obtained a BA in mathematics and English from UCG in 1981 and a Higher Diploma in Education in 1982. She taught at Tallaght Community School and Greystones Community School from 1982 to 83. Subsequently, she worked as a tutor in Mayo providing private education to children outside the mainstream school system who were home educated and also to those who needed help in different subjects.
14. The applicant's mother has worked as an examiner for the State Examinations Commission since 2016, correcting higher level Junior Certificate and Leaving Certificate English. She also worked for Examcraft, a mock exams company, correcting higher level English and states that she has corrected hundreds of exam papers from schools across the country.
15. In her affidavit before the Court, Ms. Martina Burke states that, in educating the applicant, she followed the mainstream traditional approach and used textbooks, revision books, past exam papers, video and other online resources. The learning was structured and reading, writing, comprehensions, essay writing, maths drills, notetaking and end of term assessments were all part of her approach. She states that she has, what she describes, as "*a significant body of credible evidence available in order to facilitate the calculated grade being provided to him*" (the applicant). Further, she states that the applicant has pre-exam papers or "*mocks*" available along with completed past exam papers, copybooks and notebooks, vocabulary copies and other materials including revision notes which were used to revise before exams took place.
16. The applicant proposed to sit the Leaving Certificate 2020 in the following subjects, all at higher level: Irish, French, German, English, chemistry, biology, mathematics, business and music.

Calculated Grades for Leaving Certificate 2020

17. The Court has to consider two documents published by the respondent. Firstly, "*Guide for Schools on Providing Estimated Percentage Marks and Class Rank Orderings*" (21 May 2020) and "*A Guide to Calculated Grades for Out-of-School Learners*" (June, 2020).
18. The first of these documents sets out the basis upon which calculated grades are awarded to students attending schools. There are two phases in the process, being: "*a school*

based phase" and *"a national standardisation phase"*. As for the *"school based phase"*, it is clear that the school teachers have a central role: -

"The cornerstone of the Calculated Grades model is a reliance on the professional judgment of teachers, including principals and deputy principals, in providing the best possible estimate of how each student is most likely to have performed in the examination if the disruptions caused by the COVID-19 virus had never arisen."

and: -

"A teacher's professional judgment facilitates incorporating a range of available evidence of the likely performance of students, as appropriate. Teachers know their students and are able to balance a variety of evidence in arriving at a professional judgment in relation to each student's expected performance."

The document lists various matters which may inform that professional judgment. In the first instance, each student is awarded an estimated mark in their chosen subjects. Having awarded such a mark, there then follows an *"alignment process"* across classes in the school. This alignment process may cause a teacher to revisit the estimated marks that had been given. The alignment process is subject to oversight by the school principal. Thereafter, this data is submitted to the Department of Education and Skills and calculated grades are awarded to each student.

19. The document provides for what it terms *"conflicts of interest"* as follows: -

"22. Conflicts of interest

The principles of equity, fairness and objectivity are paramount in the calculated grades system. If there is a student in a class about whom there is an actual or perceived conflict of interest involved in giving an estimated mark to, such as a son, daughter, sister, or brother, this should be drawn to the attention of the principal. The teacher may still need to assist in the process, by handing over data or factual information, but should not be involved in any judgment process that relates to that student as an individual. There will be additional oversight by the principal/deputy principal in such cases. ..."

Thus, though there may be a conflict of interest involving a particular student, that student may still be given an estimated mark which will ultimately result in the award of a calculated grade.

20. The second document is a guide to the award of calculated grades for *"Out-of-School Learners"*. Such a document was necessary as a number of students sitting the Leaving Certificate do not attend schools. Such students would not have available to them numbers of teaching staff, a vice principal(s) or a principal. Hence, provision had to be made for these students so as to enable them to be awarded a calculated grade. The system adopted for these students is in many respects similar but in other respects

different to the system for the awarding of calculated grades for those attending schools. The situation involving the applicant would be covered by the terms of this document.

21. This document sets out a number of principles which underpin the calculated grades system. It states: -

- “● Fairness and Equity: The system for calculated grades for out-of-school learners must ensure fairness and equity within this group but also in relation to all other Leaving Certificate students. The system must be such that it neither advantages nor disadvantages, through any grades ultimately awarded, any student in the 2020 Leaving Certificate cohort in its approach and delivery of calculated grades. The arrangements must be as consistent as possible with the general system to ensure fairness and equity.”

and: -

- “● Objectivity: The mechanism for the provision of estimated marks must be objective in the assessment of a student’s expected performance. In the case of out-of-school learners, there must be a range of evidence as similar as possible to the evidence required for the in-school process in order to underpin and support the judgments that are made. All involved must ensure that no bias, unconscious or otherwise, influences the decisions made in relation to a student’s expected performance.”

22. Clearly for “*an out-of-school learner*” there are no classes as such and there is no principal or deputy principal, therefore the system for providing an estimated mark and then a calculated grade has to be different. This was recognised by the document, as follows: -

“4.2 Potential routes, in the context of different tuition settings, for sourcing an admissible estimated percentage mark

...[I]n order to receive an estimate for a subject, you must have engaged in tuition regularly over a sustained period during the course of your study for the Leaving Certificate, in order that there is an appropriate source from which to receive the estimate. You may be required to provide evidence that demonstrates the frequency and regularity of this tuition. The tuition in which you engaged may vary on a subject basis, therefore, the process of obtaining an estimate may differ between subjects.

You may have followed one or more of the following routes:

Route one:

You may have engaged with a centre of learning (grind school, private college etc.) not recognised by the SEC [State Examinations Commission] for examination purposes. In this case, the teacher/tutor may provide an

estimated mark. Oversight on the estimate must be provided by the principal/manager of the centre. One of the people involved in the process must be or have previously been a registered teacher. In the absence of the involvement of a registered teacher, either in your direct tuition or in the centre of education in which you have been receiving tuition, it will not be possible to accept an estimate.

Route two:

You may have engaged with a centre of learning (grind school, private college etc.) recognised by the SEC for examination purposes. ...

Route three:

You may have engaged in tuition with a registered teacher (currently or previously registered) outside of any centre of learning. In this instance, the teacher may submit an estimated percentage mark provided they are satisfied that there is satisfactory, credible evidence on which to base the estimate.

Route four:

If you are repeating the Leaving Certificate, having previously sat the examinations in 2018 or 2019..."

It would appear that in this case, the applicant comes within "*Route three*".

23. Of particular importance in this application are the provisions made in this document for "*conflict of interest*". The document states: -

"3. Conflict of Interest

Throughout this guide, we have set out specific circumstances which will allow a teacher or tutor from whom you have received tuition, to provide an estimated percentage mark on your behalf, subject to certain criteria. To uphold the integrity of the process, it will not be possible, under any circumstances, to accept an estimated mark from a teacher or tutor who is closely related to you (including a brother, sister, parent, spouse etc.). This would be a direct conflict of interest and accepting estimated marks from a family member would undermine the credibility of the process. A Conflict of Interest declaration must be completed by all those submitting an estimated percentage mark."

24. The contrast between the provisions that are made where there is a conflict of interest for a student attending a school and where a student is "*out-of-school*" is very striking. Where a student is attending a school then, notwithstanding the conflict of interest, that student can still be given an estimated percentage mark. Further, specific provision is made for the conflicted teacher to "*assist in the process, by handing over data or factual information...*". No such provision is made for "*out-of-school learners*". Where there is a conflict of interest, there will be no estimated mark given and so, no calculated grade

awarded. Such a student will not be able to proceed to third level education until he/she has sat the Leaving Certificate whenever it is held. There is a proposal that the Leaving Certificate will be held in November, 2020, subject to requirements of public health. The holding of the Leaving Certificate in November is no more than a proposal.

25. As to whether there is a rational or reasonable explanation for the difference in how issues of conflict of interest are dealt with for school going students or "*out-of-school learners*" is a matter which I will consider later in this judgment.
26. In applying for a calculated grade, the applicant filled out Form A1. However, the form was required to be signed by his teacher, his mother, and so the declaration that "*there is no conflict of interest in my engagement with this process for this student*" could not be made. The applicant was refused by the respondent to be considered for the award of an estimated grade.

Communications between the Applicant and the Respondent

27. Prior to the commencement of these proceedings, there was some correspondence and other communications between the applicant and the respondent. I think that this has to be seen against the background of the events that were unfolding at the time. The cancellation of the Leaving Certificate due to start in June, 2020 can only be seen as a seismic event in the world of education. This event had to be addressed by considering and designing, at very short notice, an alternative system to give grades to students who were due to sit the Leaving Certificate. In these circumstances, it was not unreasonable that the respondent did not have clear answers to all the questions raised by the applicant.
28. By letter dated 22 July 2020 from Ms. Eileen McCabe, Solicitor for the applicant, to the respondent, the position of the applicant was set out as follows: -
 - "In summary, we call upon the Minister to provide the following:
 - (1) Confirmation that my client will be considered for a calculated grade, notwithstanding that he has been schooled at home by his mother;
 - (2) Confirmation that my client's mother can assist in the estimating of her son's grades, and how this is to be done;
 - (3) Confirmation whether it will be necessary to have oversight by a nominated principal or deputy principal, and how this is to be done;
 - (4) Confirmation that the calculated grade schedule will be extended to enable my client obtain a calculated grade in sufficient time to take up his chosen course this academic year;
 - (5) Detailed reasons for the above."
29. A substantive response to the Solicitor's letter of 22 July came one week later, on 29 July. There were two communications on that date from the respondent. The first response was

by way of a letter stating that a decision as to whether the applicant would be given a calculated grade would be made that day. The letter stated, *inter alia*: -

“In your letter you also request that steps are set out to allow your client to sit the Leaving Certificate examination in circumstances where his parents exercised their constitutional right to educate him at home. On the day of the announcement of the postponement of the Leaving Certificate examinations, it was publicly stated that candidates would retain the right to sit the 2020 Leaving Certificate examinations at a date in the future when it is deemed safe for State examinations to be held. Similar to the position of any other Leaving Certificate candidate, your client is entitled to sit the postponed Leaving Certificate examinations which are now expected to take place in November, 2020. This right to sit those examinations is entirely independent of whether or not he receives results through the calculated grades model.”

On the same date, the applicant was informed of the following decision: -

“The purpose of this letter is to provide you with the CGEO (Calculated Grades Executive Office) decision that it will not be possible to provide you with a calculated grade in any of the subjects in which you were entered for the 2020 Leaving Certificate examinations. This is due to the absence of satisfactory, credible evidence from an appropriate source on which to base the estimate. The reason for the decision is as follows:

To uphold the integrity of the process, it is not possible, under any circumstances to accept an estimate mark from a teacher or tutor who is closely related to you (including a brother, sister, parent, spouse etc). This is a direct conflict of interest and accepting estimated marks from a family member would undermine the credibility and integrity of the process. Given the clear conflict of interest arising in your case, it is not possible to provide an estimated mark in respect of each relevant subject.”

This letter then went on to outline the appeals process.

Application for Judicial Review

30. On 29 July 2020, counsel for the applicant applied to this Court for leave to seek certain reliefs by way of judicial review. Also on 29 July 2020, the decision of the respondent, already referred to, was communicated to the applicant. This was reflected in an amended Order of the Court. The applicant is seeking, *inter alia*, the following reliefs: -

- (1) An order of *mandamus* compelling the respondent to consider and determine, within a reasonable time, the applicant’s application for calculated grades;
- (2) An order of *certiorari* quashing the decision of the respondent to refuse to provide a calculated grade for the applicant, dated 29 July 2020;

- (3) An order of *certiorari* quashing the decision of the respondent to refuse to provide to the applicant a process for applying for calculated grades;
 - (4) An order of *certiorari* quashing those portions of the respondent's scheme for calculated grades that imposes an absolute prohibition and/or blanket exclusion on persons acting as tutors for home-schooled children; and
 - (5) A declaration by way of judicial review that the refusal to provide a calculated grade in any circumstances where the applicant is home-schooled and the applicant's teacher is a parent is arbitrary, unfair, unreasonable and contrary to constitutional justice.
31. It was correctly accepted by the respondent that the applicant had established arguable grounds for the Court to grant leave. Due to the urgency of the application, a hearing date was fixed for the application to be heard on 12/13 August 2020. Statements of Grounds and Opposition were duly filed.
32. The Court would like to express its appreciation of both the applicant and the respondent for taking all the necessary steps to ensure an early hearing, in particular, the delivery of written legal submissions and relevant authorities.

Submissions by the Applicant

33. Mr. Paul O'Higgins SC (with Mr. Brendan Hennessy BL), on behalf of the applicant, relied upon the following provisions in the 1937 Constitution: -

"Education Article 42

- 1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
- 2 Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.
- 3. 1^o The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

..."

This Article, it was submitted, should be seen in the context of Article 40, which provides, *inter alia*: -

"Personal Rights Article 40

- 1 All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

Mr. O’Higgins submitted that as there was an established constitutional right to be educated in the home, it followed that persons educated at home should not be at a disadvantage compared to persons educated in schools in the obtaining of a calculated grade for the Leaving Certificate of 2020.

34. The applicant made clear that he was not challenging the lawfulness of the system for the award of calculated grades but, rather, the decision to exclude him as was communicated to him by the respondent on 29 July 2020. The applicant, as per his affidavit of 7 August 2020, stated: -

“(3) I say that I do not make the case I am entitled to a calculated, rather that I should be allowed to be considered for a calculated grade...”

35. Mr. O’Higgins challenged the provisions made, or rather the lack of such provisions, for persons such as the applicant who are educated at home where the teacher involved has a conflict of interest. This means, under the present system, that the applicant is excluded from obtaining a calculated grade. He depicted this situation as being unreasonable and unfair. It was submitted that in circumstances where a student may have a certain disability, that student is facilitated in doing the Leaving Certificate. No facility was afforded to the applicant.

36. The applicant took issue with so much of the decision of 29 July 2020 which stated that the absence of “*satisfactory, credible evidence from an appropriate source*” meant that the applicant could not be part of the system for the awarding of a calculated grade. This was depicted as conflating the issue as to whether the applicant could be considered for a calculated grade and the potential weakness of any body of evidence.

37. The applicant also relied on a breach of legitimate expectation as per the principles set out in *Glencar Exploration PLC v. Mayo County Council (No. 2)* [2002] 1 I.R. 84. Also, it was submitted by the applicant that in refusing to carry out any assessment of the evidence that may be offered concerning his educational record and abilities that this was, in effect, a breach of the rule of “*audi alteram partem*”.

38. As for the reliefs being sought, the applicant seeks: -

- (i) An order of *certiorari* quashing the decision of 29 July 2020; and
- (ii) A declaration by way of judicial review that the refusal to provide a calculated grade in circumstances where the applicant is home-schooled and the applicant’s teacher is a parent is arbitrary, unfair, unreasonable and contrary to constitutional justice.

The Respondent

39. Ms. Nuala Butler SC (with Mr. Joseph O'Sullivan BL), on behalf of the respondent, made clear that the scheme to provide calculated grades was an emergency response to the cancellation of the June, 2020 Leaving Certificate and should be seen as a temporary, not permanent, system. Ms. Butler submitted that the applicant was in no worse a position than others who may have been denied a calculated grade or given a calculated grade which they were dissatisfied with. Such persons have an entitlement to sit the Leaving Certificate which it is hoped will take place in November, 2020. This would be subject to the requirements of public health.
40. Ms. Butler disputed the applicant's entitlement to rely on Articles 40 and 42 of the Constitution as establishing a right to be considered for a calculated grade. The right conferred in Article 42 is a right conferred on parents to educate in the home and should be construed as such.
41. Ms. Butler submitted that where a student is educated in the home by a teacher who does not have a conflict of interest, then that student would be entitled to apply for a calculated grade. It was submitted that the scheme for providing calculated grades applied to all students but could not apply where an estimated percentage mark was being given by a person who had a clear conflict of interest. For this to be permitted, it would undermine the credibility of the Leaving Certificate and the respondent could not stand over this.
42. The submissions of the respondent to a considerable extent concentrated on the consequences that may arise were the respondent to provide an "*independent*" teacher to assess the applicant for an estimated percentage mark in each of his chosen subjects. Ms. Butler maintained that this would be giving the applicant a facility not available to other students doing the Leaving Certificate. If such a facility was made available to the applicant, then it would have to also be made available to all others, amounting to some 62,000 students. In support of this submission, Ms. Butler relied on an affidavit of Mr. Dalton Tattan, Assistant Secretary of the Department of Education and Skills. In this affidavit, Mr. Tattan stated: -
- "(63) As regards the proposal in paragraph 31 of the amended statement of grounds that an independent teacher or principal assess 'the evidence' to determine whether a calculated grade could be provided... However, the process of an independent person who has no prior knowledge of the applicant or his work making an assessment of his level of achievement in a particular subject in a restricted period of time would to all intents and purposes be an individualised assessment which is not what the CGS (Calculated Grades System) is or is intended to be. The only circumstances in which an independent person can be asked to individually assess a candidate's work in a manner that is objective, fair and equitable is when that work has been produced under examination conditions..."

and: -

“(65) Most significantly, the ‘evidence’ referred to in the applicant’s papers would be from the applicant himself and Ms. Burke which, because of the conflict of interest which necessarily arises due to the close family relationship between them, would not be evidence from an appropriate source.”

In addition, the respondent also relied upon an affidavit of Ms. Andrea Feeney, Director of the Calculated Grades Executive Office (CGEO) of the Department of Education and Skills. This affidavit reiterated a number of the points made in Mr. Tattan’s affidavit.

Legal Authorities

43. Both in the course of oral submissions and written submissions, the Court was referred to a number of authorities. I refer to *The State (Kenny) v. Minister for Social Welfare* [1986] I.R. 693. These proceedings concerned the provision of the Social Welfare (Consolidation) Act 1981 which provided that a social assistance allowance be paid to “*an unmarried mother*” in certain circumstances. The relevant regulations (1973) provided that a “*woman is to be regarded for the purposes of the (Act of 1981) as being an unmarried mother if, not being or having been a married woman, she is the mother of a child that has not been adopted*”. Ms. Kenny was a divorced woman with one child born outside marriage and was held by the relevant social welfare officers to be ineligible for the social assistance allowance because she was excluded by the said definition of “*unmarried mother*”. In giving the judgment of the High Court, Egan J. held that it would be oppressive and unfair if one class of mother were excluded from such benefits which other classes of mother were entitled to where such exclusion was never intended by the legislature: -

“Could Parliament have intended that one single class of mother should be excluded from the same benefits as those to which other classes of mothers would be entitled? Was it intended that such a mother should be punished together with her child or children because her marriage had been dissolved? I think not. To repeat the words of Henchy J. it would be ‘oppressive’ and ‘unfair’ .”

44. In my view, the legal principles which a court ought to apply in an application such as this are well settled. I refer to the oft cited passage of Henchy J. in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, where he stated: -

“... [W]hether the conclusion reached in the decision can be said to flow from the premises. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense...”

I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making

which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.”

More recently, I refer to the following passage of Fennelly J. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701, where he states: -

“(449) I prefer to explain the proposition laid down in the *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 and *O’Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, retaining the essence of the formulation of Henchy J. in the former case. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. ...”

In my view, this application falls to be determined by the aforesaid principles. I do not consider that it is necessary to examine in detail the nature, extent and application of the rights provided for in Article 42 of the Constitution (in conjunction with Article 40) in order to reach my decision. For the same reason, I do not believe it is necessary for me to consider the principles applicable in actions for “*legitimate expectation*” and the application of the principle of “*audi alteram partem*”.

Consideration of Issues and Conclusions

45. The applicant has made clear the purpose of these proceedings is not to invalidate the process whereby calculated grades are awarded. Rather, the applicant challenges so much of the procedures followed by the respondent that resulted in him being refused for consideration for the award of a calculated grade. As he stated in his own affidavit: -

“I say that I do not make the case I am entitled to a calculated grade, rather that I should be allowed to be considered for a calculated grade.”

46. The starting point for the awarding of a calculated grade is the giving of an estimated percentage mark in each of the subjects chosen by a student. This is to be done by a teacher using his or her professional judgment, as is stated in the “*Guide for Schools on Providing Estimated Percentage Marks and Class Rank Orderings*” (21 May 2020): -

“The cornerstone of the Calculated Grades model is a reliance on the professional judgment of teachers, including principals and deputy principals, in providing the best possible estimate of how each student is most likely to have performed in the examination if the disruptions caused by the COVID-19 virus had never arisen.”

47. Where a teacher has a conflict of interest (e.g. is a close relative of the student involved), then clearly it would be inappropriate for that teacher to give an estimated percentage

mark. It seems to me that it is equally clear that a student should not suffer because he or she is being taught by a close relative.

48. The possibility that conflicts of interest might arise was anticipated by those who drew up the documents that provide a scheme for the awarding of calculated grades. There are two separate documents. Firstly, there is a document that covers students attending schools (Guide for Schools on Providing Estimated Percentage Marks and Class Rank Orderings) (21 May 2020). Secondly, there is a document that covers "*out-of-school learners*" (A Guide to Calculated Grades for Out-of-School Learners) (June, 2020). The applicant falls into this latter category.
49. Where a conflict of interest arises in the case of a student attending school, the document covering school students states: -

"22. Conflicts of interest

The principles of equity, fairness and objectivity are paramount in the calculated grades system. If there is a student in a class about whom there is an actual or perceived conflict of interest involved in giving an estimated mark to, such as a son, daughter, sister, or brother, this should be drawn to the attention of the principal. The teacher may still need to assist in the process, by handing over data or factual information, but should not be involved in any judgment process that relates to that student as an individual. There will be additional oversight by the principal/deputy principal in such cases. This will include the principal/deputy principal countersigning Form A to confirm that appropriate arrangements were put in place and that he/she provided additional oversight and approval of the estimated mark. ..."

In the case of the "*out-of-school learners*", the following appears in the document that covers them: -

"3. Conflict of Interest

Throughout this guide, we have set out specific circumstances which will allow a teacher or tutor from whom you have received tuition, to provide an estimated percentage mark on your behalf, subject to certain other criteria. To uphold the integrity of the process, it will not be possible, under any circumstances, to accept an estimated mark from a teacher or tutor who is closely related to you (including a brother, sister, parent, spouse etc.). This would be a direct conflict of interest and accepting estimated marks from a family member would undermine the credibility of the process. ..."

50. The difference between how a "*conflict of interest*" is dealt with for a school student and an "*out-of-school learner*" is very stark. In the case of a school student, the conflicted teacher "*may still need to assist in the process, by handing over data or factual information...*" and "appropriate arrangements" may be put in place to provide the student

with an estimated percentage mark. This means the school student can remain in the system and may be awarded a calculated grade.

51. However, for the "out-of-school learner", which includes the applicant, no such arrangements apply. Once a conflict of interest arises, the applicant will not be awarded an estimated percentage and, so, is excluded from the system under which he/she may be awarded a calculated grade.
52. In both cases, the school student and the "out-of-school learner" are facing a similar problem, not of their own making, that arises from the teacher having a conflict of interest. Both should have the benefit of a similar solution, but they do not. To my mind, this is a patent unfairness. Indeed, the "out-of-school learner" document does not live up to its own stated principles of "fairness and equity" where it states: -

"The system for calculated grades for out-of-school learners must ensure fairness and equity within this group but also in relation to all other Leaving Certificate students. The system must be such that it neither advantages nor disadvantages, through any grades ultimately awarded, any student in the 2020 Leaving Certificate cohort in its approach and delivery of calculated grades. ..."

53. The solution to the problem of a conflicted teacher is, essentially, making provision for the involvement of another non-conflicted teacher. The respondent did not accept this, arguing that a non-conflicted teacher, or an independent teacher, outside of a school setting would have no prior knowledge of the student involved and would be making "an individualised assessment" which is not what the calculated grades system is intended to be.
54. I do not accept this argument as, in both a school setting and an out-of-school setting, what the non-conflicted teacher is required to do to give an estimated percentage mark in a particular subject. In both situations, it will require the teacher involved to apply his/her professional judgment to the "data and factual information" concerning the student involved. Indeed, as is stated in the "out-of-school learners" document: -

"6.1 The estimation process

As part of the estimation process, your teacher/tutor will consider all evidence available to them in order to arrive at an estimated percentage mark of your expected performance in the subject to which they provided tuition. ... They will also be required to confirm that you engaged in tuition with them, regularly over a sustained period. ..."

There does not appear to me to be any reason why the aforesaid could not be carried out by a non-conflicted teacher in the place of a conflicted teacher in considering an out-of-school student, such as the applicant, for an estimated percentage mark.

55. I do not believe that a non-conflicted teacher in giving an estimated percentage mark to an "out-of-school learner", such as the applicant, is required to do anything or take any

step that would be materially different from that done by a non-conflicted teacher in a school setting taking the place of a conflicted teacher. Therefore, I do not believe that there is a rational basis for maintaining that the involvement of another teacher, as described, in the applicant's situation is conferring on the applicant an advantage that is not available to a school going student.

56. I am also of the view that the decision of 29 July 2020 is legally in error where it refers to an absence of "*satisfactory, credible evidence*" concerning the applicant. A conclusion can only be reached that evidence is not satisfactory or credible when such evidence has been looked at. This never happened here. The respondent appears to have reached the conclusion that as the evidence was being furnished by the applicant's mother, a conflicted teacher, that such evidence must be neither satisfactory nor credible. This may or may not be the case but it can only be decided when such evidence is looked at by a non-conflicted or independent teacher. The applicant has a right at law to the benefit of such a process. Indeed, it should also be pointed out what happens when a conflict of interest arises in the case of a student attending school. In that case, as per the respondent's own document, the conflicted teacher "*may still need to assist in the process, by handing over data or factual information...*".
57. The respondent stated that in some cases it may not be possible to give a calculated grade and a student may be dissatisfied with the calculated grade awarded. In both cases, the student in question may opt to do a Leaving Certificate which it is hoped will take place in November, 2020. The respondent submitted that the applicant is in a similar position. I do not accept that this is the case. The fact is that, in my view, the respondent has unlawfully excluded the applicant from the system for the awarding of calculated grades. An opportunity to do the Leaving Certificate in November, 2020, which may or may not take place depending upon public health advice at the time, is not a remedy. It would, at the very least, mean that the applicant would be delayed by one year in commencing his third level course of choice, should he be so admitted to it. This would clearly be detrimental to the applicant.
58. I am satisfied that a non-conflicted or independent teacher(s) ought to be involved in the place of the applicant's mother in the system for the award of an estimated percentage mark in each of the applicant's Leaving Certificate subjects. Should it be possible to award such percentage mark(s), then the process set out in the "*out-of-school learners*" document for the awarding of a calculated grade can operate for the applicant.
59. I, therefore, conclude that so much of the system that provides for the giving of estimated percentage marks that excludes the applicant on the grounds that his teacher has a conflict of interest is irrational and unreasonable and, thus, unlawful.
60. It also follows that the decision of the respondent of 29 July 2020 is irrational, unreasonable and, thus, unlawful.
61. In the affidavits filed by the applicant and submissions made to this Court on his behalf, much was made of the academic success and other achievements of the applicant and his

siblings. This may have led to an inference that had the applicant sat his Leaving Certificate in June, 2020 in the usual way or were he to be awarded calculated grades, there was a strong probability that the applicant would have done very well and achieved his points goal. I wish to emphasise that I made no such inference and the stated achievements and abilities of the applicant and his siblings are irrelevant to my decision. I based my decision on what I believe are the correct legal principles and authorities and this decision is applicable not only to the applicant, but to any other students who find themselves in a similar situation, irrespective of their achievements or abilities.

Reliefs

62. By reason of the foregoing, I propose to grant the following reliefs: -

- i. An Order of *certiorari* quashing the decision of the respondent to refuse to provide a calculated grade for the applicant, dated 29 July 2020; and
- ii. A declaration by way of judicial review that the refusal to provide a calculated grade in circumstances where the applicant is home schooled and the applicant's teacher is a parent and thus has a conflict of interest is arbitrary, unfair, unreasonable and contrary to law.

63. It may well be that other orders are required to give effect to this judgment. With this in mind, I will list the matter before me on Tuesday, 25 August 2020.