

THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 738 J.R.]

BETWEEN

REBECCA CARTER

APPLICANT

AND

THE MINISTER FOR EDUCATION AND SKILLS, THE STATE EXAMINATION COMMISSION AND THE CENTRAL APPLICATIONS OFFICE

RESPONDENTS

AND

UNIVERSITY COLLEGE DUBLIN – NATIONAL UNIVERSITY OF IRELAND, DUBLIN

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 3rd day of October, 2018

1. Writing in 1957, Professor C. Northcote Parkinson announced the principle that “*delay is the deadliest form of denial*” (*The Law*, 1957, 1981 Penguin ed., p. 158). If proof were needed of Parkinson’s Law of Delay, the present case will stand as a helpful illustration. “*Instead of saying ‘No’, the P[rohibitive] P[rocrastinator] says ‘In due course’... The theory of N[egation by] D[elay] depends upon establishing a rough idea of what amount of delay will equal negation. If we suppose that a drowning man calls for help, evoking the reply ‘In due course,’ a judicious pause of five minutes may constitute, for all practical purposes, a negative response*” (p. 157).

Facts and procedural history

2. The applicant is a student who has had the life-long dream of being a veterinary surgeon. In 2016-17 she completed the practical work experience required for admission to veterinary medicine in UCD by working in a vet’s clinic. In 2017, she sat the Leaving Certificate examination but was twelve points off the required level to qualify for the course. She then determined to repeat the Leaving as an external candidate, studying at home under her own steam.

3. In the meantime, on 23rd November, 2017, unknown to the applicant and to the State Examinations Commission (SEC), UCD’s Programmes Board decided to bring forward its cut-off date for current students so that any places offered after 30th September would be deferred for a calendar year. The SEC only became aware of UCD’s policy in the course of the present judicial review proceedings (Affidavit of Andrea Feeney, para. 37). The Central Applications Office (CAO), which acts on behalf of higher education institutions in offering places, has published a handbook which states that the offer season ends on 17th October. But while superficially that might give the impression that participating institutions will take students for the current year up to that date, the handbook does not preclude any given institution from deferring offers to the following year.

4. The 2018 Leaving Certificate exams took place between 6th and 22nd June. Results were posted on 15th August, 2018, at which stage the applicant was informed that she had 554 points. On 20th August, 2018, the first round of CAO offers were made, at which point the applicant was six points short of the course requirement for veterinary medicine in UCD, which was 560 points. On 28th August, 2018, second round offers were made and the course requirement dropped to 555 points, the applicant being only one point short.

5. The applicant’s initial option was to accept her second preference course, Health and Performance Science at UCD. On 30th August, 2018 she contacted UCD by email to change her mind and state that she was not taking up this option and was going to repeat the leaving cert yet again.

6. On 31st August, 2018 the applicant viewed her examination scripts and saw that there had been a computation error in the business paper which, had it not occurred, would have entitled her to a H1 grade (the highest available) rather than the lower H2 grade actually awarded. The higher grade would have qualified her for her chosen course.

7. The SEC’s functions, conferred by the State Examinations Commission (Establishment) Order 2003 (made under s. 54 of the Education Act 1998), include determining procedure to enable the review and appeal of results of examinations at the request of candidates (art. 6(1)(f)). The SEC procedures provide two routes for students dissatisfied with their grade – (i) review outside the appeal process (ROAP) or (ii) formal appeal. The review option is limited in scope and is dealt with by clerical staff, and is a fast-track process because the grade can be changed very rapidly where that process applies. The appeals process goes to an examiner who in principle has appropriate educational qualifications, and takes considerably longer.

8. The applicant forthwith completed a form for review outside the appeal process (ROAP1 form). On 1st September, 2018 she electronically paid for the review application and also for a formal appeal and on 3rd September, 2018 she submitted a hard copy formal appeal form (AP1). The appeal form is attached to the candidate script and sent to the SEC by the school. Also on Monday 3rd September, 2018 the orientation of new students for UCD veterinary science began, which is effectively the start of the academic year and of the course. On 4th September, 2018 the applicant contacted the SEC by email, in which she stated that “*I sat the leaving cert as an external candidate, meaning I studied myself for the entire year which is something I truly feel shows how extremely passionate I am with regards (sic) to becoming a vet. I never had the chance to celebrate my achievements nor acknowledge them. I have been left devastated over the past few weeks and this is solely down to an error made in the adding up of three figures ... after all my diligent work I am left without a place because of not mine, but somebody else’s mistake*”.

9. This was followed up by an email from a friend on her behalf on the following day as well as phone contact from the applicant’s mother and aunt on 4th, 5th and 6th September, 2018. On the 4th and 5th September, 2018 an internal memorandum was prepared to the effect that the computational error was “*not a clerical error*” and that the matter was going for appeal. The applicant was informed of this on 6th September, 2018.

10. This was a critical development because the applicant's only hope of getting a place in her chosen course in the 2018-19 academic year depended on being allowed to avail of the fast-track review process. If she had to go the route of the appeal process, she would not get a decision until 10th October, which fell after UCD's cut-off date of 30th September. That meant that if her appeal was successful she would not be able to take up her course until September, 2019. That is where Parkinson's Law of Delay governs the case – as of the 6th September, 2018 the SEC did not say no to the appeal, it said "in due course" – but too late for the applicant to take up the place in the current academic year. The uncomfortable choice facing the applicant on 6th September, 2018, having already rejected the second-choice offer, was therefore to await the outcome of the appeal in the hope of entering veterinary medicine in 2019, to contemplate sitting the Leaving Certificate yet again, for a third time, in 2019 if the appeal was unsuccessful, or to seek relief by way of judicial review. Courageously, she chose the latter option.

11. On 7th September, 2018 leave in the present proceedings was granted by Creedon J. The following Monday 10th September, 2018, the formal course of lectures in UCD commenced after the end of the orientation week. The matter came before me on 11th September, 2018 when I ordered UCD to leave a place open until 30th September, 2018 in the event that the applicant was successful in the proceedings. I gave one week for statements of opposition and gave the applicant liberty to bring a motion seeking directions regarding the priority marking of the appeal. I also, on consent, struck out the Minister for Education and Skills as a respondent with no order. On 17th September, 2018 I fixed a hearing date in the following week and also by consent struck out the CAO as a respondent with no order. The CAO had earlier agreed to abide by any order of the court. The action was then heard on 25th and 26th September, 2018. I announced the order at the conclusion of the hearing and indicated that written reasons would be provided later, which I now give. The deadlines that were looming at that point were that on 30th September, 2018 UCD proposed to finalise places for the academic year 2018-19 and that by 10th October, 2018 the SEC would have decided on the applicant's appeal unless an earlier date were to be directed by order of the court.

12. The order made on 26th September, 2018 required that the applicant's appeal be determined by 28th September, 2018. That order was complied with and as a result the applicant's business paper was upgraded to a H1, a result which, having reviewed the paper, I considered was extremely likely when I made the order. That in turn resulted in an offer of a place in veterinary medicine in UCD for 2018-19 being made forthwith, which the applicant accepted. Thus she was able to join her chosen class, a month late, on Monday 1st October, 2018.

13. I received helpful submissions from Mr. Mícheál P O'Higgins S.C. (with Mr. Brendan Hennessy B.L.) for the applicant and from Mr. Conor Power S.C. (with Ms. Aoife Carroll B.L.) for the SEC. Mr. Tony McGillicuddy B.L. previously appeared for the Minister prior to the strike-out of the proceedings against that respondent. I also heard submissions from Mr. Barra Faughnan B.L. for UCD but struck out that notice party, with (by consent) no order as to costs during the hearing on the basis that UCD would abide by any order of the court requiring it to admit the applicant to a place on or before 30th September, 2018.

UCD not liable for imposing a cut-off date after the start of the academic year

14. The reason for my striking out the proceedings against UCD at the close of the applicant's submissions was that it was not unreasonable or unlawful for UCD to impose a cut-off point such as the 30th September, 2018 beyond which it would only offer deferred places. This possibility is more or less acknowledged in the CAO handbook so no breach of the handbook or of any legitimate expectation arising therefrom has been established. A higher education institution is acting reasonably by taking the view that once the academic year has got underway, new students would have difficulty catching up and that their academic performance would suffer as a result of having missed out on the start of term. As it is put in UCD's statement of opposition at para. 5, "*it became increasingly difficult for students to properly integrate academically and socially. Students entering into programmes almost half way through the first semester, missing weeks of lectures, labs and tutorials and many continuous assessments, increase their chances of not achieving the necessary credits for said programmes. This is particularly acute in some disciplines where there are high practical elements, of which Veterinary Medicine is one*".

15. That is a fundamental difficulty with the current system whereby the results of appeals only come through some time after the start of the academic year. In fairness to the SEC there may be issues here of wider co-ordination beyond its sole control as matters currently stand.

Amendment of pleadings

16. The applicant sought and was granted liberty to amend her proceedings during the hearing. The procedure adopted on behalf of the applicant by seeking to amend the proceedings on the day of the hearing is certainly unsatisfactory on any analysis. However, the definitive approach to the jurisdiction to amend in the light of recent jurisprudence is that set out by Peart J. for the Court of Appeal in *B.W. v. Refugee Appeals Tribunal* [2017] IECA 296 [2018] 2 I.L.R.M. 56, which approved the approach taken in *B.W. v. Refugee Appeals Tribunal (No. 1)* [2015] IEHC 725 [2015] 11 JIC 1703 (Unreported, High Court, 17th November, 2015). The tests arising from the jurisprudence are arguability (which may include an arguable major new point), explanation (which may be simple inadvertence and should not be conflated with the high level of explanation required to actually commence proceedings late as opposed to widening an existing challenge) and lack of irremediable prejudice.

17. In the latter judgment, I had emphasised that it is clear that the interests of justice and the protection of the applicant's right of access to the courts are of paramount importance, as is the need for the court to ensure that the real issues in dispute are determined (see *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29 [2012] 2 I.R. 580 *per* Fennelly J. at paras. 29 and 47 and *O'Neill v. Appelbe* [2014] IESC 31 (Unreported, Supreme Court, 10th April, 2014) *per* O'Donnell J. at para. 14). In *Keegan*, the Supreme Court gave leave to amend judicial review proceedings to include a legal point that was simply "overlooked" by the applicant's lawyers prior to the application for the amendment (para. 39). The amendment was "*an entirely new ground in law*" which "*substantively enlarge[d]*" the application (para. 38). The amendment was sought well outside the time period for application for judicial review. Nonetheless, the Court held that "*[t]he appellant should not, without good reason, be deprived of the right to argue a very significant point of law*" (para. 46). In *O'Neill, O'Donnell J.* at para. 14 emphasised that: "*The High Court, and this Court on appeal, has a very extensive power of amendment where it is necessary to permit the real issues in dispute to be determined. There is nothing which prevents the court from re-amending proceedings, even if that re-amendment would reintroduce a claim that had previously been removed by amendment*".

18. The three criteria approved by the Court of Appeal in *B.W.* for an amendment, arising from *Keegan*, were (i) that the point should be arguable (*Keegan* para. 38), (ii) that there be an "explanation" for the point not having been pleaded (para. 39), and (iii) that the other party should not be unfairly prejudiced (see para. 32), which, given the court's power to remedy any unfairness, would in practice amount to a test that he or she should not be irremediably prejudiced.

19. In opposition to the amendment, by UCD who were still parties at the time, reliance was placed on the judgment of Hedigan J. in *Fleury v. Minister for Agriculture Food and Rural Development* [2012] IEHC 543 (Unreported, High Court, 12th December, 2012). At para. 2 of that decision, Hedigan J. assayed to "summarise" *Keegan* in a series of numbered points. I must very respectfully conclude

that a number of those points are not based on an entirely correct reading of *Keegan*, as the subsequent judgment of the Court of Appeal in *B.W.* makes clear.

20. Point (3) is that "*There should be good reason for allowing the late amendment, e.g. circumstances should be exceptional.*" That is unfortunately a mischaracterisation of *Keegan*. The exceptionality test was central to the pre-*Keegan* law, as set out by Costello P. in *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489 at page 503. In *Keegan*, Fennelly J. said of the exceptionality requirement that while the court can naturally be cautious about amendments, the exceptionality hurdle "*cannot be regarded in itself as providing the test. ... the various dicta which I have quoted cannot be regarded as precluding and undoubtedly were not intended to preclude a court from granting leave to amend grounds, when the interests of justice require that such an order be made*". Thus, justice is front and centre, not exceptionality, as might be inferred from Hedigan J.'s judgment, which runs the risk of restoring the pre-*Keegan* approach that was often quite capable of preventing the court from achieving a just solution. A quest for exceptionality would be an unwarrantedly respondent-friendly mind-set that would impair the identification of the real issues and thereby the doing of justice. In fairness to Hedigan J., it is not entirely clear what was meant by the phrase "e.g." in the passage quoted – literally if the circumstances are "*for example exceptional*" that must mean that they could also be non-exceptional – in which case why refer to exceptionality at all? That concept is best jettisoned in the amendment context as it can only confuse the analysis.

21. Hedigan J.'s next points are "(4) *The Court should consider whether the facts are new facts that arose since leave was granted.* (5) *The Court should consider whether the proposed amendment would be a significant enlargement of the proceedings already in being*". In one sense these are fair points in that if there are new facts that could not have been known at the time of the leave application, or if the point does not particularly change the case significantly, then the amendment might be allowed more or less for the asking. But if Hedigan J.'s questions are read as suggestive of the notion that if the facts are not new facts, or if there would be a significant enlargement, or both, then the amendment should be refused, then I would very respectfully suggest that such an interpretation would be a misreading of *Keegan* because in that case there were no new facts and yet a significant enlargement of the case was allowed. The lawyers for the applicant had just overlooked a major point, and simply came to court, in the modern argot, with their hands up. Nonetheless, they prevailed on the issue of the amendment being allowed.

22. Fennelly J. said at para. 35 of *Keegan* that "*There is no reason, in logic, to impose on an applicant a criterion of newly discovered fact to justify an application to amend, when an application for an extension of time is not subject to any equivalent condition. This is not to say that the applicant's knowledge of the facts is irrelevant. In some cases, as in McCormack v. Garda Síochána Complaints Board, discovery of new facts may be an explanation for the omission to include a ground. In other cases, the applicant may have been aware at all relevant times of the facts relevant to the new ground and this will weigh in the balance against him, without being necessarily conclusive*". On the issue of the significance of the amendment, he said at para. 37 that "*Amendment may be more likely to be permitted where, as in O'Siodhacháin v Ireland [(Unreported, Supreme Court, 12th February, 2002)], it does not involve a significant enlargement of the applicant's case. To the extent that leave has already been granted, the public interest in the certainty of a decision is already under question. An additional ground may not make any significant difference, particularly if it is based, as in the present case, on a pure matter of law. A court might take a different view, if the new ground were likely to give rise to further exchange of affidavits relating to the facts*". Overall, Hedigan J.'s fourth and fifth questions should not obscure the overall priority of the search for justice that arises from *Keegan* and *O'Neill*.

23. Hedigan J.'s sixth question is that "(6) *The Court should consider whether the proposed amendment would prejudice the respondent*". However, this is a slight over-simplification. *Keegan* does not speak only of prejudice but also of unfair prejudice. In this regard, the Court of Appeal has since confirmed that this means irremediable prejudice. If the justice of the case is met by allowing the amendment but compensating the respondent in costs for any extra expense, then there is no irremediable prejudice and accordingly that is not a reason not to allow it. Furthermore, respondents will *always* claim to be prejudiced. An approach that allows a claim of prejudice to kill an amendment application is simply a far too respondent-friendly tactic that impairs the doing of justice overall.

24. Possibly most problematical of all is the seventh question posed by Hedigan J. that "*The Court should bear in mind the true nature of judicial review noting that the leave stage of judicial review is a filtering mechanism, the Court should consider the overarching requirement of promptness*". But promptness is not the overarching requirement – justice is. It is hard to see how the seventh question can be described as a summary when it does not appear in *Keegan* as such. *Keegan* does of course refer to the requirements of the rules of court as to time but a significant distinction needs to be drawn between the requirement to commence the action in time, and the possibility of amending or refining the grounds or reliefs once the action is up and running. The major public policy considerations regarding certainty and preventing belated challenges to public law decisions are satisfied once an applicant is prevented from initiating a belated challenge. Refinement of the precise terms of the action poses much less of a threat to public policy than late commencement of the proceedings, because by that stage all concerned have been made aware in a timely manner that the decision is under challenge.

25. Ultimately there is no getting away from Fennelly J.'s conclusion at para. 46: "*In the particular circumstances of the present case, it would be unjust to visit on the appellant the consequences of what his legal representatives frankly admit to have been their error. The appellant should not, without good reason, be deprived of the right to argue a very significant point of law.*" The punchline essentially is that the test for allowing an amendment that enables the court to do justice and address the real issues is not the same as for allowing a late grant of leave to bring any proceedings at all. The former must by definition be a more forgiving, flexible and responsive test, and an amendment cannot be refused on the basis that "*good and sufficient reason*" of the weight necessary for an extension of time to seek leave in the first place is required. The Supreme Court in *Keegan* allowed a major new point, Fennelly J.'s "*very significant point of law*", by way of amendment long after the event based simply on oversight, as in the circumstances it was in the interests of justice to do so.

26. So I most respectfully have to take the view that for the foregoing reasons *Fleury* does not represent an altogether reliable guide to the *Keegan* doctrine. Rather, I turn in that regard to the judgment of Peart J. in *B.W.* Applying that judgment here, as regards the three criteria for an amendment, the first one is an explanation that Mr. O'Higgins said is essentially inadvertence by lawyers on behalf of the applicant. That was also the situation in *Keegan*. The second point is arguability, and the points made were arguable, although that was very much without prejudice to other points that may be made by way of defence. The third issue is lack of irremediable prejudice and while an amendment at the late stage of the hearing itself could cause difficulties, they are not such as to be irremediable.

27. As regards a further amendment to particularise the constitutional and statutory rights that were alleged to be infringed by the impugned scheme and decision by way of an additional para. 30a in the statement of grounds, the same justifications must be said to apply to this amendment, with the additional factor that it is simply a particularisation of something that was already in the statement of grounds, because at para. 20 the rights (unspecified) of the applicant are pleaded. The amendment is simply a specification of what is expressly stated in an unparticularised manner (which a court can be especially open to, particularly seeing as in a garden-

variety common law action, notices to provide (or require) further particulars are par for the course long after the pleadings proper have been delivered, and cause no major difficulties in theory or practice there, so there is no reason to be horrified by such particularisation in the public law context). Secondly, the point sought to be made was something that can be dealt with simply by oral legal submission rather than requiring any lengthy adjournment for further affidavit evidence, so on those grounds I was of the view that the *B.W.* criteria were satisfied. I therefore allowed all of the amendments sought. I did not require the SEC to deliver amended opposition papers because I took the denials in the existing statement of opposition as covering the new claims. The fact that I later let UCD out of the action having heard the applicant's case against it in full, only demonstrates, if such be needed, that allowing an amendment does not require the court to commit to attributing any particular level of weight or substance to a proposed amendment, above and beyond the arguable. There is no contradiction between allowing an amendment after a contested hearing on the application for liberty to amend, and then dismissing the proceedings as so amended (something similar happened in *B.W.* at first instance in that the points the subject of the amendment were rejected).

The paper

28. The examination paper at issue here is the applicant's higher level business paper in the 2018 Leaving Certificate, completed through the medium of the Irish language. The face of the paper shows that the applicant was awarded 334 marks plus 19 marks for answering in Irish, making a total of 353 marks. The paper was marked out of a maximum 400 marks. In that context, an award of 360 marks would have been a H1, the highest grade. The applicant's 353 marks qualified her for a H2 grade. There were three problematic questions in terms of the marking of the paper, as follows.

- (i). The error identified by the applicant arose in question 2 where the question was divided into three parts, for which the examiner awarded 17 marks, 19 marks and 30 marks. Unfortunately, the examiner inadvertently added these up to a total of 56 instead of 66, which deprived the applicant of 10 marks which would have qualified her for the higher H1 grade.
- (ii). A second error occurred in question 5 where the applicant was given 1 mark more than she was entitled to. However, this in fact is immaterial in terms of the final outcome.
- (iii). A third alleged problem occurred in question 1 where the applicant was required to explain three business terms with examples. In each case, 2 marks were awarded for the explanation plus an additional 3 for the example. The examiner awarded 15 marks out of 15 for these three answers. However, the problem is that the examiner seems to have put the final 3 marks for example 3 in the wrong place (against example 1 rather than example 3) but then crossed the "3" out without rewriting it in the correct place. The SEC in submissions suggested that perhaps the examiner intended to award zero marks for this example but my view in granting an order on 26th September, 2018 was that this was extremely unlikely given that the examiner gave the applicant 15 marks out of 15 and the question appeared to be properly completed. The suggestion that there was some further error here to the disadvantage of the applicant was fragile speculation and did not seem to have any plausible basis. Two days later that speculation proved unfounded when the paper was indeed upgraded.

29. As matters stood on 26th September, 2018 it appeared on the face of the materials, subject to formal marking by the examiner at the appeal stage, that the applicant should gain 10 marks from question 2, lose 1 mark for question 5 and retain the 15 out of 15 for question 1. That would have given the applicant 343 marks; on top of which she would be entitled to an extra 17 marks for having completed the paper in Irish (the addition of marks for Irish depends on the mark level rather than being a constant figure). That would have given the applicant a total of 360 marks which would be a H1 grade and which therefore would qualify her for veterinary medicine in UCD. On that basis the applicant had, as matters stood at that point, far more than a *prima facie* or even a strong case. She had an overwhelming case that she was incorrectly deprived of her chosen place.

30. The applicant's case against the SEC broke down into two very broad headings. Firstly, an allegation that the SEC did not comply with its stated policy and secondly, that the policy itself was flawed. The latter challenge in turn was advanced under a number of different administrative law grounds as set out in the Statement of Grounds, essentially four sub-headings of proportionality and unfairness, irrationality by failing to take relevant matters into account, inequality, and failure to make a decision within a reasonable time.

Allegation that the SEC did not comply with its stated policies

31. Dealing firstly with the complaint of lack of compliance with the policy, it is important to establish what the policy is. It can be extracted from two documents. Firstly, and more importantly, the "*candidate information booklet*" (exhibit AF1) and secondly, the form for review outside the appeal process (exhibit AF5). If one were to look at the form alone, one might draw certain conclusions as to what the policy is but matters are clarified and explained if one looks at the two documents together. Mr. O'Higgins' essential complaint under this heading is that the applicant should have been allowed to use the expedited ROAP process rather than having to go through a formal appeal. His complaints can be broken down under a number of headings as follows:

- (i). It is suggested that the wrong test was used and that the expression "*clerical error*" that is used in the analysis of the applicant's ROAP application does not appear in the policy. But "*clerical error*" can only be regarded as a short-hand for the type of situations covered by the policy. The minute noting the application is not a formal legal instrument requiring elaborate or ponderous formulae. Short-hand comment on such an internal memorandum must be interpreted as referable to concepts set out at greater length in the published policy.
- (ii). Mr. O'Higgins submits that this was a clerical error so the decision that it was not is erroneous. But seeing as the error identified does involve an element of examination of the marking scheme and the content of the script, it is not unreasonable for the SEC to have determined that this error fell outside the ROAP process given that such process is openly described as a limited one.
- (iii). Complaint is made that neither the form nor the booklet expressly articulate the SEC position to the effect that the review process would only cover errors on the front page of the exam script. That is certainly the case and is suboptimal, and I would suggest that, in future, any conditions of this nature should be made more explicit. However that conclusion is implicit in the booklet because reference is made at p. 14 to the ROAP process operating where the "*overall mark*" is inconsistent with the grade. Reference to the overall mark is reference to the mark on the front page of the exam script.
- (iv). Mr. O'Higgins alleges that the applicant met the test set out in the first paragraph of the form, which refers to failure to award the marks in the script. Again, the wording of the first paragraph of the form is somewhat unsatisfactory and ambiguous but the actual policy in this regard is set out in the booklet where it very clearly states that the ROAP process only applies where "*the matter can be resolved administratively without any reference to the marking scheme*".

(v). Complaint is made that there is no reference in the policy as to whether it covers errors transferring marks within the paper onto the front cover. Again, that is a fair criticism of the wording of the form and the booklet. Students should, in future, be told what precisely the ROAP process covers and it would be appropriate to spell out specifically whether such errors are covered by the summary review process. Nonetheless, despite failing to expressly spell out the terms of the process, it does not seem to me that the manner in which the SEC applied their procedures regarding the summary process amounts to a misinterpretation.

32. Overall, the fact that the SEC adopted a narrow interpretation of the ROAP process that in itself was quite narrow to begin with (Ms. Feeney says "*the test ... is a very rigorous one*" (para. 17)) is not unlawful provided that there is an effective, timely and lawful appeal process to cover any complaints not encompassed within the summary review process. Thus in and of itself there was no unlawfulness in the decision to adopt a narrow reading of the ROAP process. What caused the real problem here was the ineffectiveness of the alternative procedure offered by the SEC, that of formal appeal. With that important *caveat*, and on the assumption (not in any way challenged on the evidence in this particular case) that the narrow fast-track ROAP scheme is operated on a consistent basis as between the applicant and other students and that errors in other papers similar to this one are also sent into formal appeal rather than summary review, I conclude that the officials who declined to apply the ROAP procedure in this instance acted properly and did not misconstrue or improperly fail to operate the SEC's existing policies regarding the fast-track review system. I therefore turn to the question of the legal adequacy of the appeal mechanism.

The applicant's fundamental rights are engaged by the process of admission to higher education

33. The right to earn a livelihood is well established in Irish constitutional law: *Murtagh Properties v. Cleary* [1972] I.R. 330, *Murphy v. Stewart* [1973] I.R. 97, and *Re Employment Equality Bill 1996* [1997] 2 I.R. 321. Likewise, the process of grading the Leaving Certificate and the consequent process of access to higher education or vocational training is fundamental to the future life paths of students. It goes to the fundamentals of human personality just as the right to work itself does: see *N.H.V. v. Minister for Justice and Equality* [2017] IESC 35 [2017] 2 I.L.R.M. 105. At para. 16 of his judgment in that case, O'Donnell J. cited General Comment No. 18 on the Right to Work, adopted on 24th November 2005, at para. 1 of the UN Committee on Economic Social and Cultural Rights to the effect that "*The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his /her development and recognition within the community*" and said that "*It is not necessary to endorse every aspect of this to recognise that the thinking is broadly consistent with that which was the background to the Constitution.*"

34. While the recognition of the constitutional right to higher vocational training was left open in *Bloomer v. Incorporated Law Society of Ireland* [1995] 3 I.R. 14, in the modern world it is difficult and in some spheres impossible, to earn one's livelihood without access to higher education or vocational training. He or she who wills the end must will the means. The recognised constitutional right to earn a livelihood would be meaningless without the concomitant recognition of a right of reasonable access to available higher education and vocational training commensurate with the ability of the citizen. Therefore the latter right must be regarded as a constitutional right that flows from the former right. As Jane Kotzmann in "Lifting the cloak of conceptual confusion: exploring the meaning of the human right to higher education" *Australian Journal of Human Rights*, Vol. 21, 2015, Issue 1, at p. 71 puts it at p. 80, a "*purpose of higher education under a rights framework is the enabling of community participation ... education must have an aspect of practicality and be directed towards interaction with the future community. In order to participate in a free society, individuals need to develop the capacity to engage in work and employment of their choosing, consistent with their interests, passions and capabilities. Education ... is a threshold requirement for individuals to work or practice in many vocations and professions.*" There may of course be qualifications and conditions that can safely be left to another case, such as the extent to which that right is positive rather than negative, and questions regarding the costs to the student of availing of such education and training.

35. The connection between the two rights is obvious in the present case. If the order in this case had not been made and if the applicant had qualified for veterinary medicine on a deferred basis in 2019, her taking up her livelihood would have been postponed for an entire year merely because the SEC would have decided her appeal a matter of days after the cut-off point applied by UCD.

36. Having said that, and while it does not arise for decision in the present case, there are some reasons why a right of reasonable access to available higher education or vocational training commensurate with the abilities of the citizen should be recognised as a stand-alone right rather than merely as an aspect of the right to earn a livelihood. That can again, safely be left for further discussion in a later case but I will briefly outline some such considerations now lest it be thought helpful.

37. Firstly one must not see education in instrumental terms, and like most worthwhile actions it has a value for the human personality in itself rather than purely as a means to a vocational end. As UCD's predecessor university's first rector, John Henry Newman puts it, "*Knowledge is, not merely a means to something beyond it, or the preliminary of certain arts into which it naturally resolves, but an end sufficient to rest in and to pursue for its own sake*" (*The Idea of a University* (1852), Discourse 5(2)).

38. Secondly, it would be anomalous to draw a distinction between the rights of students, such as the present applicant, who seek to pursue a course leading to a specific vocation as opposed to those doing, say, a general humanities degree that does not prepare them for a predetermined role.

39. Thirdly, and most fundamentally in this context, the right to access higher education is provided for in international law, and there is no compelling reason to acknowledge only some scaled-down, bonsai version of rights for Irish citizens. Again, we should not reinvent the wheel. To decline to draw on established international human rights instruments in informing, on a persuasive basis only rather than a binding basis, the quest to determine the scope of unenumerated rights could be to fossilise the Constitution and could translate into a denial of internationally-recognised human rights to the people of Ireland today. The concept of a "*living*" constitution has repeatedly received express approval: *McGee v. Attorney General* [1974] I.R. 284; *Croke v. Smith* (Unreported, Budd J., High Court, 31st July, 1995); *Sinnott v. Minister for Education* [2001] 2 I.R. 545; *A. v. Child & Family Agency* [2015] IEHC 679 at para. 34. In *A. v. Governor of Arbour Hill* [2006] 4 I.R. 88. Denham J. (as she then was) outlined the way in which this principle applied to Irish constitutional interpretation: "*[The] power of the superior courts is exercised in the context that neither the law nor the Constitution is frozen in 1937. The Constitution is a living instrument. Concepts are before the courts today in forms not envisaged in 1937. Principles and rights have developed over the last seventy years, from roots in national society, the European Community and international documents*" (para. 155).

40. Reflecting art. 26 of the Universal Declaration of Human Rights, art. 13(2)(c) of the International Covenant on Economic Social and Cultural Rights provides that "*2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:...(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education*". In the article noted above, Kotzmann discusses this

provision and emphasises the relevance of a right to higher education to both human personality (p. 79) and to earning a livelihood (p. 80). She comments that "While the right to education is usually discussed in reference to the rights of the child, it is a right of all people at all stages of life ... This is important in that higher education is generally provided to adults" (p. 75).

41. Article 2 of protocol 1 to the ECHR (relevant via the European Convention on Human Rights Act 2003) provides that "No person shall be denied the right to education". This is not confined to primary or secondary education. Van Dijk and Van Hoof *The Theory and Practice of the European Convention on Human Rights* (4th ed., Antwerpen/Oxford, 2006) comment that "this right of access refers to all levels of education. As the Commission held in the *Belgian Linguistic Cases*, it 'includes entry to nursery, primary, secondary and higher education' (p. 897, citing *Belgian Linguistic Cases* 23 July 1968 para. 1 (A.6 (1968) p. 22)). The learned authors go on to say that "Article 2 in principle also refers to secondary and higher education to the extent available" (p. 905). Similarly, art. 14.1 of the EU Charter on Fundamental Rights provides that "Everyone has the right to education and to have access to vocational and continuing training." If a right to access to higher education and training is recognised as a separate right both in International and European law, there does not seem to be a compelling need to conceptualise it differently for the purposes of the doctrine of unenumerated rights under the Irish Constitution.

42. For these reasons I would be inclined to the view that the right of access to higher education and vocational training is best conceptualised as an independent unenumerated right, as opposed to merely simply a necessary consequence of the existing recognised right to earn a livelihood; but a definite conclusion on that point can safely await a later case and no final conclusion is necessary now given that the applicant based her case under this heading on the right to earn a livelihood, and in addition did not seek to rely either on the 2003 Act or the EU Charter.

43. In an ideal world, the determination of questions of the interpretation and scope of constitutional rights would take place in a case where Ireland and the Attorney General were parties, and a developed view of some of the issues canvassed here can be left to such a case. But in the meantime it is most certainly not the law that a court cannot vindicate rights unless the State proper is a party. Such an approach would have strangled much settled constitutional law at birth: see e.g., *Educational Company of Ireland v. Fitzpatrick (No. 1)* [1961] I.R. 323, *Meskeil v. C.I.E* [1973] I.R. 121; and the cases on the right to earn a livelihood referred to above. In any event the relevant emanation of the State was a respondent, and Mr. Power made no submission to me that the applicant's rights should not be vindicated pending the joining of the State as such.

44. The conclusion under this heading is that given the intimate connection between access to higher education and the rights that are specifically relied on by the applicant, including the right to earn a livelihood, the applicant's fundamental rights are engaged in the question of her admission to higher level education and therefore in the process and timescale for informing her of the outcome of her appeal against her Leaving Certificate grades.

Disproportionality and unfairness

45. We are therefore not dealing here with a minor administrative scheme conferring discretionary benefits. On the premise, set out above, that the process of admission to higher education engages the applicant's constitutional rights, any procedure for such admission must not unfairly interfere with the substance of those rights. Any such interference must be proportionate in accordance with the doctrine in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3. At para. 21 of her judgment in that case, Denham J. endorsed the approach of Costello J. in *Heaney v. Ireland* [1994] 3 I.R. 593: "The means chosen must pass a proportionality test. They must (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that their effects on rights are proportional to the objective: see *Chaulk v. R.* [1990] 3 SCR 1303, at pages 1335 and 1336."

46. The proportionality test casts an obligation on a respondent to demonstrate that the interference with the right at issue meets the *Meadows* criteria, which has not been discharged here. It is insufficient for a state respondent to say in essence that "this is the best we can do". This is also the essential problem with Mr. Power's core submission that the policy could only be condemned if it was capricious or arbitrary. Caprice and arbitrariness are of course fatal but they do not exhaust the grounds of public law challenge. The argument that as capriciousness has not been demonstrated, therefore the respondent wins, is something of a straw man. Yes, I am not specifically condemning the policy for caprice. But I am considering the challenge under the headings that it is irrational, discriminatory, in breach of fair procedures, disproportionate and substantively unfair. Unless we are to turn the administrative law clock back by a couple of centuries, the problems I have listed are ones that confer a jurisdiction on the court to intervene to uphold the rights of an affected citizen. The SEC's submission that "the only potential basis for any challenge to the procedures is based in irrationality" simply ignores vast swathes of modern administrative law. The court is not confined to review on grounds of irrationality (even though the policy does not pass that test either). As Hogan J. put it in *Efe v. Minister for Justice, Equality and Law Reform* [2011] 2 I.R. 798, "it is clear that, post *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701 at any rate, it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be protected against unfair attack, if necessary through the application of a *Meadows* [-] style proportionality analysis" (at 819-820). Modern judicial review, by virtue of its inclusive scope, amounts to an effective remedy: *N.M. (DRC) v. Minister for Justice and Equality* [2016] IECA 217 [2016] I.L.R.M. 369 and *A.A.A. v. Minister for Justice and Equality* [2017] IESC 80 (Unreported, Supreme Court, 21st December, 2017), per Charleton J.; see also *F.M. (D.R.C.) v. Minister for Justice and Equality* [2018] IEHC 274. That would not be so if it was confined to the anachronistic sole criterion of irrationality as contended for by Mr. Power.

47. As Mr. O'Higgins validly submits, it is not the law that unless an applicant produces a management consultant or other expert to show how the system could work differently, she cannot succeed. It is sufficient for the court to identify the disproportionality, determine that it has not been shown to be lawful, and make orders accordingly. Precisely how this is to be addressed is a matter for the executive, provided that fair, proportionate, equal and timely results are achieved. The SEC's complaint that the applicant is asking that "[the] Court ought to intervene to establish an appeals system that would operate to her benefit" (submissions, para. 4) misunderstands the legal process involved.

48. However, there can be very little question but that the SEC can do significantly better than it currently does. Over a 54 day period between 22nd June and 15th August, 2018 the SEC issued 383,764 grades, which amounted to approximately 600,000 papers as well as orals and practicals. It engaged 1,652 examiners for that purpose. It took a full 40 days between 31st August and 10th October, 2018 to deal with reviews and appeals. There appear to be only a handful of reviews: in 2017 there were 143. The number of appeals is Lilliputian compared to the number of examination candidates. In 2018 there were 9,092 appeals and only 400 examiners were engaged. Those appeals were referable to around 15,000 scripts as well as orals and practicals.

49. What that comes down to is that during the appeal period, the SEC processes 375 papers a day (averaged over the entire period of 40 days). During the original marking period, it processes 11,111 papers a day (averaged over the 54 days). Thus it can be seen

that the SEC processes scripts at the appeal stage 29 times more slowly than it does at the initial stage. To illustrate the point another way, if the appeal stage was marked with the same concentration of effort as the original marking phase, the entire 15,000 papers would be cleared before breakfast on the second day of marking.

50. Mr. Power submitted there was no evidence as to how the SEC could organise matters more quickly and that there was affidavit evidence as to why the scheme is how it is. But first of all, Mr. O'Higgins submits, correctly, that an inference can be drawn from the significantly reduced resources being devoted to appeals as compared to the original marking. Resources are not even necessarily the only problem here but even if they were, they are not automatically a conclusive answer to a complaint (see e.g., *Hoey v. Minister for Justice* [2994] I.L.R.M. 334). Even more fundamentally, one does not need to be a management consultant to see immediately that the SEC's affidavits do not explain why other solutions would not work. Mr. O'Higgins also correctly submits that inferences can be drawn from the gaps in the SEC's evidence and the matters not explained. I don't think it would be helpful or necessary for me to spell out the matters not explained on the evidence, as to do so might be wrongly interpreted as making suggestions as to what the detail of any upgraded system should look like, which is not something I either want or need to get involved in; but broadly, while the SEC's evidence presented somewhat generalised justifications for the current system, the gaps in the evidence in the present case amount to a failure to explain why each individual step in the process could not start earlier and could not be concluded quicker. It may be that more detailed evidence could have presented a more nuanced picture, but that is to contemplate what might happen in some other hypothetical case; all that needs to be said for present purposes is that the evidence in the present case raised more questions than it answered about why the process took an excessive period of time.

51. Of course the SEC is anxious to uphold the quality of the system (para. 32) but that is not a complete answer for two reasons. The first is that the effect of an excessively prolonged appeal process is to significantly and disproportionately impact on the quality of the education being received by the student who misses out on the first weeks of their higher level course and who runs the risk of a postponement of their course altogether (a relevant consideration not taken into account in the SEC's affidavit). Quality of education is a continuum; and prioritising lengthy procedures over a timely outcome, in the alleged interests of quality, may not serve the interests of educational quality overall. This may highlight a lack of co-ordination, which in fairness to the SEC is not necessarily entirely the fault of any one actor. The second problem is that it has not been shown that a quicker turn-around would in some way materially, still less significantly, diminish the interests of quality. It does not follow, because the results are delivered late, that therefore they must be of high quality. That would be a fallacy akin to the idea that because a product is expensive it must be good.

52. Even if one were highly sympathetic to all of the explanations offered, there is no getting away from the fact that the *result* of all of the difficulties the SEC says it is labouring under is a disproportionate interference with the rights of the applicant. The argument was made that it did not give an entitlement to relief to show that the scheme could be better. But this is not a case about a scheme that could be better. It is about a scheme that wrongly impinges on the rights of the applicant. It is not a defence to such a complaint to say that any scheme could be improved. If it was, then no judicial review would ever succeed.

53. Mr. Power also submitted that there would be an inequality in providing relief to this applicant because it would put her ahead of other applicants. That is perhaps his most intellectually engaging point and perhaps is true in the very limited sense that she is the only person who has brought an application to the High Court. But if there were other applicants who had similarly brought judicial reviews they would have been dealt with by the court in a similar and hopefully equal way. The possibility of privileging the person who puts their head above the parapet first is the very nature of litigation, particularly in a public interest type of test case such as this one effectively is (despite the fact that the applicant also benefits personally from the order). Otherwise no such applicant would ever succeed. The possibility of their getting a benefit is a justified trade-off in return for ensuring that rights are vindicated. Importantly here, the applicant is not being treated more favourably than the student who would otherwise get the place (in the absence of a court order) because that student would be someone randomly selected on 555 points, whereas the applicant was properly entitled to higher points. Thus there is no inequality caused by the court order as compared with the situation that would have been the case without the order.

54. On the other hand, I would concede that there is a potential inequality if one considers the hypothetical that some other student who was hoping to get a place on the same course would win their appeal on 10th October, 2018 and get even higher points than this applicant. Of course, by that stage, there would not in practice be any place available. Theoretically, yes, the solution I am fashioning could under some totally speculative conditions be seen as unequal but it is only unequal because that other entirely hypothetical comparator student (who may not in fact exist) did not initiate High Court proceedings in a timely manner and therefore could never have taken up the place in question under the current system. That is an objective reason for difference in treatment and for giving relief to the applicant. Overall, the order I am making reduces the net level of inequality because otherwise a definitely less qualified person who *does* exist would be favoured over this applicant, at the risk perhaps of an entirely theoretical risk of favouring the applicant over a possibly non-existent more qualified person who, if she exists, did not in any event seek relief in a timely manner or at all and who therefore could never have been in the running for the place as the system currently stands. One could consider a further hypothetical that UCD might reverse its position and admit further students after the appeals process had concluded after all. In that situation, the applicant would have been catapulted ahead of another hypothetical comparator who might have ended up, post-appeal, with higher points for veterinary medicine. But again, while that is not ideal, the order made will have reduced the net level of inequality. The true comparison is not between the result ordered by the court and perfect equality but between the result ordered by the court and the outcome without an order. On the latter comparison, following the order being made, the applicant is advantaged over both the under-bidding student on 555 points and the hypothetical better-performing candidate, but without an order, the under-bidding student gets the place ahead of both the applicant and the even better hypothetical candidate. Equality clearly favours the order having been made. But all that goes to emphasise the need to change the system to ensure that the problems in this case requiring recourse to the High Court do not recur.

55. Mr. Power also makes an opaque argument that what is at issue here was an outcome of a process rather than a decision; but then resiled from any suggestion that this alleged distinction had any specific legal consequences, thereby sparing me from considering the point further. I could not in any event discern any such consequences.

56. Misplaced reliance was put on *Abrahamson v. Law Society* [1996] 1 I.R. 403 at 423 to the effect that in the context of legitimate expectations the court should not interfere with the discretion of the decision-maker. That comment was in a very specific context and certainly not intended to suggest that discretionary decisions were immune from review. Here the legal difficulties arising from the SEC scheme go well beyond the realm of affecting legitimate expectations.

57. Finally, at para. 67 of the SEC's written submissions it was suggested that the applicant is not prejudiced. That argument completely flat-lines because quite clearly the applicant is prejudiced in several ways. First of all, she has irrecoverably missed out on the first complete month of the course and secondly, but for the court order she would have received a deferred offer and missed out for a year on the commencement of study of veterinary medicine. That is independently of the stress and difficulty caused to her by the flawed appeal system to which she has deposed on affidavit and which I need not spell out here.

58. However one wishes to categorise it conceptually, the applicant's rights are engaged; and a process that has deprived the applicant of the first weeks of her course through no fault of her own, and threatened to require a postponement of her year of entry altogether, is inherently disproportionate and substantively unfair. Accordingly, insofar as the statement of grounds involves a complaint that that the outcome is disproportionate or unfair, and a breach of the right to earn a livelihood, I would uphold the allegation at grounds 20, 21, 27 and 30a.iii.

Irrationality by reason of the SEC's failure to take all relevant matters into account

59. As noted above, the SEC were simply unaware of UCD's decision to bring forward the cut-off date for new students for the current academic year, to 30th September. This was a material consideration to the determination of timescales that any rationally-constructed appeals system would have had to have taken into account. One does not need to attribute fault to anybody to come to the conclusion that the SEC's appeals system was flawed because the SEC failed to have due regard to, or alternatively to make itself aware of, the fact that the system would be an ineffective remedy for anyone hoping to attend a course at the country's largest university in the current year. On conventional administrative law principles, such a hugely important factor was one that would have been essential to take into account in any process of rational and fair deliberation underlying the construction of an appeals system (see Michael Fordham, *Judicial Review Handbook*, 4th ed., para. 56.1 on failure to consider relevant factors which he describes as "a basic and long-standing principle of judicial review" (p. 558).)

60. To put it another way, the procedures adopted by the SEC were structured on the basis of an incorrect understanding of the factual situation and were fundamentally erroneous for that reason. The SEC failed to inform itself of the situation and its misunderstanding of fact amounts to a failure to take into account a relevant consideration, namely an earlier cut-off date being adopted unilaterally by a participating institution; and therefore to legal irrationality. The SEC has a duty to take all relevant facts into account before adopting procedures, which was not done here. Separately, it is hard to see how the rational integration of exam marking with higher education and training admission can be achieved on a sustainable basis in the future without clear binding timetables, whether contractual or administrative, for the start of courses that allow appropriate space for the exam results system to work in tandem with the CAO system and the admission process in a holistic manner. The absence of any binding arrangements, which is what we are looking at in this case, is not necessarily the fault of any one actor in the process – but that doesn't mean that things should stay that way. Returning to the particular complaint made against the SEC here, to the extent that irrationality and unreasonableness in the policy itself are alleged by the applicant at grounds 21 and 24, I would uphold that complaint.

Failure to treat similarly situated citizens similarly

61. By definition, in dealing with a computational error in marking, but more generally when dealing with any marking error, one is considering a situation where the student is not at fault. By comparison with a student who completed an exam paper entitled to the same mark as the applicant, this applicant is being treated less favourably because she was slated to lose an entire year of study and, in any event, has lost the first crucial weeks of her course in the 2018-19 academic year. We are, in this context, for the reasons discussed earlier in this judgment, well within the territory of human personality that is encompassed by the terms of Article 40.1 of the Constitution. Can it be said that the difference in treatment is lacking in objective and proportionate justification so as to amount to a breach of her right to equality?

62. Human error can occur in any process, and the fact that in a particular case it may take time to correct the error and thus for there to be, to a limited extent, an unequal process, does not necessarily constitute a breach of the right to equality if the delay is a reasonable consequence of a proportionate and properly-functioning system. In particular, there is no impermissible inequality in itself in the fact that front-page errors are picked up immediately in the ROAP review whereas other errors require an examiner to examine on appeal. The difference in the nature of the error (and therefore in the identity of the error-corrector) provides an objective reason. That does not mean that the appeal can take an excessive amount of time. However, given the competitive nature of course allocation, all appeal results are announced at the same time. That time is currently well after the start of the academic year. Thus (apart from the narrow front-page-error review process), due to the length of time the process takes, the system is such that a timely rectification of error in the appeal process, and thus an equal outcome, is positively precluded. A blameless student such as this applicant is irremediably and inherently deprived of several weeks of their course, and subjected to considerable potential disruption. Overall, it is not possible to identify the necessary degree of objective, reasonable and proportionate justification that would allow one to say that the less favourable treatment being afforded to the applicant is permissible under Article 40.1.

63. To put it another way, the fact that under *this particular* appeals process the appeal results necessarily emerge after the start of the academic year, and in addition after the cut-off date for the course itself, means that the degree of inequality between the applicant and other students of similar ability is materially greater than is inherently required by *any* appeals process. Mr. Power laboured under the misapprehension that the burden of proof was on Mr. O'Higgins to show that a better appeals system was possible. As it happens I would infer from the evidence, the significant reduction in resources and expedition at the appeal stage, and the gaps in the SEC's account of the process, that a better system is very much possible. But in any event, once difference of treatment has been shown between equally situated citizens – in this case, between the applicant and someone who submitted a paper of equal standard that was correctly marked in the first place on behalf of the SEC – then the onus falls on the relevant emanation of the State to show an objective and reasonable justification for the difference in educational outcomes. That was not done. There may be appeals processes in other contexts where delay in itself is not an inequality because the appellant is introducing further evidence, information or submission that was not put at first instance. But an exam appeal is basically a straight re-marking of the original paper. The student does not get to introduce further supplemental answers – at most she draws attention in a very summary manner to the answers where the original examiner went wrong. Thus the delay and the resulting inequality is entirely a question of organisation of the appeal system and cannot be attributed to the student.

64. In those circumstances I would uphold the plea of failure to treat similar applicants similarly insufficient regard to the rights of the applicant, in particular the right to equality, at grounds 20, 29 and 30a.ii.

Failure to provide a timely decision

65. The right to fair procedures and to good administration inherently involves a right to a prompt decision: see *Byrne v. Criminal Injuries Compensation Tribunal* [2017] IEHC 28 (Unreported, High Court, White J., 27th December, 2017). In *K.M. v. Minister for Justice, Equality and Law Reform* [2007] IEHC 234 (Unreported, High Court, 17th July, 2007), Edwards J. said "entitlement to a prompt decision is an aspect of constitutional justice" and referred to the "the idea of substantive fairness includes a duty not to delay in the making of a decision to the prejudice of fundamental rights." In another context, Kearns P. in *Doherty v. Government of Ireland* [2011] 2 I.R. 222 condemned a situation where a decision could be put off for so long that it no longer served the original purpose. Justice delayed is justice denied; and likewise, good administration delayed is good administration denied.

66. But for the order made in this case, delay in determining the appeal would have defeated the applicant's right of access to a third level place in the current year for which she properly qualified. But even with that order, by getting an offer up to a month-and-a-half after the start of the academic term, an applicant is significantly educationally handicapped. A situation such as that here is in

breach of the right to a timely decision that is a part of the constitutional requirement to fair procedures. The SEC's statutory duties under art. 6(1)(f) of the State Examinations Commission (Establishment) Order 2003 to "determine procedure to enable the review and appeal of results of examinations at the request of candidates") must be construed as involving an implied requirement to provide for timely review and appeal in accordance with the constitutional rights of persons subject to those procedures, in the light of the principles set out in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 104 I.L.T.R. 81. That requirement was not complied with here.

67. Leaving aside altogether the most egregious consequence of the current system, that the applicant was facing loss of her college place altogether until 2019, the fact that the appeals system does not deliver results until after the commencement of the academic year has at least two consequences. Firstly, assuming that the academic year commences at the start of September and the close of the offer season occurs on 17th October, students miss out on significant chunks of first year amounting to anything up to a month and a half of a crucial period of orientation, study, and integration into the class and the institution. This applicant has suffered a significant loss of her course. Secondly, there is potential for severe disruption depending on what the student decides to do in the meantime. While this aspect does not strongly affect this applicant, and while a detailed consideration can be left for some hopefully hypothetical future case, it is nonetheless evident that a cohort of those students suffer severe disruption if they have already accepted some other offer and begun to integrate themselves into a different class and possibly a different institution, perhaps even in a different town or city. That involves seeking and securing accommodation, attending orientation, starting classes, getting through freshers' week, and integrating themselves with the institution, its student societies and sports associations, and their own classmates. Weeks later, as a result of the delayed outcome of the appeals process, they face being yanked out of these organised arrangements and transported cold into a new course that has already been well underway for many weeks. Either of these consequences amount to a breach of the right to a decision within a reasonable time as an aspect of fair procedures. The concept that it is seen as officially acceptable to visit such a situation on children and young adults just on the threshold of such a crucial cross-roads in life is inherently flawed. In the context under discussion, a decision within a reasonable time can only mean a decision on the appeal that is made so as to allow any new offer to be made and accepted in time for the candidate to make arrangements to attend the course before it starts. Such a timely decision was denied to this applicant.

68. Insofar as the statement of grounds alleges a failure to determine the appeal in a timely manner at grounds 23, 24 and 25 and insofar as it alleges breach of fair procedures, of which the right to a timely decision is part, at grounds 20, 30, 30a.i and 32, and of the consequential failure to take the rights of the applicant into account in the exercise of statutory powers in a constitutional manner, envisaged by grounds 20 and 30.a.iv, I would uphold those pleas.

The appropriate injunctive remedy

69. While Mr. O'Higgins submitted, correctly, that a court can fashion whatever remedy is appropriate to avoid breach of rights, ultimately there is nothing hugely innovative about the order in this case. It is not really necessary to explore the by-ways of *Carmody v. Ireland* [2009] IESC 71 [2010] 1 I.R. 635 and *McCabe v. Ireland* [2014] IEHC 435 to determine how to provide a remedy for the applicant. As of the date of the oral pronouncement of the decision, the obvious and indeed necessary remedy was by way of a mandatory order requiring the determination of the applicant's appeal before the cut-off date. No other relief would have sufficed. Once a breach of her rights was established, it was not a difficult decision to identify the appropriate injunctive remedy.

Application for stay following oral pronouncement of the order

70. Following the oral pronouncement of the order, Mr. Power applied for a stay pending appeal to the Court of Appeal. Having heard counsel on the stay issue I refused that application. Firstly, the stay would have nullified the benefit to the applicant of having won the case and would have had the effect of determining the issue given the cut-off date of 30th September, 2018 for taking up a place.

71. Secondly, as matters stood on 26th September, 2018, I stated that the applicant had an extremely strong case that she was incorrectly deprived of meeting the criteria for an offer for her chosen course. On the evidence it was well beyond a *prima facie* case or an arguable case. It seemed to me that the entitlement to an additional 10 marks (due to a totting error) had not been displaced even allowing for the 1 mark to be lost (due to a separate error). The calculations showed that she was extremely likely to have qualified for her chosen course if the paper had been marked properly. I did not see the SEC's very speculative suggestion that there could be a question mark over another 3 marks as having any basis that I could see. That section was clearly marked as 15 out of 15 and the format of the answers which give examples in each case supported that. My view of the applicant's script on 26th September, 2018 – that she was extremely likely to succeed in her appeal – was, as it happens, borne out by the successful outcome of the appeal two days later.

72. In terms of the balance of convenience and justice relevant to a stay, my view was that they were massively in favour of the applicant being allowed to have her paper correctly re-marked even apart from the point that the stay would have nullified the benefit to the applicant of having won the case. It is bad enough to have a situation where a mere stay would determine the event (see by analogy *Agrama v. Minister for Justice and Equality* [2016] IECA 72, para. 32); but to have the grant of a stay determine the event against a person who has actually won their case at first instance would be truly bizarre.

Summary

73. Without taking from the more specific terms of the judgment, an attempt can be made to broadly summarise the major legal conclusions arrived at, as follows:

(i). A higher education institution is acting reasonably by taking the view that once the academic year has got underway, new students would have difficulty catching up and that their academic performance would suffer as a result of having missed out on the start of term.

(ii). UCD was not in breach of the CAO handbook or any legitimate expectation arising therefrom in so deciding.

(iii). The definitive approach to the jurisdiction to amend in the light of recent jurisprudence is that set out by Peart J. for the Court of Appeal in *B.W. v. Refugee Appeals Tribunal*. The tests arising from the jurisprudence are arguability (which may include an arguable major new point), explanation (which may be simple inadvertence and should not be conflated with the high level of explanation required to actually commence proceedings late as opposed to widening an existing challenge) and lack of irremediable prejudice.

(iv). On the premises referred to in the judgment, the officials who declined to apply the ROAP procedure in this instance acted properly and did not misconstrue or improperly fail to operate the SEC's existing policies regarding the fast-track review system.

(v). The recognised constitutional right to earn a livelihood would be meaningless without the concomitant recognition of a right of reasonable access to available higher education and vocational training, commensurate with the ability of the citizen. Therefore the latter right must be regarded as a constitutional right that flows from the former right. There may of course be qualifications and conditions that do not fall for decision here and can safely be left to another case.

(vi). There are some reasons why a right of reasonable access to available higher education or vocational training commensurate with the abilities of the citizen should be recognised as a stand-alone right rather than as an aspect of the right to earn a livelihood. That does not fall for decision here and can again safely be left for further discussion in a later case.

(vii). Given the intimate connection between access to higher education and the rights that are specifically relied on by the applicant, including the right to earn a livelihood, the applicant's fundamental rights are engaged in the question of her admission to higher level education and therefore in the process and timescale for informing her of the outcome of her appeal against her Leaving Certificate grades.

(viii). Any procedure for admission to higher education or vocational training must not unfairly interfere with the substance of the applicant's rights. Any such interference must be proportionate in accordance with the doctrine in *Meadows v. Minister for Justice, Equality and Law Reform*.

(ix). The proportionality test casts an obligation on a respondent to demonstrate that the interference with the right at issue meets the *Meadows* criteria, which has not been discharged here.

(x). The effect of an excessively prolonged appeal process is to significantly and disproportionately impact on the quality of the education being received by the student who misses out on the first weeks of their higher level course and who runs the risk of a postponement of their course altogether.

(xi). A process that has deprived the applicant of the first weeks of her course through no fault of her own, and threatened to require a postponement of her year of entry altogether, is inherently disproportionate and substantively unfair.

(xii). The SEC has a duty to take all relevant facts into account before adopting procedures, which was not done here.

(xiii). There is no impermissible inequality in itself in the fact that front-page errors are picked up immediately in the ROAP review whereas other errors require an examiner to examine on appeal.

(xiv). Due to the length of time the process takes, the system is such that a timely rectification of error in the appeal process, and thus an equal outcome, is positively precluded. A blameless student such as this applicant is irremediably and inherently deprived of several weeks of their course, and subjected to considerable potential disruption. Overall, it is not possible to identify the necessary degree of objective, reasonable and proportionate justification that would mean that the less favourable treatment being afforded to the applicant is permissible under Article 40.1 of the Constitution.

(xv). The SEC's statutory duties under art. 6(1)(f) of the State Examinations Commission (Establishment) Order 2003 to "*determine procedure to enable the review and appeal of results of examinations at the request of candidates*") must be construed as involving an implied requirement to provide for *timely* review and appeal in accordance with the constitutional rights of persons subject to those procedures. That requirement was not complied with here.

(xvi). In the context under discussion, a decision within a reasonable time can only mean a decision on the appeal that is made so as to allow any new offer to be made and accepted in time for the candidate to make arrangements to attend the course before it starts.

(xvii). In terms of the balance of convenience and justice relevant to a stay, they were massively in favour of the applicant being allowed to have her paper correctly re-marked even apart from the point that the stay would have nullified the benefit to the applicant of having won the case. It is bad enough to have a situation where a mere stay would determine the event; but to have the grant of a stay determine the event against a person who has actually won their case at first instance would be truly bizarre.

Order

74. In case anyone thinks that the case has an entirely Hollywood ending, it should not be forgotten that the applicant has lost the initial crucial weeks of her course. The applicant's pleadings do not just complain that she might have missed out on a place until 2019, but more specifically that "*The inability to resolve the said error in a timely manner before the college course starts is unreasonable and unconscionable*" (ground 24, emphasis added). In that respect she shares a fate with all students who have to avail of the appeals system. Some of those other students will have experienced massive disruption if they have already accepted some other course. The applicant has missed out on the start of her degree course not just because of a mistake in the SEC process – that is human error which cannot be eliminated from any system – but because the error-correction process fails to restore the applicant's entitlement to her place in time for the start of the course. An appeal system that does not enable applicants to take up their courses until potentially one-and-a-half months after the start of the academic year – the period between the start of the academic year on or about 3rd September and the close of the offer season on 17th October – is, as I said when announcing the order, manifestly not fit for purpose. I should say in fairness to the SEC that while it must take legal responsibility for the consequences of its appeals system, not all of the problems created by tight time-frames and lack of co-ordination between the various protagonists in the educational sphere can be regarded as entirely being the fault of any one actor – and indeed all of the relevant actors are in principle independent agencies. Nonetheless, the point remains that UCD changing the cut-off date has highlighted that situation but it did not create it. That change did not create the problem because the flawed concept that it is officially acceptable that a cohort of students would be deprived of the first crucial weeks of their courses through no fault of their own pre-existed the emergence of the early cut-off date. The current system is highly unfair to Leaving Certificate students and has caused untold stress to this applicant and I have no doubt also caused massive stress and disruption to other students who are obliged to avail of that appeal system at a delicate and pivotal cross-roads in their lives. This situation cannot be repeated. I adverted at an earlier stage in the proceedings to the prospect that an intensified process of co-ordination in which central government could play a facilitative role might assist in that regard.

75. Perhaps the last word should be left to Professor Parkinson: "*Parkinson's Law of Delay cannot, of course, be amended or repealed but it can be circumvented. Just as it was within the bounds of ingenuity to accomplish human flight, so, perhaps, there will always be a right way of getting new ideas off the ground*" (p. 164). The applicant will have done the public interest some service if these proceedings have amounted to such a way.

76. For the reasons outlined in this judgment, the order made on 26th September, 2018 was as follows:

(i). an order compelling the SEC to consider and determine the appeal of the applicant and notify the applicant, the CAO and UCD by 12 noon on Friday 28th September, 2018; and

(ii). a consequential order that the CAO is to notify the applicant and UCD of any offer of a place by 5 pm on 28th September, 2018 and subject to the applicant's acceptance, that UCD forthwith facilitate the applicant's admission to any course so offered, prior to 1st October, 2018.

77. While that order and developments subsequent to it have in effect rendered the proceedings moot, I will hear the parties on the issue of costs. In that regard, it is nice to have heard in open court on 1st October, 2018 that the SEC is anxious to be seen to publicly wish the applicant well, particularly since it previously defended the case on the basis that her proceedings were "*self-serving*" (SEC's legal submissions, para. 87) and raised the issue of possible costs consequences arising from her submissions (SEC's legal submissions at para. 10). Presumably in making its latest intervention, the SEC had in mind the applicant's averments as to the severe stress this matter has caused her.