AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2021:000035

O'Donnell C.J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

Between/

ELIJAH BURKE

Applicant/Respondent

-and-

THE MINISTER FOR EDUCATION AND SKILLS

Respondent/Appellant

Heard together with

Between/

NAOMI POWER

(A Minor suing by her mother and next friend, BREDA POWER)

Applicant/Respondent

-and-

THE MINISTER FOR EDUCATION AND SKILLS

Respondent/Appellant

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 24th of January 2021.

1. The Leaving Certificate has a been a rite of passage for many Irish students for almost a century. In recent years, more than 60,000 second-level students sit the examination, with extraordinary levels of media commentary in the papers reflective, perhaps, of the extent to which "The Leaving" is a part of Irish life. It forms an important gateway to the working world, or for admission to third-level education. It is a measure of individual achievement within the sometimes narrow terms of reference of the examination syllabus, but also permits comparison of all students sitting the exam throughout the country. The results achieved in the examination determine access to third-level courses, and may affect employment opportunities. The examination, and the education which it necessarily dictates, has been the subject of analysis, criticism and attempted reform throughout its life. Its distinctive feature, to which it perhaps owes its continued existence, is that, whatever its limitations, it provides a manifestly independent assessment conducted uniformly and anonymously across candidates and which seeks, as far as possible, to provide a dispassionate and neutral evaluation of the papers each candidate has submitted on the examination day in question, and through that, an accurate evaluation of the academic ability of the student in the relevant subject, at least within the confines of the syllabus.

2. The class of 2020 were long on the way towards completing their own Leaving Certificate when their preparations were blown off course by a unique event. On 11th March, 2020, with the exams some three months away, the World Health Organisation ("WHO") declared that COVID-19 was now a pandemic. On 12th March, An Taoiseach announced that the country would go into lockdown, which

meant the immediate closure of schools. As time moved on, it became clear that there would be no early resolution of the crisis, and attention turned to the plight of the class of 2020. There was increasing concern that it would not be possible to hold the examination safely without a significant risk of a spread of infection with knock-on consequences for everyone coming into contact with an infected person. Furthermore, the worry and stress of the candidates and their families was increased by uncertainty about whether or not the exams would be held, and concerns that the ongoing closure of schools would affect the candidates' preparation for such exams, even if the public health situation improved sufficiently to allow the examinations to be held in person. There was a further constraint which heightened the pressure for all concerned. The Leaving Certificate results are normally delivered in August, leading to a round of offers for third-level places which results in the allocation of places for third-level courses planned to commence in Autumn of that year. This meant that it was impossible to simply postpone the date of the examination by any significant period, and created an increased demand for a clear pathway that would allow the class of 2020 to have a degree of certainty about their future.

The Government Decision

3. On 8th May, 2020, the Government made a formal decision which was announced immediately. The Leaving Certificate examination would be postponed until it could be held in person in safety. The Government also formally recorded that it had been decided:-

> "to put in place a system to be operated by [the Minister] on an administrative basis pursuant to the executive power of government under Article 28.2 of the Constitution, whereby Leaving Certificate candidates could opt to have

calculated grades issued to them by the Minister in order to facilitate their progress to third-level education or the world of work in Autumn 2020, and such system shall include the following elements:

(a) the professional judgement of each of the candidates' teachers which shall not be subject to appeal;

(b) in-school alignment to ensure fairness among candidates at school level;

(c) approval by the school principal of the estimated scores and rankings of students in the school;

(d) a process of standardisation at national level to ensure fairness amongst all candidates; and

(e) […]; and

(iii) to deliver the system through a non-statutory executive office in the Department of Education and Skills and a non-statutory steering committee, made up of relevant experts, who will oversee the quality and independence of the process on the authority of the Minister; and

(iv) to run the written Leaving Certificate examinations for those who wish to sit the examinations as soon as it is practicable and safe to do so."

4. On the same day, the Department of Education and Skills ("the Department") published "A Guide to Calculated Grades for Leaving Certificate Students 2020", which set out in more detail the scheme to be put in place. On 21st May, 2020, the Department published a further and more detailed guide entitled "Calculated Grades for Leaving Certificate 2020 – Guide for Schools on Providing Estimated Percentage

Marks and Class Rank Orderings". This document has been described in these proceedings as the "In-School Guidelines".

5. It should be said that the scheme established was both detailed and elaborate. The essence of the scheme had four components. The student's teacher was to give an estimated percentage mark that was the teacher's assessment of the mark which the student was likely to achieve if the Leaving Certificate had been held in the Summer of 2020. The teacher was also required to rank the student in the class with a ranking which should not simply identify the order of the students within the class, but also to set out the relative strength of the respective pupils so that if, for example, there was a particularly strong pupil, he or she would not only be ranked first, but also the relative gap between them and the person ranked second would be recorded. The second stage was that the estimated mark provided by the teacher was to be subject to in-school alignment. The estimated mark and material were to be submitted to another teacher, if possible teaching the same subject for Leaving Certificate, but if not, then a teacher teaching that subject in the school who did not have a Leaving Certificate class in 2020. The third step was that the mark and ranking were to be considered by the principal of the school by reference to the student, their experience in the school, and the grades estimated for that student in all subjects. These three steps produced an estimated mark from the school in respect of all candidates being educated in those subjects at that school. The estimated marks were then to be subjected to a process of standardisation within the Department by reference to estimated marks across the country. While this standardisation process initially planned to incorporate the historical performance of individual schools, this aspect was later omitted from the process by reason of a Government decision on the 1st September, 2020. As set out in the judgment in *Sherry v. Minister for Education*

[2021] IEHC 128 (Unreported, High Court, Meenan J., 2nd March, 2021), the decision by the Department to omit 'school historical data' ("SHD"), or the historical Leaving Certificate examination performance for a given school across three prior years, followed the political fallout subsequent to the implementation of a similar scheme in the UK. The concern voiced by the Department was that the inclusion of SHD in the standardisation model would reflect the fact that certain schools, in particular fee-paying schools, have historically achieved stronger Leaving Certificate results than other schools. This, in turn, could have the effect that the Calculated Grades Scheme could be viewed, as it was referred to in the UK, as a "post code lottery" or as "school profiling". Meenan J., at paragraph 73 of his judgment, was satisfied that this decision was a policy decision taken by the Department to ensure public acceptance of the Calculated Grades Scheme and additionally was not arbitrary, unfair, unreasonable, irrational nor unlawful (paragraph 104). Part of the basis for this decision was based on there being, in Meenan J.'s view, two fundamental requirements for the calculated grades system, one of which was that it have the support of those involved in third-level education, future employers of the class of 2020 and the public in general. He accepted that certain data which could lead to a more statistically accurate result, such as SHD, may not be acceptable to the public in general, i.e., a degree of statistical accuracy was required to be sacrificed for the gain of public acceptance. In any event, the final four steps of the Calculated Grade Scheme produced a final mark awarded to the student for their Leaving Certificate of 2020. A student who opted not to participate in the Calculated Grade Scheme could still sit the Leaving Certificate which had been postponed, but which was anticipated would be held later in the year and was in the event held in November, 2020. However, that route, if selected, would have

the consequence that the candidate would not have the results at the same time as candidates who opted for calculated grades and, in particular, would not be able to participate in the process of offers for third-level places to commence courses in Autumn 2020, but would be able to participate in subsequent years.

6. The scheme, it should be said, is much more detailed than this short account would suggest, but since no complaint is made in these proceedings about the operation of the scheme for students in schools, it is not necessary to explain the system in any more detail. However, one qualification to the scheme should be identified at this stage because it is relevant to the arguments advanced in this case. It is apparent that the foundation of the scheme was the mark estimated by the student's teacher. However, it could be the case, and was not indeed unusual, that students might be taught one or more subjects for Leaving Certificate by their parent who was a teacher in the same school. In such a case, it was considered that equity and fairness between candidates was an essential basis of the scheme, and that the teacher/parent could not provide the initial calculated grade. However, the scheme provided that, in such a situation, the teacher/parent could provide basic material from the student to allow another teacher in the school to make the assessment which would allow the Calculated Grade Scheme to apply to that student.

7. The scheme thus devised provided an option for the more than 60,000 school students preparing for the Leaving Certificate in 2020 to obtain a Leaving Certificate in the Summer of 2020.

8. However, in addition to the students attending schools and other approved institutions to whom the Guidelines were addressed, there was a relatively small number of students who did not fall into that category. These were students who were preparing for the examination outside school in one or more subjects. These

candidates could be school students who were sitting one or more subjects which may not have been taught in the school and where they were receiving tuition either from a teacher outside school, a tutor or a parent. Another example might be the entirely self-prepared student who had followed their own course of study, but proposed to sit the exam. In other cases, a student might be attending an informal institution offering tuition and exam preparation. There might also be repeat students who had studied for the Leaving Certificate in 2018 or 2019 when the syllabus was similar to that for 2020, and who may have elected to prepare themselves or do so informally, and without attending a school or institution and perhaps receiving tuition from a teacher or tutor. The essentially democratic nature of the Leaving Certificate meant that any candidate was entitled to present themselves for examination and be marked in the same way as all other candidates, irrespective of the educational course they followed. The option remained available, once it was safe from a public health perspective, to hold examinations in person. However, none of this cohort could avail of the in-school Calculated Grade Scheme, which was plainly directed towards the majority of candidates who were educated in schools and which indeed relied upon the schoolteacher and the school for significant input to the process.

9. The Department of Education and Skills produced a supplemental guide to the original scheme, published on 25th June, 2020, known as the "Guide to Calculated Grades for Out-of-School Leavers". This has been described as the "Out-of-School Scheme" and is central to these proceedings. This supplemental guide addressed the position of out-of-school candidates and sought to provide for calculated grades in a number of cases. The Court of Appeal ([2021] IECA 67 (Unreported, Court of Appeal, Donnelly, Faherty and Ní Raifeartaigh JJ., 9th of March, 2021)) identified

four routes or pathways to a calculated grade for candidates who were not in school. These are set out at paragraph 31 of the Court of Appeal judgment as follows:-

> "(a) Where a student may have engaged with a centre of learning (grind school, private college *etc*.) not recognised by the SEC for examination purposes, the teacher/tutor may provide an estimated mark. Oversight on the estimated mark was required to be provided by the principal/manager of the centre in question. 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 1").
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> (b) Where a student may have engaged with a centre of learning (grind school, private college *etc*.) recognised by the SEC for examination purposes, the teacher/tutor may provide an estimated mark. Oversight on the estimated mark had to be provided by the principal/manager of the centre. Given that the centre was recognised for examination purposes and will have engaged in the calculated grades for fulltime students, "the involvement of a registered teacher is not an absolute requirement in this setting" ("Route 2").
>
> (c) Where a student may have engaged in tuition from the registered teacher (currently or previously registered) outside of any centre of learning, the teacher could submit an estimated percentage mark provided that they were satisfied that there was satisfactory, credible evidence on which to base the estimate ("Route 3").
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> (d) In the case of a student repeating the Leaving Certificate, having previously sat the examination in 2018 or 2019, or where the student may have

> engaged in tuition on a one-to-one basis with a tutor "who [was] not or ha[d] never been a registered teacher", or engaged with a centre of learning that was not recognised by the SEC for examination purposes, and where neither the tutor nor the principal/manager was a registered teacher, it might be possible for the CGEO to make a connection with the school in which the student sat the examination previously for the purposes of collaboration by the principal of the school with the tutor such that the principal might be satisfied to sign off on an estimate even though the student had not been attending the school as part of his/her study for the Leaving Certificate examinations, 2020. The tutor was required to provide additional elements, to the satisfaction of the principal, of the student's further engagement with learning since his/her previous sitting of the Leaving Certificate ("Route 4")."

10. The CGEO referred to is the Calculated Grades Executive Office, which was the non-statutory executive office in the Department of Education and Skills established pursuant to the Government decision of 8th May, 2020.

11. Once again, the scheme is more elaborate and detailed, but this description is sufficient to identify the legal issues in this case. It is, however, important in focusing only on the aspects of the scheme that give rise to the legal issues in this case to appreciate that these elements in dispute are only small elements of a very detailed scheme with a number of components, and that the issues which loom so large now may not have been the most pressing in framing the scheme or securing the agreement of stakeholders. It is apparent that the four pathways were an attempt to cater to a significant number of out-of-school students so that they could obtain calculated grades, even though they could not initially participate in the in-school Calculated Grade Scheme announced in May 2020, and were not in a position to

replicate the measures established under that scheme. In the event, it was said that there was group of 929 candidates within the category of "independent or not attached to a school or authorised centre" who were seeking a total of 1,834 grades and that this scheme permitted 549 candidates to be provided with 787 grades. Even this did not mean that 380 candidates sought but failed to receive a calculated grade or grades. There were cases where students did not apply under the scheme or engage with the CGEO or did not seek a calculated grade. In the end, it was asserted by the Minister for Education and Skills ("the Minister") that the mechanisms developed allowed 99.4% of calculated grades applied for by all candidates to be awarded. However, it was apparent from an analysis of these schemes and indeed the terms of the Out-of-School Guidelines themselves, that there would be some candidates who could not benefit from the Calculated Grade Scheme and for whom the only option would be to sit the Leaving Certificate written examinations when they were held, with the consequence that they would not be able to proceed as envisaged either to the wider work place or third-level education in the Autumn of 2020.

12. The plaintiffs in these proceedings are two such candidates, and their exclusion from the possibility of obtaining calculated grades has given rise to these proceedings.

Elijah Burke

13. The applicant in the first proceedings, Elijah Burke, was the youngest of ten children, all of whom were educated at home by their mother, Martina Burke, who is herself a registered teacher with a long history of work in the educational sector, including working as an examiner for the State Examination Commission ("SEC") since 2016, marking higher-level Junior and Leaving Certificate English examinations. She runs a tuition centre at her home and provides other students from schools in the local

area with tuition in some subjects. She follows the national curriculum and the pattern of work in schools so that the school day and terms are replicated. The applicant's siblings have all received strong Leaving Certificate results, and have achieved high levels of educational attainment. The applicant, Elijah himself, in addition to his good academic record, is a gifted pianist and musician studying for an Associate Diploma in Piano Teaching. Ms. Burke is in a position to provide an estimated mark for her other students because, although not in a school setting, she is a registered teacher and thus satisfied the criterion for Route 3. However, her son could not benefit from that pathway in the Out-of-School Scheme because the conflict of interest provisions of the scheme precluded a close relative, in this case his mother, from providing the estimated mark. If this situation occurred in a school setting, and Ms. Burke was Elijah's English teacher, for example, she would also have been excluded from providing the initial estimated mark. But the In-School Guidelines provided for a workaround, under which she could provide material to another teacher in the school to allow them to make an assessment and provide an estimated mark that would allow the system to proceed and a calculated grade to be awarded. This is, in essence, the heart of the applicant's complaint and which has led to the commencement of these proceedings. The High Court ([2020] IEHC 418 (Unreported, Meenan J., 19th of August, 2020)) found that the operation of the scheme in the case of Elijah Burke was irrational, in the sense identified in the *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642 ("*Keegan*"), and made an order of *certiorari* quashing the decision of the Minister to refuse to provide a calculated grade to the applicant, and granted a declaration that the refusal to provide such a grade was unreasonable.

14. In the immediate aftermath of the decision in Elijah Burke's case, a second set of proceedings were commenced. The applicant in those proceedings, Naomi Power,[1] was then under 18 and thus sued through her mother and next friend, and had also been refused a calculated grade. In her case, however, the basis for the refusal was somewhat different. She was the third of nine children and had been educated for nine years preceding the Leaving Certificate by her mother, with assistance at times from her father and from tutors. To assist in preparation for the Leaving Certificate, her mother had retained the services of two tutors, a Mr. Simon O'Neill and his wife, Ms. Tatenda O'Neill, who had previously acted as tutors for other members of the family. They held third-level degrees, including one PhD in Biomedical Chemistry, but neither was a registered teacher. They purported to provide estimated marks for Naomi Power in Irish, English, Mathematics, Geography, Biology and Home Economics. The Minister refused to provide Ms. Power with a calculated grade due "to the absence of satisfactory credible evidence from an appropriate source on to which to base an estimate". The reason given for this decision was that the tutor providing the estimated mark was engaged in private tuition, and was not currently, and had not previously been, a registered teacher. The applicant points out that in this case, the fact that a student may have been taught by an unregistered teacher, did not necessarily exclude that student from the scheme so long as the tuition was provided in a school setting or a recognised institution or possibly where the student had previously sat the examination through a school. The High Court ([2020] IEHC 479 (Unreported, Meenan J., 24th September, 2020)) concluded that the exclusion of the applicant from the scheme was unreasonable and quashed the decision refusing

[1] While Ms. Power had initially been anonymised, the Court raised the issue during hearing and it was accepted by all parties that the title should set out the full name of the plaintiff.

to provide a calculated grade to her, and made a declaration that the refusal to provide a calculated in any circumstances where the applicant was home-schooled by a teacher who was not a registered teacher, was irrational, arbitrary, unfair and unlawful.

15. It should be noted at this point that although the Minister appealed the High Court decision in both cases, no stay was sought so that the consequence for the individual applicants was that an *ad hoc* scheme was devised whereby material was provided which permitted an external teacher to provide an estimate that led ultimately to the award of calculated grades to both Elijah Burke and Naomi Power. It was agreed between the parties, however, that the appeal could proceed since it not only addressed the mechanism for an important state examination process, but also raised important issues of law of more general application.

16. The Court of Appeal delivered an impressively detailed and comprehensive judgment in a short timescale. It is apparent from the issues discussed, decided and touched upon in that judgment that the matters canvassed in the appeal were much more broad-ranging than the single issue upon which the High Court decided the case. While the High Court had found for the plaintiffs on the relatively narrow ground that the refusal to provide calculated grades was irrational, neither side sought to limit their argument to that issue. The applicants sought to support the High Court decision on its own terms but also advanced broader arguments, while the appellant Minister sought to challenge the decision on its own terms, and also to counter the broader arguments raised by the respondents. The result was a broad-ranging survey of some difficult issues lying at the intersection of administrative and constitutional law.

17. While the Minister in these proceedings is the appellant and challenges the reasoning of both the High Court and the Court of Appeal, the case is perhaps best understood by setting out the arguments raised by the applicants, the Minister's defence to those arguments, and the applicants' response to the issues raised by the Minister.

18. In perhaps overly simple terms, the applicants argued that the decisions to refuse calculated grades to them, and the provisions of the scheme which perhaps compelled that outcome, failed the test of rationality set out in *Keegan*. However, the applicants also argued that the decision affected their constitutional rights. The applicants contended for a right contained in, or derived from, Article 42 of the Constitution to engage in home-schooling, or a right derived from Article 42.4 on the part of a home-schooled child to have their interests reasonably taken into account when education policy was decided. It was argued that the refusal of a calculated grade, and/or exclusion from the scheme, was an impermissible interference with or restriction on the applicants' rights as home-schooled children. The applicants also argued that the decision and exclusion breached the Article 40.1 guarantee to hold citizens, as human persons, equal before the law, and in that regard pointed to what the applicants contended were inequalities of treatment by comparison to students being taught by a close relative registered teacher in a school setting, and those being taught by unregistered teachers in a school setting or in another approved institution who in each case could benefit from the Calculated Grade Scheme while the applicants were excluded.

19. The Minister responded to these arguments by maintaining that the test of rationality was inappropriate in the present context. It was argued that the decision to establish the scheme and to operate it was the exercise of the executive power of the state under Article 28 of the Constitution, to which the courts were required to show

deference. A court should only interfere with, or set aside, any exercise of such power in circumstances where it could be said there was a "clear disregard" of the Constitution, a test first articulated in the case of *Boland v. An Taoiseach* [1974] I.R. 338. It was also argued that the scheme did not fail that test, and furthermore was not, in any event, irrational. There was a reasonable justification for the manner in which the schemes had been constructed, and the consequent exclusion of some students in circumstances where such candidates remained entitled to sit an examination. The Minister disagreed that a student who was home-schooled had a right derived from the Constitution to have reasonable account taken of his or her situation when education policy was being implemented or otherwise, or that the schemes as constructed amounted to an impermissible interference with any such right, whether express or derived from the Constitution. Similarly, the Minister argued that the Article 40.1 guarantee of equality before the law was not engaged in this case, but if engaged was not breached. In response, the applicants did not agree that the scheme and decisions were to be treated as the exercise of the executive power, or indeed that, if so, any different test should be applied to that which would apply if, for example, the scheme had been implemented by legislation. If, however, it was to be viewed as an exercise of the executive power, then it was contended that the clear disregard test was only applicable in matters of high policy, and was not applicable to administrative-type matters. If, however, the clear disregard standard was applicable, the applicants maintained that it had been satisfied in this case.

20. The Court of Appeal delivered a comprehensive judgment which found that the scheme was the exercise of executive power under Article 28. However, the Court considered that the clear disregard test was not applicable to the type of scheme established and in issue here. The Court further considered that there was a right

derived from Article 42.4, in particular, "[for] the home-schooled child to have reasonable account taken of his or her situation when education policies are being implemented by the State" and which right was breached in these cases. In those circumstances, it was not necessary to address the equality argument. In considering whether the right of the home-schooled student had been breached, the Court considered that it was necessary to refine the relief granted by the High Court. It considered that what was being challenged was the Minister's decision that there was no sufficient information from an appropriate source to consider providing a calculated grade. In addressing this issue, the Court considered it was entitled to have regard to the fact that the Minister had awarded calculated grades to the first named applicant (and, in the event, to both applicants) in the aftermath of the High Court decision.

21. The Minister has sought leave to appeal to this Court. It is accepted that all issues are before this Court, and the applicants have thus repeated the arguments made in the Court of Appeal, including their arguments in relation to Article 40.1. It is apparent, therefore, that a number of issues are raised and that there are a number of distinct routes by which either party might succeed. While it is both sensible and desirable to attempt to decide a case on the narrowest basis possible, it does not appear possible to decide this case, for example, simply on the application of the *Keegan* irrationality test applied in the High Court. Consideration of that issue would still involve a determination of whether or not there were constitutional rights involved, and consideration of the Minister's argument that the *Keegan* test is inapplicable to a scheme such as this and the decisions made under it. In any event, the decision of the Court of Appeal considers a number of the broader issues, and it is therefore desirable that, so far as possible, the issues raised should be resolved.

22. It appears that the following issues arise for determination on the appeal:-

(i) Whether the Calculated Grades Scheme ("the CGS") was an exercise of the executive power of the State;

(ii) Whether, if so, in considering the applicants' challenge to the scheme and the Minister's decisions made under it, a Court could only determine that the scheme was flawed or set aside the decision if it considered that the scheme or decision amounted to a clear disregard of the Constitution;

(iii) Whether there was a right derived from Article 42.4 or otherwise for a home-schooled student to have their interests reasonably taken into account when educational policy was being devised and implemented by the State;

(iv) Whether that right, or any right of the applicants under Article 42 was interfered with by the scheme;

(v) Whether, in the alternative, the applicants were not held equal before the law contrary to Article 40.1; and

(vi) Whether, and in the light of the conclusions to the questions posed above on the correct application of the legal test, the Minister's decision to refuse to provide calculated grades to the applicants was invalid.

Is the Calculated Grades Scheme the Exercise of the Executive Power of the State?

23. The argument advanced but, it should be said, not particularly pressed, by the respondents to this appeal that the scheme for calculated grades does not itself involve the exercise of the executive power of the State, is necessarily closely related to the subsequent issue relating to the standard of review. The State appellants maintain that it is because the scheme involves the exercise of the executive power of the State that a higher and more demanding test must be met before a court may

intervene. In particular, it must be demonstrated that the executive has acted in "clear disregard" of the Constitution. This is described as a more deferential standard than that which would apply if, for example, what was in issue was a legislative provision. It is in part to avoid being required to surmount that hurdle, that the respondents maintain the contention that what was in issue in this case does not constitute the exercise of the executive power such as to attract the "clear disregard" standard of review.

24. There may be areas where the analysis is more difficult, but in this case there is, in my view, no doubt that what is challenged in these proceedings involves the exercise of executive power pursuant to Article 28.2 of the Constitution, which provides that, subject to the provisions of the Constitution, such power shall be exercised by or on the authority of the Government. First, that is how the power is itself expressed. The Government decision made on the 8th of May, 2020, set out at paragraph 3 above, says so in explicit terms. There is, moreover, no reason to doubt this description. A decision to operate the Calculated Grades Scheme for the Leaving Certificate of 2020 made in the course of a global pandemic, and without ostensible legislative underpinning, is clearly not the exercise of legislative or still less judicial powers. The power to set up a body, to set the terms of the Scheme, and to fund the operation of a substantial mechanism to implement it, all flows almost self-evidently from the executive power.

25. It is said however, that the function is (merely) administrative and it is pointed out, correctly, that while the basic scheme was itself established pursuant to a detailed decision of the Cabinet, and followed closely the outline of that decision, the particular issues which arise here, i.e., the exclusion of out-of-school learners educated either by a close relative or without the involvement at some point of a

registered teacher, are features of the scheme addressing out-of-school learners, not specifically contemplated by the Cabinet decision of the 8th May, and which is the result of the terms promulgated by the Department of Education and Skills on the 25th June, 2020.

26. However, in my view, while the fact that the basic scheme can be traced back to a formal decision of the Cabinet in making express reference to Article 28.2 of the Constitution makes it easy to find that the executive power of the State is engaged in these proceedings, no different conclusion would arise if the entirety of the scheme was a departmental circular issued by the Department of Education and Skills. The fact that any such scheme would be properly characterised as the exercise of *administrative action*, would not preclude its source being *executive power*. These are not mutually exclusive categories. Indeed, the legal authority of a department of State to issue any such circular would flow from the position of the Minister as head of their department and a member of the Government. As a matter of history, much of both the educational and health systems in Ireland were administered during the 20th Century on the basis of departmental circulars, and without any legislative authorisation or control. It is not necessary, therefore, in this case to consider the perhaps more difficult theoretical issues that can arise at the margins. The establishment of an alternative route to obtaining a Leaving Certificate in the context of a public health emergency, authorised by Cabinet decision, the details of which are provided for by a formal departmental circular, is, in my view, undoubtedly the exercise of the executive power of government.

Does the "Clear Disregard" Test Apply to a Challenge to the Calculated Grades Scheme?

27. The more difficult issue, in truth, is the question of the test which is to be applied, particularly when it is contended as here that constitutional rights are affected adversely by the exercise of that power. The State appellants maintain that there is well-established authority over the last 50 years that the courts exercise a high degree of restraint, or deference, in relation to the actions of another branch of government, and will only interfere with the exercise of the executive power if there has been clear disregard of the provisions of the Constitution, a term first employed in the landmark case of *Boland v. An Taoiseach* [1974] I.R. 338 and applied thereafter in many different contexts in some of the most important cases decided in the past half-century such as: *Crotty v. An Taoiseach* [1987] I.R. 713, *McKenna v. An Taoiseach (No 2)* [1995] 2 I.R. 10, *Kavanagh v. Government of Ireland* [1996] 1 I.R. 321, *T.D. v. Minister for Education* [2001] IESC 101, [2001] 4 I.R. 259, *Horgan v. An Taoiseach* [2003] IEHC 64, [2003] 2 I.R. 468 and *Curtin v. Dáil Eireann* [2006] IESC 14, [2006] 2 I.R. 556.

28. The State appellants point out that the factual circumstances of these cases vary widely. *Boland* involved a challenge to a communiqué issued after discussions between the Government of Ireland, the Government of the UK and elected representatives in Northern Ireland, and thus clearly involved the executive power of state in connection with its external relations, which under Article 29.4.1° was to be exercised "by or on the authority of the Government". This occurred, moreover, in the difficult and sensitive context of the then provisions of Articles 2 and 3 of the 1937 Constitution. *Crotty* was also an exercise of the power of the State in the area of external relations, in the particular context of the State's membership of the

European communities. *Horgan* dealt with the contention that the permission by the Government for US military planes *en route* to or from Iraq to land at Shannon was a violation of neutrality, and was therefore a breach of international law. All of these cases were located very clearly in the area of governmental decisions in the field of foreign and external relations, explicitly consigned to the Government by the Constitution and understood as a quintessential executive function.

29. However, as pointed out by the State appellants, the application of the clear disregard standard has not been limited to the area of what can be described, even loosely, as foreign relations. *McKenna v. An Taoiseach* related to the Government's expenditure in support of a proposal to amend the Constitution. *T.D. v. The Minister for Education* concerned the appeal to the Supreme Court from a mandatory order made in the High Court directing the defendant, the Minister for Education, to take all necessary steps to facilitate the building and opening of secure and high support units for troubled children at a number of specified locations. The Supreme Court overturned the order on the grounds that it offended the separation of powers. However, Murray J. also expressed the view that a mandatory order should only be made against another organ of the State in exceptional circumstances, if such an order had disregarded its constitutional obligations in an exemplary fashion. *Curtin* was a case concerning a statutory procedure for the removal of a judge of the Circuit Court by joint resolution of the Houses of the Oireachtas, by analogy with the procedure provided for under Article 35.4 of the Constitution. Clearly, the case did not involve the exercise of any executive power, but the Supreme Court adopted the language of clear disregard as used in *T.D.*, acknowledging that the legal basis for the adoption of this standard was the fact that the matters at issue fell primarily within the executive province of government, but considered that such a standard

should also be applied to performance of the "exceptional and sensitive function constitutionally assigned to one organ of government, the legislature, of removing judges from office".

30. Finally, *Kavanagh* was not the exercise of power derived directly from the Constitution but rather a power conferred by statute. The Offences Against the State Act, 1939 ("the 1939 Act") was enacted in accordance with the provisions of Article 38.3 of the Constitution, which permitted the establishment of special courts when it was determined in accordance with law that the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order. Section 35 of the 1939 Act provided that a Special Criminal Court could be established "if the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice" and made a public proclamation to the effect. The Act also provided for the Government to declare certain offences to be scheduled offences for the purposes of the Act. The proceedings involved a very broad challenge to the operation of the Special Criminal Court, including a challenge to the proclamation made by the Government which was made pursuant to statute, albeit one whose terms were closely patterned on the terms of the Constitution. Both the High Court ([1996] 1 I.L.R.M. 333) and the Supreme Court (*supra*) dismissed the challenge, relying in part on *Boland v. An Taoiseach*. At page 363 of the Supreme Court judgment, Keane J. (as he then was) said:-

> "It follows that, where the Constitution has unequivocally assigned to either the Government or the Oireachtas a power to be exercised exclusively by them, judicial restraint of an unusual order is called for before the courts will intervene. That is also no more than a recognition that, while all three organs of state derive their powers from the people, the Government and the

> Oireachtas are accountable, directly and indirectly, to the people in the electoral process".

Keane J. also cited a passage in the judgment of Griffin J. in *Crotty v. An Taoiseach* which, although contained in the dissenting judgment, expressed, he considered, the views of the Court upon the issue of principle:-

> "No express power is given by the Constitution to the courts to interfere in any way with the Government in exercising the executive power of the State. However, the Government, and all of its members and the administration in respect of which the members are responsible, are subject to the intervention of the courts to ensure that in their actions they keep within the bounds of lawful authority. Where such actions infringe or threaten to infringe the rights of individuals, citizens or persons, the courts not only have the right to interfere with the executive power they have the constitutional obligation and duty to do so. But that right to interfere arises only where the citizen or person who seeks the assistance of the courts can show that there has been an actual or threatened invasion or infringement of such rights".

31. The State appellants deduced from these landmark cases, covering as they did a broad range of different factual circumstances, a general principle that "deference arises because of <u>who</u> the Government is, not necessarily what it <u>does</u>" which, if correct, would apply to this case. The decision challenged in this case, concerning the question of the application of conflict of interest rules to exclude a teacher related to the candidate pupil and the requirement of the involvement of a registered teacher for the purposes of calculated grades for home-schooled students, appears to involve relatively routine administrative-type decisions, and might have been made pursuant to a function conferred by statute, and if made by any other body would be open to

review simply on the basis of interference with the constitutional rights of the families concerned, and without any special standard of review. Nevertheless, it is argued that, because this is the exercise of executive power by the Government, what is done is not relevant: it is being done by the Government, so that in order to succeed, the respondents must establish that the challenged provisions of the Scheme amount to a clear disregard of constitutional provisions.

32. The Court of Appeal, while accepting that the Calculated Grades Scheme was the exercise of executive power, did not accept that the clear disregard standard was applicable to the actions of the executive in this regard. It sought to distinguish between the cases on the basis of subject matter. Courts were obliged, on a "case by case basis" to give appropriate weight to both appropriate deference to executive power decisions and appropriate vindication of individual constitutional rights as far as possible. At paragraph 228 of its judgment, the Court identified a number of factors to be taken into account in this balancing test. These included the degree to which the executive decision has a policy content, whether or not there are international relations involved which might attract Article 29.4 considerations, whether any resource implications are of distributive or commutative nature, and whether or not there are constitutional rights in issue and, if so, the degree to which the executive decision has impacted on those rights, the degree to which judicial action would interfere with any executive policy, and whether, if there was a range of reliefs possible, the less intrusive relief would be sufficient to vindicate the constitutional rights. These factors, which the Court considered to be non-exhaustive, were deduced from a consideration of the case law. Where constitutional rights had been affected by an executive decision or action, the question the Court was obliged to ask itself was whether the executive decision/power was

"unreasonable" in the *Meadows* sense, i.e., informed by considerations as to whether the interference with constitutional rights was proportionate. Judicial deference should be adhered to, but only as far as was consistent with the protection of individual constitutional rights and in some cases a clear disregard or deliberate and conscious clear disregard test might not be appropriate as it would not be constitutionally adequate to protect the rights. Applying this analysis, the Court came to the conclusion that the decision in this case did not require the application of the clear disregard standard.

33. The argument on behalf of the State appellants recognises that the neatness of the contention advanced – that the deference encapsulated in the clear disregard standard is appropriate every time a Governmental action is involved – comes at a price of some apparently anomalous conclusions. While it is perhaps easy to argue that the decisions of high policy decided at Cabinet level should be approached with some significant margin of appreciation given the differing functions the Constitution envisages that the Government on the one hand and Courts on the other will perform (and the fact that the Government is by Article 28.4 responsible and accountable to the Dáil) it is more difficult to see how or why the principles should apply to more granular decisions taken of an administrative variety, particularly where the decision is made by Government pursuant to a power or duty conferred or imposed by statute, and which could conceivably have been conferred on another body and where the decision would not attract the same deference. It is also difficult in principle to understand why the Constitution obliges the Court to apply a more rigorous standard to actions of the legislature alleged to infringe constitutional rights than to actions of the executive alleged to have precisely the same effect.

34. In this case for example, if the Calculated Grades Scheme had been established pursuant to a statute (as it certainly might have been, if time allowed) it appears to be accepted that the clear disregard standard would not be applicable to the provisions which are under scrutiny in this case. But any such legislation would be the product of both executive determination at Cabinet level and legislative consideration by both houses of Oireachtas. However, the fact that two of the three organs of government had combined to establish a scheme would have the perverse effect that the resulting scheme would be more closely scrutinised and held to a higher standard than if adopted by the executive branch alone. Finally, the underlying principle to follow from the Constitution suggests greater leeway being afforded to governmental decisions, even when affecting constitutional rights. However, that is difficult to square with the law of judicial review of administrative action, which subjects decisions made pursuant to the executive power to the same rigorous scrutiny that is applied to any exercise of public law power. It is difficult to understand why no distinction is made when a decision is challenged which does not directly affect constitutional rights, but that a considerable level of deference is required when it comes to scrutiny of decisions affecting the constitutional rights of a citizen which it is the duty of the courts to uphold, protect and vindicate.

35. To these questions, the State appellants respond simply that the distinction is rooted in the Constitution itself. The executive is responsible to the Dáil under Article 28.4.1°. This, it is argued, is the primary constitutional check on the powers of the Government, and while scrutiny by the courts is not precluded, it is necessarily subsidiary to that of the Dáil. This, it is argued, must necessarily be reflected in the standard of scrutiny applied by the courts to executive action. I agree that the fact of Government accountability to the directly elected house of the Oireachtas is a

relevant consideration when addressing the exercise of executive power, but it does not, in my view, provide a single, entirely satisfactory justification for the broad principle contended for by the State appellants, and upon which they rely in this case.

36. First, I should say that language such as judicial deference or judicial restraint can be employed casually to suggest that the level of scrutiny applied by the courts is a matter for the court's discretion, which could necessarily fluctuate with the nature of the issues, the temper of the times, and the identity and experience of the judges concerned. Deference, or restraint in this context, can be misleading terms, since they tend to suggest that the power exists, but that there is judicial reluctance to apply it to the fullest extent. Properly understood, however, deference to a decision making power of another branch of government, where appropriate, is not a matter of choice on the part of the Court. It is something to be deduced from, and accordingly mandated by, the Constitution. If the proper analysis of the allocation of functions of the different branches of government leads to a conclusion that a court cannot review the validity of the conduct of an office holder such as required, for example, by Article 13.8, even in circumstances where it might be considered that the conduct is wrongful or damaging to the structure of the Constitution or to the constitutional rights of a particular citizen, the Court must nevertheless give effect to the express provisions of the Article. That outcome is required by the Constitution; it is not a matter of choice. Similarly, if the structure of the Constitution implies that action in the courts is a default option, and not the primary method by which the particular constitutional obligation is to be enforced, then that may have a consequence on the degree of scrutiny a court may apply and the manner in which it should approach the issue. But in every case, the conclusion must be found to be required by the

Constitution, and not merely the discretionary decision of the courts. In each case, the test to be applied must be justified by reference to the Constitution and the system and order it envisages. It is necessary therefore to consider in some greater detail what the Constitution says, and does not say, in this regard, and to address to the case law in a little more detail, with particular focus on the decision in *Boland*.

37. It was perhaps easy at the time to miss the significance of the decision in *Boland* since the challenge failed, and contemporary commentary tended to focus on the political fallout from the decision, which was itself quite significant. Looked at through modern eyes, however, it is apparent that it was a case which raised truly novel and important issues. The Constitution contains an explicit prohibition on the Oireachtas enacting legislation repugnant to the Constitution (Article 15.4.1°), and confers a corresponding power on the High Court, and any court exercising appellate jurisdiction from it, to determine the validity of any law having regard to the provisions of the Constitution (Article 34.3.2°). The power of judicial review of legislation is therefore expressed in the text, and just as expressly conferred upon the courts. It is not dependant on any process of inference or deduction, as, for example, famously occurred in *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803), and which led some to argue that judicial restraint in the exercise of the power deduced was required. However, no such similar provisions are contained in the articles of the Constitution dealing with the executive power, and no similar power of review is conferred, at least expressly, upon the courts. Article 28.2 does provide that the executive power of the State shall be exercised by or on the authority of the Government "subject to the provisions of this Constitution". However that, in itself, does not necessarily mean (or at least state in express terms) that the courts are

entrusted with the power of determining whether the Government has acted in accordance with the provisions of the Constitution.

38. As Professor Oran Doyle has observed, *Boland*, in deciding without, it appears, much argument, that the executive could be restrained by the courts if found to be acting contrary to the Constitution, was a significant step in delimiting a broader area for judicial review than the express text of the Constitution provided for and to that extent amounted, he suggests, informal constitutional change, since the Constitution was held to provide for something of immense significance not expressly provided in the text itself (Oran Doyle, 'Constitutional Change in Ireland: Political History and Balance of Power' (2017) 40 D.U.L.J. 3.).

39. It should be said immediately, as Professor Doyle did, that the conclusion in *Boland* was fully justified, even if a more elaborate analysis of the text and structure of the Constitution had been undertaken in that case. The Constitution contains a number of provisions controlling the constitution of the executive (Article 28.1 and 28.7), the manner of its appointment (Article 28.1) and how it shall proceed, even in the field of foreign affairs, an area expressly consigned to the Government by Article 29.4 and traditionally understood as a core function of the executive branch in many comparable jurisdictions. Thus, the Constitution contains explicit provisions in relation to the treaty making power, setting out in Article 29.5 the circumstances in which any treaty made by the Government must be approved by Dáil Éireann, and that a treaty cannot be part of the domestic law of the State without the decision of the Oireachtas. Perhaps the clearest example of the manner in which the Constitution constrains an important — indeed, vital — power of the executive, is the requirement that war shall not be declared without the agreement of Dáil Éireann (Article 28.3.1°). The Government is also obliged to observe confidentiality (Article

28.4.3°), and to prepare annual estimates (Article 28.4.4°). As already observed, the constitution of the Government is controlled, in part, by the Constitution. The Taoiseach, Tánaiste and Minister for Finance must be members of the Dáil (Article 28.7.1°).

40. There seems little doubt that if any of these specific provisions were contravened the courts would be required to exercise a jurisdiction to so declare. Every judge is, after all, required by Article 34.6.1 to make a declaration that they will uphold the Constitution. Similarly, if the Government were to infringe the constitutional rights of a person by, for example, statements considered to be damaging to the good name of the citizen, it is clear that the courts would be obliged to afford the citizen a remedy. Thus it follows, almost inescapably, from the structure and detail of the Constitution that the executive is constrained by the Constitution and that the Courts are empowered to police and, where necessary, enforce those constraints.

41. The fact that the Constitution does not expressly address the possibility of judicial review of the validity of Governmental action cannot be explained therefore by the fact that the Constitution did not consider that the Government was constrained by the Constitution, or indeed that the Courts should not have power and jurisdiction, if necessary, to enforce those constraints. Instead, it may reflect an understanding that the actions of the executive power do not normally directly impinge upon citizens whose rights the Constitution enumerates, and which the State guarantees to uphold. The focus of the Constitution in the protection of the rights of the citizen is directed primarily towards the legislature. This is apparent from the language of the text. Article 40.3 commits the State "by its laws" to defend and vindicate the rights of the citizen, and "by its laws" to protect them from unjust attack. While the State is obliged by Article 40.1 to hold all citizens as human persons equal "before the

law" it is expressly provided that this shall not be held to mean that the State "in its enactments" shall not have due regard to differences in capacity physical and moral and of social function.

42. This focus of the Constitution is also, if anything, more apparent from the underlying nature of the rights protected and guaranteed by the Constitution, and the structure of the State and society created by it. The focus of the Constitution on the possibility of infringement of the rights by legislation enacted by the Oireachtas is precisely because under the Constitution, the executive does not itself make law, and lacks, therefore, the wide-ranging power of interfering with and affecting the lives and rights of citizens, which the legislature undoubtedly possesses. This distinction is blurred in a separation of powers in which the Government sits in and effectively controls the legislature, but is important in the present context.

43. Whatever the position in other constitutional arrangements, the executive under the Irish Constitution is not generally empowered to directly affect the rights of citizens. The executive cannot order the arrest or detention of any individual: that requires legislative authority, under Article 40.4.1°. The executive cannot normally of its own power authorise the entry into the dwelling of the citizen, or indeed any other private property: that again requires legislative authorisation. The executive cannot restrain the exercise of convictions or opinions or restrain the right of citizens to assemble peaceably and without arms or form associations and unions. If the Government were to promulgate rules providing for the detention of individuals, it would not matter how carefully constructed the rules were, what safeguards were established, and how proportionate it was to a legitimate State interest: it would be considered to be an unconstitutional interference with a constitutional right, not because of the nature of the interference, but rather because of the allocation of functions between

the branches of government under the Constitution. The executive lacks power to directly exercise that degree of compulsion over citizens.

44. The distinction is well-illustrated by the law relating to the establishment of tribunals of inquiry. The Government can appoint any person or group of persons to conduct an inquiry and to report to it, and may publish the report, and often does. The costs, sometimes substantial, may be payable by the Government or a Minister of the Government. Many expert reports or inquiries into specific events can proceed on this basis. If, however, it is considered necessary to exercise compulsive power over a citizen, for example by compelling the production of documents, the attendance of a witness at the hearings, or requiring that a witness who while present at those hearings must answer questions put to him or her, or permit the punishment of a person for failure to comply with the orders of the tribunal, then that requires statutory authority under legislation, such as the Tribunals of Inquiry (Evidence) Act, 1921 or the Commissions of Investigation Act, 2004 or some similar provision.

45. This is not to say that the Government by its actions cannot directly affect constitutional rights. The present context, the field of education, is perhaps the most obvious example, where for a considerable time, the State performed its constitutional obligations to the citizen in respect of the provision of education, without detailed legislation, other than provisions compelling the attendance at school for primary education. It is entirely conceivable that, where substantial parts of the State's mechanism in fields such as education or health were regulated by departmental decision, or formal departmental circular, and where funding was provided through central Government, claims could be made that the provisions of the Governmental or departmental decision interfered impermissibly with the constitutional rights of the citizen. In those circumstances, there is no reason to

consider that the courts' obligation to protect and vindicate the constitutional rights of the citizen is any less than if such interference had been effected by legislation, and no different test should, or has been, applied. There are a number of cases where administrative action on the part of the executive has been held to be invalid having regard to the Constitution, and in which the clear disregard standard has not been applied. In *Greene v. Minister for Agriculture* [1990] 2 I.R. 17 the High Court held that a scheme contained in a departmental circular was invalid as it did not protect the institution of marriage. This conclusion was found to follow from the decision in *Murphy v. The Attorney General* [1982] I.R. 241, which of course concerned statutory provisions, and no different test was applied. In *Mulloy v. Minister for Education* [1975] I.R. 88 the Supreme Court held that the provisions of a scheme promulgated by the Department of Education impermissibly discriminated on grounds of religious status contrary to Article 44.2.3°. *Brennan v. Minister for Justice* [1995] 1 I.R. 612 decided that the exercise of clemency was an executive and not judicial function, and the operation of a scheme of commutation of penalties by the Minister for Justice was inconsistent with the Constitution as it operated as a parallel form of justice system. A consideration of the case law, and more importantly, principle, does not establish the general proposition for which the State appellants contend in this case. It is not required to distinguish between cases where it is alleged fundamental rights have been affected by reference to the actor alleged to have infringed the right. Instead, I consider that the case law, and a consideration of principle leads to a different distinction, one, moreover, illustrated in that case law.

46. An important distinction must be drawn between the provisions of the Constitution protecting the fundamental rights of the citizen on one hand, and those on the other,

which regulate the separation of powers and in particular the conduct of the executive branch. This distinction was not squarely addressed in *Boland* or the subsequent case law. The statement of principle made by Griffin J. in *Crotty* and adopted with approval by Keane J. in *Kavanagh* runs the two issues together. Since no distinction was made, no consideration was given to whether different tests applied to review of Governmental action. *Boland* was seen at the time as significant because it was understood as perhaps the first time it was asserted that Governmental action could be restrained by the courts by reference to the Constitution at all. Indeed, the case was defended on the basis that the courts lacked any power to review and control the actions of the Government. But the case can be best understood as perhaps the first case in which a citizen sought to bring proceedings, not to protect a fundamental right guaranteed by the Constitution, but rather to enforce compliance with what the plaintiffs contended to be the provisions of the Constitution regulating the conduct of a branch of government, and in this case, the executive.

47. The claim was not that the actions of the Government infringed a constitutionally protected fundamental right of the citizen: it was rather a claim to require the Government to comply with what the plaintiffs contended were provisions of the Constitution regulating the executive's conduct. It was perhaps understandable, that in 1974, at a time when question of *locus standi* to raise constitutional claims had not yet been explored and determined, that this distinction was not as clear cut as it can appear today. In addition, the dominance of the unenumerated rights jurisprudence led to a certain fluidity about the definition of rights. If a citizen was entitled to challenge legislation (or conceivably, an executive act) because of the alleged infringement of the rights of a third party, such a claim would look very similar to a claim to enforce the provisions of the Constitution by a person not

directly affected by the action or inaction concerned. But logically these are two distinct claims to which different considerations could apply. The plaintiffs in *Boland* and *Crotty* could not argue that the actions of the Government being challenged affected any constitutionally protected fundamental right of theirs, or indeed anyone else's right. Furthermore, they could not argue that they as individuals were affected by the actions of the executive, in any way differently from the manner in which they affected any other citizen, many of whom might have approved of the Governmental action in question. They simply argued that the Constitution did not permit the Government to act in a particular way and that they, as citizens, were entitled to ask the courts to enforce what they argued the Constitution required.

48. It was conceivable that it might have been held that under the Constitution the executive at least in this respect was only responsible to the Dáil in accordance with the provisions of Article 28.4.1°. Unsurprisingly, however, the courts and the State more generally have proceeded on the basis that the Constitution requires that the Court shall have jurisdiction to determine if the executive branch has failed to comply with the provisions of the Constitution. This conclusion follows once again from a consideration of the text and structure of the Constitution. The courts are obliged to uphold the Constitution and the actions of the Government are not immunised from judicial scrutiny in, for example, the same way as the acts of the president (Article 13.8), the utterances in either House of the Oireachtas (Article 15.13), or when the action is said to fall under Article 45. It seems to follow that citizens may have recourse to the courts to argue that the Government has not acted in compliance with the provisions of the Constitution, without having to establish that any personal right of the citizen has been affected, or indeed, that they have any better claim to raise such a contention than any other citizen.

49. It has been observed that the outcome of the decisions in *Boland* and *Crotty* can be said to have established an unenumerated personal right to have the Constitution enforced and applied in accordance with its terms. If a court will enforce a claim as a matter of law, and not discretion, it is possible to speak of this as being a right, but in the present context to describe *Boland* and *Crotty* as generating an unenumerated personal right obscures a distinction which is important in this case. For the purposes of the present case at least, it is better to consider that the outcome of both cases is that a citizen may have recourse to the courts to enforce the Constitution without establishing that the impugned action on provision has any effect upon any personal right guaranteed to the citizen by the Constitution.

50. Returning to the Constitution, it is apparent that there are a number of specific and clear-cut provisions of the Constitution regulating the establishment and conduct of the executive branch. The provision relating to the declaration of war, or the handling of treaties, already discussed, are good examples. A court can be required to consider and, if necessary, enforce those provisions. Outside of the area of foreign relations, it can be said that the executive branch is prohibited from the grant of titles of honour or nobility by Article 40.2, just as much as the Oireachtas is. There are other clear examples of constitutional provisions regulating the manner in which the Government may act. If the Government were to fail to comply with any such clearly expressed provision, then it might be said that the executive was acting in clear disregard of the Constitution, but it would not be necessary to do so: it would be sufficient that the executive had not complied with a clear-cut provision of the Constitution.

51. However, the specific enumeration of certain matters in the Constitution concerning the exercise of power by the executive, if viewed in isolation, would not give a true

picture of the executive power under the Constitution and the approach the Constitution takes to it. Some of the most important functions of Government are not subject to detailed or, indeed, in some cases, any regulation. External relations of the State is a classic area of executive function, and might indeed be said to be captured by the general provisions of Article 28.2, but the express terms of Article 29.4 repeat and emphasise the fact that the Government, and not the legislature or the judiciary, is to conduct the foreign affairs of the State. The Constitution says little enough in concrete terms as to how the external affairs of the State should be conducted other than stating that Ireland affirms its devotion to the ideal of peaceful and friendly cooperation, and the principle of pacific settlement of international disputes, and accepts the general principles of international law. These are not bright-line constraints on Government, and the Government has, by and large, been able to conduct the foreign affairs of the State without much scrutiny by judicial decisions, as indeed the Constitution intended.

52. While foreign relations is a prime example of executive function under this and other constitutional arrangements, the Government also exercises quite considerable power in the domestic arena subject to very little constraint under the Constitution. While the exercise of compulsion or restraint upon citizens may require (whether emanating from the Oireachtas or as a matter of common law) the spending of the considerable funds gathered by the central exchequer, this is something which can directly affect citizens' lives and behaviour but is not subject to detailed regulation under the Constitution. This was, after all, the context in which the decision in *McKenna* arose. The broader circumstances of this case provide a different example. For much of the 19th and 20th centuries the area of primary education was regulated by administrative circular, commencing with the Stanley letter in 1831 but

continuing into the latter part of the 20th century. It is an important feature of the Constitution, therefore, that any analysis of the structure of the State should recognise both the very considerable domestic power of the Government and the fact that the Constitution is largely, and deliberately, silent on the manner of the exercise of that power where it does not, or cannot be said to, affect the personal rights of the citizen.

53. It is possible to return to the *Boland* case, and consider the issue which arose for determination in those proceedings in the light of the above analysis. The Sunningdale conference in 1973 was an early attempt to chart a course to an agreed peaceful future in Northern Ireland. A joint communiqué was issued after the conference and executed by the parties to it, including the Governments of Ireland, and the United Kingdom. Separate declarations were made at paragraph 5 of the communiqué. The declaration made by the Irish Government, and to which the plaintiff objected, was in the following terms:-

> "the Irish Government fully accepted and solemnly declared that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status".

The corresponding declaration by the British Government provided that it would support the wishes of the majority of the people of Northern Ireland, and if in the future the majority of those people should indicate or wish to become part of a united Ireland, the British Government would support that wish.

54. Once it is recognised that the plaintiff's claim in *Boland* was that the issuing of the communiqué by the Irish Government, and in particular the terms of the fifth paragraph, were in breach of Articles 2 and 3 of the Constitution, it can be seen both how ambitious and revolutionary the plaintiff's claim was. Articles 2 and 3 of the

1937 Constitution were more subtly ambiguous than those at either extreme perhaps wished to believe. As Barrington J. pointed out writing extra-judicially in 1979 ('The North and the Constitution' in Brian Farrell (ed.), *De Valera's Constitution and Ours* (Gill and MacMillan 1988)), the articles had to be read consistent with the Constitutional commitment to the ideal of friendly relations with other nations, and to the pacific settlement of international disputes. Later the Supreme Court was to go so far as to hold that the articles operated "in the political rather than the legal order": *In re the Criminal Law (Jurisdiction) Bill, 1975* [1977] 1 I.R. 129. This statement was disapproved of in *McGimpsey v. Ireland* [1990] 1 I.R. 110, where the Court held, however, that insomuch as the Anglo-Irish Agreement provided a means whereby the re-integration of the national territory might be achieved by a process of consultation and discussion, it would never be inconsistent with the Constitution, which was expressly devoted to peace and co-operation in international relations.[2] Barrington J. in 'The North and the Constitution' had considered that the Constitution as a whole committed the State to seek a peaceful method of unification. There was, he considered, no mandate in the Constitution for the Government to attempt to resolve the partition problem by violence. The Sunningdale Agreement was not a treaty and was not subject to the treaty-making or ratification provisions of Article 29. The manner in which the objectives of Article 2 were to be achieved was, therefore, a matter for the Government, and it could hardly be said that those articles of the Constitution required the State to seek reunification against the wishes of the majority of the people of Northern Ireland.

[2] See the discussion at para 3.104 and footnotes of Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly :The Irish Constitution* (5th edn, Bloomsbury Professional 2018).

55. It is of course possible that the Constitution could have spoken in more blunt terms, and, for example, obliged the State not to recognise the status of Northern Ireland, or indeed to refuse to recognise any other state. If so, the Government would be constrained in the exercise of foreign relations, and if it purported to recognise such a state contrary to the express requirements of the Constitution, the Government could be restrained from doing so. Even if the Government did not do so expressly, if it took steps which committed the State to such recognition in all but name, then it might be said that the Government would be acting in "clear disregard" of the Constitution. But that was not the case either in respect of Articles 2 and 3 on the one hand or the Sunningdale communiqué on the other, and accordingly *Boland's* case failed.

56. The outcome of that case, somewhat ironically, provided further justification for the approach that where the Constitution conferred executive power, and did not expressly constrain it in any way, that the courts should only intervene if there was clear disregard of the provisions of the Constitution, and of the structure and society which it contemplated. The decision in *Boland* and some of the language became part of the political narrative and was pressed into service by those opposing the agreement as suggesting that the Irish Government's declaration in paragraph 5 was at best superficial, carried no weight or was, at worst, duplicitous. The fact that a question hung over this aspect of the agreement for even the relatively short period between the commencement of the case and its conclusion was certainly unhelpful. If the Constitution presumptively consigns an area to another branch then even the process of review involved in any court proceedings is capable of being an interference with the freedom of action contemplated by the Constitution.

57. It was entirely logical, therefore, that the Court should find that the power of the Court to intervene in such circumstances would, in a field such as foreign relations, only arise where it could be said that the executive was acting in "clear disregard" of what the Constitution either expressly said, or necessarily implied. That test was held to have been satisfied in the different factual contexts involved in both *Crotty* and *McKenna. Crotty* can be understood as deciding that it was both implicit in and fundamental to the Constitution that sovereignty cannot be transferred without the assent of the people. Once it was determined that certain aspects of the Single European Act had that effect, the conclusion that the Government was acting in disregard of that fundamental precept followed. Normally the Government is at large in how it determines it will spend funds which have been collected and appropriated. However, in *McKenna* it was held, that to do so in aid of one side of a referendum was inconsistent with fundamental concepts of equality, which were inherent in the amendment process and were in clear disregard of it.

58. The decision in *T.D. v. Minister for Education* is somewhat different. The issue in that case arose on the assumption that the Government was acting in breach of the provisions of the Constitution. Nevertheless, Murray J. considered that having so determined, a court would only take the further and significant step of making formal mandatory orders against the Government where there was clear disregard of the constitutional provisions. This was simply a feature of the separation of powers and the respect shown by one organ of government to the other.

59. *Kavanagh*, while involving a statutory power, is somewhat unusual in that the statute in question gives effect to the constitutional provision permitting the establishment of special courts for the trial of offences where it may be determined that the ordinary courts are inadequate to secure the effective administration of justice and the

preservation of public peace and order. That determination involves calls for a broadly political judgement rather than a forensic determination by a court. Effect was given to that constitutional provision by the terms of the 1939 Act, and it followed that where it was contended that the declaration made by the Government was in some way in breach of the Constitution, that it should be necessary to demonstrate some clear disregard for the provisions of the Constitution.

60. It is also arguably consistent with this approach, that where the Constitution calls for a broad-based judgment, and does not constrain it by any specific restrictions or standards, that the primary accountability for such action lies under Article 28 with the Dáil, and that this reinforces the analysis of the judicial role as arising only in the cases of clear disregard. These cases illustrate circumstances where the courts have been called on to review the actions of the Government in different spheres, where it is contended the Government has failed to act in accordance with the express or implied mandates of the Constitution, and have held that the court may only interfere in an exercise of power consigned by the Constitution to the Government where there has been clear disregard of such express or implied mandate.

61. However, a different analysis applies where it is alleged that an executive action infringes the constitutional rights of the citizens. For the reasons touched on above, the circumstances in which the executive may be brought into direct conflict with the fundamental rights of the citizen may be more limited than is the case of legislative action, but where such is alleged, there is no reason why the Court should apply a different standard if it is established that the constitutional right is affected. There is nothing in the Constitution to suggest that the judgment is political in nature or that the Dáil has a particular expertise in the area so that accountability of the

Government to the Dáil should be seen as the primary or sole method of protection of the rights of the citizen. The courts' obligation is to defend and vindicate the rights of the citizen. There is no reason under the Constitution to extend deference to the executive's decision in this regard, over and above the presumption of constitutionality arising from the respect due to both of the other branches of government. But if it is established that the actions of the Government have breached the rights of the citizen, then the courts must uphold the Constitution, and defend the rights of the citizen, in the same way and applying the same standards, as if those rights had been infringed by the actions of the legislative branch of government. This is indeed what Griffin J. said in *Crotty*, and approved in *Kavanagh*:-

> "Where [Government] actions infringe or threaten to infringe the rights of individuals citizens or persons the courts not only have the right to interfere with the executive power they have the constitutional obligation and duty to do so".

That is what is alleged here. The respondents to the appeal contend that the operation of the Calculated Grades Scheme breached the constitutional right of the plaintiffs in each case, identified as an unenumerated or derived right of the home-schooled child to have reasonable account taken of his/her situation when education policies are being implemented by the State, or alternatively a duty on the State not to disadvantage a child who is home-schooled where it is reasonably possible to avoid that outcome. The State, however, deny that any such right is guaranteed by the Constitution, and in any event that any constitutionally protected right of the plaintiffs has been infringed by the terms of the Calculated Grades Scheme. There is no justification for applying a "clear disregard" test to that question. The Court of Appeal, considering itself constrained by authority, considered a case-by-case

analysis should be carried out, and concluded that the standard did not apply here. For reasons I have addressed, I have come to the same conclusion albeit by a somewhat different route. It is necessary to turn to now to the question of whether any right of the applicants was affected by the Calculated Grades Scheme and the decisions made under it and if so whether any such right was breached.

Is there a Constitutional Right of the Home-Schooled Child to have Reasonable Account Taken of his/her Situation when Education Policies are Being Devised and Implemented by the State?

62. The plaintiffs have asserted that the Constitution protects a right which is defined in these terms. It is argued that the right is derived from Article 42.4, which provides:-

> "The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation".

63. The appellants contend, and I agree, that there are a number of serious and ultimately insurmountable objections to accepting that the right asserted can be numbered among the unenumerated rights protected by Article 40.3 of the Constitution.

64. First, it is accepted that the principles set out in the judgment of Clarke C.J. (with which the other members of the seven person court agreed) in *Friends of the Irish Environment clg v. Government of Ireland* [2020] IESC 49, [2020] 2 I.L.R.M. 233, ("*FIE*") are applicable to this case. The right asserted must be capable of being derived from the text and structure of the Constitution. It is difficult, however, to understand how Article 42.4 can be said to imply any such right.

65. It is not apparent that Article 42.4 is addressed to or contemplates home-schooling at all. It commits the State to providing for free primary education, something which, by definition, is not being availed by children being educated at home or outside schools, which normally involves the rejection of the education provided, or supported, by the State. It also commits the State to endeavour to supplement and give reasonable aid to private and corporate educational initiatives. This also cannot be understood, in my view, as a reference to home-schooling. It more naturally applies to private schools, which have already been identified in Article 42.2 as something distinct from home schooling. That Article states that parents should be free to provide education in their homes or in private schools or in schools recognised or established by the State. The subsequent reference in Article 42.4 to "other educational facilities or institutions" may refer to other forms of institutions and facilities, outside the traditional school structure and providing something other than the standard academic curriculum, and may also possibly apply to third-level education. However, and in any event, such educational facilities or institutions are to be provided by the State whereas the essence of home schooling is that under Article 42.2 it is to be provided by parents. Given the scope of Article 42.4, it is difficult to accept, whether by reference to the individual clauses, or collectively in the overall, that it can be understood to address the position of home-schooled children, let alone imply the existence of the rather cumbersome right contended for by the plaintiffs.

66. It is also argued, correctly in my view, that the right contended for is both implausibly and impermissibly vague. Education is the one socio-economic right unambiguously protected by the Constitution. Article 42 makes a comparatively detailed provision in respect of it. The right asserted is of a different order, and is

less specific than the rights and obligations enumerated in Article 42 and in particular in Article 42.4. It is difficult to accept that it is to be derived from the terms of Article 42.4 or Article 42 more generally.

67. In *FIE*, Clarke C.J. stated at paragraph 8.11 of his judgment:-

> "… it does seem to me that there needs to be at least some concrete shape to a right before it is appropriate to identify it as representing a standalone and separate right derived from the Constitution. If it does not extend existing recognised rights, then there is no need for it. If it does extend existing recognised rights, then there needs to be at least some general clarity about the nature of the right so that there can be a proper analysis of whether the recognition of the asserted right can truly be derived from the Constitution itself".

In the particular case, he considered that the "right to a healthy environment" asserted by the plaintiffs in that case, and as suggested by the High Court in another case, was impermissibly vague. The same reasoning can be applied *mutatis mutandis* to the right asserted in this case.

68. A further objection to the right as specified, is that it appears to fluctuate depending on the particular circumstances of the individual. The right is asserted to have "reasonable" account taken of "his/her situation". In *School Attendance Bill, 1942, and Article 26 of the Constitution* [1943] I.R. 334, it was stated, however that the certain minimum education in Article 42.3.2° "indicates a minimum standard of elementary education <u>of general application</u>" and indeed, that is normally the case with any constitutionally protected rights. They are rights which all citizens have, equally. It is not explained, how in the context of a provision dealing with rights of

general application, there can be an unenumerated or a derived right to have special, albeit reasonable, account taken of the individual's particular situation.

69. Perhaps an overarching objection to the derived right argued for, is that on analysis it reveals itself as having been engineered in reverse. The steps of the argument can be traced in the following way. The plaintiffs were undoubtedly excluded from the operation of the Calculated Grades Scheme. That decision followed from certain policy decisions made (to exclude teachers who had a conflict of interest, and who require the involvement of registered teachers). Those decisions, in turn, did not take account of (in the sense of make provision for) persons in the position of the plaintiffs who could not obtain a calculated grade. This is undeniable. Indeed, once the scheme was devised, it meant, and was understood to mean, that a small group of candidates could not obtain a calculated grade. The plaintiffs contended, and the Court agreed, that this was unreasonable, and that steps could have been taken to make the possibility of calculated grades available to the plaintiffs. If, therefore, there was a constitutional right to have reasonable account taken of the position of the home-schooled child when educational policies were being formulated or implemented by the State, then it must follow that the plaintiffs' claim must succeed. But this reasoning has proceeded backward from the facts of the case to assert a right rather than to demonstrate how any such right can be derived from the Constitution. For these reasons I cannot accept that the right asserted can be derived from the Constitution and in particular Article 42.4 thereof.

70. While these reasons provide sufficient justification to conclude that there is no such derived right, it is also worth considering why the Court should be rigorous in its analysis of such claims. Determining the existence of a constitutionally protected fundamental right is not merely about succeeding in litigation. The existence of such

a right normally implies a correlative duty. Officials devising educational policy ought to be entitled to be aware in advance of what the Constitution requires of them, at least in general terms, and are entitled to feel aggrieved, if informed after the fact, that they have breached a constitutional right which had never before been suggested, and which cannot be easily or readily deduced from the provisions of Article 42.4, for example. Furthermore, as the discussion in *FIE* acknowledged, there are certain fundamental aspects of the separation of powers involved in this issue. If it is permissible to conclude that a particular decision is unreasonable, in the sense that a judge considers a different decision ought to have been made, and then find a constitutional right to a reasonable decision (in the same sense), the plaintiff may succeed but there has been a significant shift of decision-making authority from the executive to the judicial branches in circumstances, moreover, where the intense focus that litigation brings to bear on the particular circumstances of the individual case does not give the Court visibility, or necessarily understanding, of the many factors that may be involved in the particular decision.

71. However, in this case it is puzzling that the plaintiffs thought it necessary to derive the asserted unenumerated right from Article 42.4 or at all. It is understandable that the Court of Appeal approached it in this way, because it seems clear that the Calculated Grades Scheme affects, and as it is sometimes put, engages constitutional rights and values and the plaintiffs' assertion that their constitutional rights were infringed does not appear in any way implausible. Home-schooling is specifically mentioned in Article 42.2, which provides as follows:- "Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State". There was therefore a clear constitutional dimension to the case.

72. The provisions of Article 42.2, recognising the possibility of home-schooling, can best be understood in the context of the sub-articles which bracket that sub-article. Thus, Article 42.1 provides that:-

> "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".

Article 42.3 provides:-

> "1° 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.
>
> 2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social".

73. There is no doubt, therefore, that the Constitution recognises and protects the freedom of parents to provide education for their children in the home. Article 42.1 has already stated that it is the duty of parents to provide according to their means for the education of their children, which is described in very broad terms as religious, moral, intellectual, physical and social. It follows that parents have a duty to provide for that education, and Article 42.2 expressly provides that such education can be provided in the home. It must also follow that, in any case, where there is no conflict between the members of the family that children have a constitutional interest in receiving the education provided for them by their parents. It will be necessary to consider later what is comprehended by the concept of freedom in this sub-paragraph, but it seems apparent that the freedom to provide or receive

education in the home is protected by the Constitution, so that the family or individual cannot be deprived of it by the State, other than in accordance with the Constitution. It is, in any event, part of the right and duty of parents to provide (and therefore the right of their children to receive) education under Article 42.1, which right the State has guaranteed to respect. The Irish text of Article 42.1 provides an important flavour in this regard:- "… ráthaíonn [An Stát] gan cur isteach ar cheart doshannta ná ar dhualgas doshannta tuistí chun oideachas … a chur ar fáil dá gclainn" which conveys the sense that the State cannot interfere with (cur isteach ar) the right of parents subject to the Constitution to provide education under Article 42.1, a right which Article 42.2 contemplates may take place at home.

74. Once it is accepted that the express provisions of Article 42 implies corresponding rights and interests on the part of the child, then the plaintiffs' case can be put more simply, and perhaps more powerfully, as a contention that the operation of the Calculated Grades Scheme in excluding certain home-schooled students is an impermissible interference with (cur isteach ar) the express right of parents to provide education in the home, and the derived right of children to receive it. It follows that the next issue is whether those rights and interests have been impermissibly interfered with by the State in the provisions of the Calculated Grades Scheme.

Was the Calculated Grades Scheme an Impermissible Interference with the Rights of the Plaintiff Parents and Students?

75. This question raised a broader issue as to how a challenge to an administrative decision alleged to infringe the constitutional rights (or freedoms) of the citizen, should be assessed. In this regard it may be useful to consider precisely what is in

issue here. The Calculated Grades Scheme did not, of itself, prevent the plaintiffs from obtaining a Leaving Certificate. The examination was postponed, but that decision was not challenged. Accordingly, the nub of the plaintiffs' complaint is that the operation of the scheme meant that they could not get a Leaving Certificate in late Summer 2020 at the same time as other candidates, and were accordingly unable to proceed to the next phase of their lives, or more particularly, to enter third-level education in autumn of that year.

76. In the course of case management, the parties were invited to consider a number of other hypothetical situations. If the plaintiffs had been able to sit the Leaving Certificate in June, 2020, or at least in sufficient time to obtain a Leaving Certificate in time to progress to third-level education, would it still be maintained that their exclusion from the Calculated Grades Scheme was an impermissible interference of the constitutional rights of the plaintiffs? Counsel for the plaintiffs frankly, and correctly in my view, conceded that this would significantly weaken his case, and perhaps fatally undermine it.

77. The converse situation was put to the State appellants: if there was no prospect of sitting an examination, perhaps for a year or indeed more, so that the consequences would be that the plaintiffs would have to wait perhaps indefinitely to obtain a Leaving Certificate, would the decision that the plaintiffs were excluded from the scheme be justified? The State appellants were unwilling to concede that in this situation there would either be an invalidity of the scheme or an unconstitutionality, in part because it was argued that it was still possible to obtain a Leaving Certificate by bringing oneself within the Calculated Grades Scheme, and which it was argued was rationally constructed, and the exclusions therefrom justifiable.

78. A further consideration was that in this case the examination was due to commence in June and that all the students concerned were to sit it after what was, in nearly all their cases, a two year educational cycle. If, however, it had been possible to give greater notice of the decision, so for example, if the 2021 and 2022 examinations had also been postponed in circumstances where students who intended to sit it in June, 2021 and 2022 could have had time to bring themselves within some provision of the Calculated Grades Scheme, would the decision still be considered invalid and unconstitutional? That seems unlikely – even on the respondents' formulation, the constitutional right was qualified. It was an obligation to take reasonable account of their position.

79. These considerations illustrate the fact that the issue in this case depends upon particular and pressing facts. While it was suggested in the course of argument that *anything* which inhibited or interfered with a family decision in relation to home-schooling was an impermissible interference with the constitutionally protected right, this is too sweeping a proposition. A student who could not get calculated grades, but could still sit the Leaving Cert in June 2020 so as to proceed to third-level that year, or who had been given sufficient notice of the change to be able to adjust his or her educational arrangements would not be able to successfully challenge the scheme, even though such a student would experience some differentiation and disadvantage as a result of his/her status as a home-schooled child, particularly in comparison with school educated peers. But that in itself would not, it appears, render the operation of the scheme invalid. It would seem apparent therefore, that administrative decisions as to examinations or alternatives schemes, may affect arrangements made by parents to provide education in an out-of-school setting, without contravening the Constitution.

80. This is an important point. It was contended in argument that no interference whatsoever was permissible with home-schooling. Any arrangements which discommoded parents was, it was suggested at one point, outlawed by the Constitution. If this were indeed what the Constitution requires, that would create a significant constraint on educational policy and, in particular, the State education and examination system. The State would be obliged to only pursue options which could be pursued outside the formal school setting by parents, and indeed, conceivably the choices made by parents, however idiosyncratic, would create a threshold above which educational policy could not rise. That could, for example, preclude moving the examination process from formal written examinations on a set day towards more project-based assessments or might preclude examination in subjects which could require expensive investment in equipment and infrastructure, even though education in such subjects might be considered highly desirable to equip children for the future world. I cannot agree that this is what Article 42 requires.

81. The "freedom" to provide education at home so long as certain minimum standards are achieved is not just a freedom to prepare children for the State examination system outside a formal school setting, which is the focus of this case. It is a much broader freedom. Once a parent provides the minimum education required by Article 42.3.2°, the parent is free to provide an education they think fit, perhaps entirely rejecting the traditional curriculum and the State examination structure itself. Alternatively, it could involve preparing children for examinations set by other examination boards in other countries. Parents may firmly believe that a thorough knowledge of Thomistic philosophy and an aptitude for the harpsichord will equip a young person for life better than the book-based learning of traditional subjects still favoured by the Leaving Certificate, and if so, so long as such parents provide the

minimum standard of formal education required, they are free to educate their children in such disciplines and skills.

82. However, that freedom does not involve any right to demand that the State provide an examination system to measure that knowledge and skill, any more than they can demand that State-supported universities provide some mechanism to admit such persons to third-level without sitting the Leaving Certificate or participating in the Central Applications Office ("CAO") process. It is of course unlikely that many — or indeed any — parents would take such extreme positions. Indeed, most cases of home-schooling involve little more than parents believing that they can better prepare children for examinations than the traditional primary and second-level education in schools or even, more prosaically, may involve simply preparation for one or more subjects which are either not taught in the school attended by their children, or are simply taught in a way or to a standard which the parents consider less desirable. The constitutional freedom guaranteed by Article 42 involves the capacity to prepare students, if so desired, for the examination outside the school setting: it is not to demand that the examination system or curriculum be adapted to accommodate the educational theories of parents. Parents may believe sincerely that aptitude for online gaming will be an invaluable life skill for their children in the future, and so long as they provide the minimum level of education required by Article 42.3.2°, the State cannot interfere with them if they devote the rest of the time available for education to improving their children's skills in this regard. But they cannot contend that the State must set up an examination system to test those skills, still less provide a marking system which would allow the young person to progress to third-level education without sitting the Leaving Cert or some equivalent, and participating in the CAO system.

83. It may be at the margins that it can be said that otherwise justifiable educational decisions may be impugned as an impermissible interference with the freedom to provide education outside a school setting or at home. For example, if the State made a subject compulsory for the Leaving Certificate which required substantial investment, and at the same time provided grants to schools to purchase equipment and then required that such equipment only be made available to full-time students in the school, an issue would arise. But other than in such extreme situations the manner in which decisions are made in respect of the structure of the Leaving Certificate, or any other method of assessing knowledge, skill or ability, does not normally engage with the freedom to provide education in an out of school setting: the freedom to provide home-schooling in such a setting is the freedom to prepare students for a state examination or indeed other form of assessment, whatever that may be, at home.

84. This case, however, involves a more narrow and particular focus. The plaintiffs were undoubtedly exercising their constitutionally protected freedom to provide and receive education in an out of school setting which in this case was directed towards preparation for the Leaving Certificate in June 2020. The students had followed a course of study in preparation for the examination. The position of the Leaving Certificate in Irish life is such that it provides an important datum which assists persons in accessing the labour market, and going on to third-level education. The plaintiffs here were registered for the examination, and the Department of Education was aware, at least in general terms, that there were persons in the position of the plaintiffs who were exercising their freedom to provide education at home and were preparing for the Leaving Certificate examination, and was further aware that there would be people in the same position as the plaintiffs and who could not be

accommodated within the Calculated Grades Scheme. In those circumstances, did the decision to put in place instead of the postponed Leaving Certificate examination a scheme for calculated grades which the student plaintiffs could not obtain, and therefore access the system for admission to third-level education in 2020, amount to an impermissible interference with the freedom to provide and receive education in an out of school setting?

85. The arguments on either side are clear. The plaintiffs do not challenge the logic of the initial decision to postpone the Leaving Certificate examination, or to put in place a substitute method of assessment to provide a Leaving Certificate. Nor do they challenge the logic of the initial exclusions from the Calculated Grades Scheme. It is apparent that a system constructed on the initial building block of teacher assessment, and required to command public confidence in the same way as the examination for all its faults does, could not accept an assessment of teachers so closely connected to the student to give rise to a conflict of interest. Similarly, it was at least logical that some assurance be sought as to the professionalism of the person involved in providing the initial grade, and registration as a teacher is a reasonable assurance of such professionalism on which the State was entitled to require.

86. The real complaint of the plaintiffs is not the initial structure of the scheme, but that it did not provide a workaround for persons in the position of the plaintiffs, in the same way as it did for candidates within the school setting who had been taught by close relatives, and/or by unregistered teachers. This is so even though the scheme was adjusted to allow other home-schooled and out-of-school candidates to obtain calculated grades. The plaintiffs do not accept that the reason advanced for the fact that the scheme did not extend to cover persons in the position of the plaintiffs, namely that any adjustment of the scheme would amount to providing an individual

assessment to persons in the position of the plaintiffs, and which would be unfair to other candidates, is either a plausible or a sufficient reason for the degree of interference with the interests of the plaintiffs.

87. The State appellants argue that faced with a crisis, the State developed a comprehensive scheme which achieved the objective of providing a Leaving Certificate to the vast majority of candidates who had proposed to sit the examination in 2020, and that the scheme was sufficiently robust to maintain the confidence of the public, and educational stakeholders. Significant adjustments were made to the initial scheme to accommodate a substantial number of candidates who did not qualify under the rules for in-school students. Unfortunately, but inevitably, it is said, it was not possible to devise a scheme that would provide a calculated grade for every candidate for the Leaving Certificate in 2020. To accommodate persons in the position of the plaintiffs would have required a form of individualised assessment which the State appellants argued was inconsistent with the scheme, and the important principle of equity between students. To make an individualised assessment available to all candidates would have been impossible. While the outcome was acknowledged to be inconvenient for the plaintiff candidates, they were not prevented from obtaining the Leaving Certificate, or indeed, accessing third-level education in due course if that was appropriate. The impact on the plaintiffs, and persons in the same position, was simply that they were not able to obtain calculated grades and were obliged to sit the Leaving Certificate, which had been deferred to November, and consequently could not enter third-level or indeed the job market, until 2021.

88. To a large extent, the outcome of this case depends therefore on whether or not a constitutionally protected freedom was affected by the decision, and if so, the test to

be applied. If, for example, there was no constitutional freedom or right involved, then even though a court might consider that the Department of Education and Skills was unnecessarily cautious, the decision might not be said to be irrational in the sense of flying in the face of fundamental reason or, even in its broadest sense, unreasonable. It was an advertent decision made by reference to valid considerations by the body with responsibility for making it and with relevant knowledge and expertise. By the same token, even if the decision was found to have affected a constitutionally protected right or freedom, it would be difficult to argue, that it was a decision taken in clear disregard of those interests.

89. For reasons already set out, I consider this decision did affect a constitutionally protected freedom, and that the clear disregard standard does not apply. It is necessary, therefore, to consider how the Court should assess whether the decision having the effect of excluding the plaintiff candidates, following as it did from the structure and terms of the scheme, amounted to an impermissible interference with the constitutionally guaranteed interest of these plaintiffs and their freedom to provide and receive education at home. This raises the difficult question of the correct approach to a contention that an administrative decision is invalid because it amounts to an impermissible interference with a Constitutional right.

90. The Court of Appeal observed correctly that it is difficult to derive a clear *ratio decidendi* from the decision of the majority Court in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701. This may be partly because the particular circumstances of that case made it an imperfect vehicle for the determination of the question. That was an application for leave to seek judicial review, and therefore only involved a threshold question, as to whether arguable grounds had been shown to grant leave to seek judicial review. Second,

while the legal issue of the correct test to be applied was a reasonably clear choice between a standard of what might be called *Keegan* rationality, and a higher proportionality standard, it was not entirely clear that the resolution of that issue was precisely engaged on the facts of the case. Both tests have in common the fact that they proceed on established or uncontested facts. The question, in one case, is whether the reasoning leading to a conclusion can be said to follow from the premises, as Henchy J. put in *Keegan*, or perhaps at the most generous extreme of the test, was reasonable. In the case of proportionality, the question is whether a means adopted to achieve a legitimate end is matched to it, so that it intrudes no more than is necessary on a protected right. It is not clear, however, if the contention in that case was that the Minister did not accept that there was a risk of female genital mutilation ("FGM") and accepted the Refugee Appeals Tribunal's rejection of the applicants account as not credible, or considered that there was a risk of FGM which was nevertheless acceptable, or indeed that FGM did not constitute a threat to freedom so as to engage s.5 of the Refugee Act, 1996, and how, in any event, the issue of validity would be resolved by adopting either a rationality or proportionality test. That difficulty is compounded by the fact that proportionality appears to be used in a number of different senses in the judgments. Furthermore, as observed in the dissenting judgments, the test is more readily applicable to the validity of legislation. Indeed, the case is further complicated by the fact that there was disagreement as to whether the application to the Minister should be viewed as a contention that the decision of the Minister to deport was in breach of the non-refoulment obligation contained in s.5 or as essentially an *ad misericordiam* request to remain under s.3 of the Immigration Act, 1999.

91. It might also be said that the issue certified did not present the issue as clearly and precisely as might be desired. It was stated to be:- "in determining the reasonableness of an administrative decision which affects or concerns the constitutional rights or fundamental rights, is it correct to apply the standards set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39?". There is little doubt that in determining *reasonableness* a court must apply the *O'Keeffe/Keegan* test. The question brought into focus by the present case is whether in determining *validity* where it is alleged fundamental rights have been breached must a court apply the *O'Keeffe /Keegan* standard? If phrased in this way it might have been more readily apparent that the question made assumptions which might have been made explicit and which required to be justified. The suggestion that any issue of breach of constitutional rights had to be resolved by reference to some test of reasonableness put the issue into something of a straitjacket. Finally, it could also be said that the argument proceeded on an assumption that the decision involved affected or concerned constitutional or fundamental rights, but without identifying the particular rights, their specific source, and the manner in which they were alleged to be breached, involved or affected.

92. Part of this difficulty lay in the genesis of the legal argument, which sought to rely on some sophisticated analysis contained in authority from the UK which had addressed the approach in that jurisdiction when it was alleged that a decision breached rights guaranteed under the ECHR, insomuch as that instrument was incorporated in that jurisdiction by the Human Rights Act of 1998 ("HRA"). Ultimately, and at the risk of oversimplification, it had been held that while the traditional judicial review rubric continued to apply, a court should approach any such case with "anxious scrutiny". Given the superficial similarity of the Irish

European Convention on Human Rights Act, 2003, to the UK legislation and the similarity of the circumstance of many cases involving deportation, it was inevitable that regard would be had to the decisions of the UK courts, whose reasoning is often of great assistance. However the legal circumstances were somewhat distinct. Prior to the coming into force of the HRA in the UK in 2000 there was no rights-based review by reference to any entrenched or guaranteed rights. There was, however, a very well developed system of review of administrative action, which, however, only permitted review of the substance of a decision on grounds of unreasonableness. It was inevitable, therefore, that when it came to be possible to challenge decisions on the grounds that the relevant authority or decisionmaker had not performed their functions in accordance with the requirements of the Convention rights, that such analysis would be fitted into the taxonomy which had been established; it was argued that a decision could be unreasonable if it breached convention rights – leading in turn to the argument that cases involving such a contention require the courts to adopt anxious scrutiny of the decision. The structure, however, remained in place. A decision which did not survive such scrutiny was invalid as being unreasonable.

93. It is undoubtedly the case that a decision that is found to breach rights can often, indeed almost always, be described as unreasonable, but it is not apparent that this is the optimal way of approaching and analysing the claim. In this jurisdiction the sequence was somewhat different. The development of judicial review of administrative action paralleled the development of constitutional law, and if anything, was later and separate. The basic question where it is alleged that an administrative decision breached constitutional rights is the same as that which applies when it is argued that a legislative provision breaches those rights. While this question might be resolved by using the language of reasonableness, it is not

facilitated by the merging of different approaches, particularly when they come encrusted with layers of case law decided in a different context.

94. Faced with these difficulties, the majority decision in *Meadows* is undoubtedly clear in relation to what it did not decide: rejection of the contention that, when it is alleged that an administrative decision breaches a constitutionally protected right, the Court should assess that on the standard of rationality set out in *State (Keegan & Lysaght) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642. When it is alleged that an enactment of the Oireachtas breaches a constitutional right, it is not sufficient to establish that the provision could be considered rational or reasonable at some level, still less that it does not fly in the face of fundamental reason. The Constitution protects rights against invasions whatever the motive or reasoning. There is, in principle, no reason why a different test should be applied to the decision or action when it is taken as an administrative decision pursuant to the executive power, rather than pursuant to legislation. The majority judgments were also clear in concluding that the principle of proportionality could be employed in the analysis and resolution of cases raising issues as to the impact of decisions on fundamental rights.

95. The extent to which any right is protected by the Constitution is defined by the Constitution itself. It is possible in theory to have a right where protection is absolute or near absolute. In such a case it is not for the Court to alter the balance set by the Constitution. However, it may be said as a general proposition that constitutional rights are not absolute and are by the terms of the Constitution itself limited by considerations of public order, morality and/or practicality. This proposition was reflected in the judgment delivered by Kenny J. in *Ryan v. Attorney General* [1965] I.R. 294 at page 312:-

> "None of the personal rights of the citizen are unlimited; their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefits which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen."

It has been found useful to approach the question of the validity of any action, legislative or otherwise, which affects constitutional rights by using the tool of proportionality. While I do not think that proportionality, as discussed in the case law to date, is necessarily a precise or a failsafe test, it is nevertheless a useful frame of analysis which can be employed in this context, where the issue is whether a provision which affects a constitutionally protected right is an impermissible interference with that right.

96. Here, the measure adopted undoubtedly pursued the legitimate interest of producing, at short notice, a comprehensive scheme which provided Leaving Certificate results to the overwhelming majority of candidates, while maintaining the confidence of the public and educational stakeholders. The scheme also, and importantly, secured the cooperation of teachers who were required to operate it and the confidence of universities and employers. The establishment of such a scheme does not, moreover, affect *per se* the constitutionally protected freedom to provide education at home.

Many students receiving education outside the school structure were able to benefit from the scheme.

97. However, the situation here is more acute. The parents and students involved here were exercising their constitutional freedom in the context of preparation for an examination to be held in June, 2020. The freedom to provide and receive education in a home setting was therefore engaged in a real sense: the preparation for the 2020 Leaving Certificate exam was an exercise and expression of that freedom in a concrete and direct way. The decision of the Government in postponing that examination to a later date precluded entry to third-level that year for anyone sitting the postponed examination. The Calculated Grades Scheme did allow for that possibility, indeed that was one of its principal purposes. The decision to adopt provisions relating to out-of-school candidates and the decisions made consequent upon it that the plaintiffs were ineligible, did therefore, affect the freedom to provide and receive the education out of school, which in this case was directed towards the Leaving Certificate due to take place within a month of the challenged guidelines being issued.

98. The decision that the plaintiffs were ineligible for calculated grades undoubtedly imposed a burden upon the particular plaintiffs which occurred because they had elected to exercise a freedom the Constitution guaranteed. If there was an option of sitting the Leaving Certificate or some substitute in June, then it could still be said that the plaintiffs would have been burdened, since they would not have the two options open to students educated at school. But they would still have had a route to proceed to third-level, and moreover a route akin to that which they had chosen to prepare for. Therefore, the degree of interference with the right would have been more marginal and might have been be said to be justified by considerations of

fairness and equity and perhaps more pragmatic considerations as to whether the scheme would continue to receive the support of teachers and the confidence of parents.

99. Similarly, if sufficient notice had been given to afford a lead time to candidates to adjust their education to permit compliance with the scheme and obtain a calculated grade, then it might be said, that there would still be some interference with the freedom of choice of parents and pupils in relation to the delivery of education, but it would be of a significantly lesser order, and arguably justified by the same considerations. At the other extreme, if there was no possibility of sitting the Leaving Certificate examination and, moreover, calculated grades were the only method of obtaining a Leaving Certificate, so that the only option for plaintiff students would be to abandon their studies and perhaps go to a formal school, it would appear that the measure could be said to be an impermissible interference with the rights of the students and their parents.

100. This case lies between those extremes. However, given the fact that these plaintiffs had already completed a substantial course of preparation for the Leaving Certificate, and given moreover, the significance of that examination on the life of most young people in Ireland, the loss of a year which would otherwise be spent in third-level education, the decision to exclude the plaintiffs from the Calculated Grade Scheme is a significant and substantial interference with, and a burden on, the freedom exercised by them. In my opinion, it cannot be justified by the general consideration advanced. The question is whether the degree of interference with or burden upon the exercise of the right is justified. This requires a close consideration of the specific explanation offered by the Departmental witnesses for the choice made.

101. The argument advanced was that any accommodation of the plaintiffs would require an individualised assessment by a review of their work by another assessor, or by a special examination. If an individualised assessment scheme was permitted for the plaintiffs, it would have to be made available as a matter of fairness to other students which could undermine the efficacy of the scheme, and be impossible in practice. However, if not made available generally, other students might complain and challenge a refusal to provide such an option for them.

102. However, this argument is not compelling. There is no evidence as a matter of fact that any concern had been expressed in this regard, or indeed, as to the different provisions already adopted for out-of-school students. Furthermore, the impact on any such students of not being offered the possibility of the type of individualised assessment which would be offered to these plaintiffs and similar students would be of a much lesser order than the impact on these plaintiffs of exclusion from the Calculated Grades Scheme. Any such student who complained that students in the position of the plaintiffs were receiving a form of assessment not made available to the complaining student would have to acknowledge that he/she had access to the Calculated Grades Scheme not available to the plaintiffs. It is difficult to see how that difference of treatment can be said to affect any constitutional right, freedom or interest. I do not consider, therefore, that the prospect of a challenge from a complaining student has been demonstrated to be of sufficient weight or reality to justify the undoubted burden imposed on the plaintiffs by being excluded from the possibility of progress to third-level education in 2020. I would, therefore, uphold the decision of the High Court and Court of Appeal albeit on different and narrower grounds.

The Equality Argument

103. Much of the plaintiffs' arguments have been advanced by drawing comparisons with the position of other students, whether those in school, being taught by a teacher closely connected to them, or those out of school, but who nevertheless were able to access the Calculated Grades Scheme. This is understandable, and is a further illustration of the fact that a person who feels that they have been treated less favourably that somebody in a similar position may have a strong sense of grievance. The Court of Appeal did not consider it necessary to address the plaintiffs' arguments in this regard because the plaintiffs had already succeeded on the argument that the exclusion from the scheme violated the derived right contended for. The plaintiffs have, however, sought to advance the argument again on this appeal.

104. It is clear that the difference of treatment made here is not made on the basis of any intrinsic aspect of human personality. Nevertheless, the plaintiffs argue that the right to an education is concerned with promoting the skills, dignity, self-confidence and intellectual and moral development of the individual and that the exclusion of the plaintiffs from the Calculated Grades Scheme prevented them from concluding their secondary education and progressing to university and thus it is suggested their exclusion affects their human personality.

105. It is undoubtedly the case that education is concerned with the development of the human person, and at the broadest level it is said that the objective of the protection of fundamental rights is to permit the full development of the human person. However, it is precisely because of the importance of education in that process that it receives specific protection under Article 42. However, Article 40.1 is concerned with impermissible differentiations. The difference of treatment here is based on the

fact that the plaintiffs, such as Elijah Burke, are educated at home, whereas a hypothetical comparator student also taught by a close relative, is educated within a school system. This distinction cannot be said to be a differentiation based on human personality.

106. It is also argued however, that Article 40.1 can be invoked where a differentiation involves or bears upon a constitutional right. However, if it is established that something is a breach of a constitutional right, then the argument gains nothing if it is also asserted that someone else was treated differently and better. The claim already succeeds on the basis of an interference with a constitutionally protected right, freedom or value, and considerations of equality are superfluous. That, indeed, is what has occurred here. I would leave, therefore, to another case the question of the broader applicability of Article 40.1 where there is no discrimination on grounds of human personality, or where it is alleged that a fundamental right is involved, but not itself breached. For the reasons set out above, I would dismiss the appeal.