

APPROVED

[2024] IEHC 313



**THE HIGH COURT
JUDICIAL REVIEW**

2022 494 JR

BETWEEN

**B. (A MINOR)
AND ANOTHER**

APPLICANTS

AND

**MINISTER FOR EDUCATION
NATIONAL COUNCIL FOR CURRICULUM AND ASSESSMENT
STATE EXAMINATIONS COMMISSION
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 May 2024

INTRODUCTION

1. These judicial review proceedings seek to challenge the legality of the marking scheme for a leaving certificate examination. The leaving certificate subject at issue is Mandarin Chinese. Candidates sitting an examination in this subject are expected to use a script system known as simplified Chinese characters in preference to traditional Chinese characters.

NO FURTHER REDACTION REQUIRED

2. The applicants contend that this policy choice as to the form of characters is unlawful. It is said that it discriminates against persons whose cultural and linguistic heritage derives from a country or region where traditional characters are officially used. It is further said that the policy choice does not have an objective and reasonable justification.
3. The applicants have also sought to challenge the marking scheme on the grounds that it has been introduced other than by way of a statutory instrument made pursuant to the provisions of the Education Act 1998.

FACTUAL BACKGROUND

4. The first named applicant in these judicial review proceedings is a secondary school student. The student is seventeen years of age. As the student has not yet reached his age of majority, the proceedings are being pursued on the instructions of his mother as his “*next friend*”, i.e. litigation friend.
5. The mother has also been joined to the proceedings in her own right as a second named applicant. However, no specific relief has been sought which relates to her personal circumstances. It is doubtful, therefore, whether she has a “*sufficient interest*” to pursue any claim in her own right as required under Order 84 of the Rules of the Superior Courts. At all events, it is proposed, for ease of exposition, to refer to the student throughout this judgment as “*the applicant*” singular. This is done in circumstances where the student is the principal applicant.
6. The applicant was born in Taiwan in 2006. The applicant is an Irish citizen. The applicant’s mother is a Taiwanese national and his father is a national of an EU member state. The applicant lived in Taiwan until he was four months old. The

applicant speaks Mandarin Chinese at home and has learned to read Mandarin Chinese, to a limited extent, using traditional characters. The applicant's mother is teaching him to read Mandarin Chinese. The applicant's parents wish for him to foster his Taiwanese and Chinese language heritage through, *inter alia*, the use of traditional characters.

7. The applicant attends a non-fee paying secondary school. The school is a "recognised school" for the purposes of the Education Act 1998. The applicant commenced a course of study, at his secondary school, in Mandarin Chinese in the academic year 2023/24. This is a two year course consisting of 180 class contact hours. The course is pitched at *ab initio* learners. The applicant is scheduled to undertake the leaving certificate examination in this subject in June 2025.

THE IMPUGNED MARKING SCHEME

8. The marking scheme for the examination in each individual leaving certificate subject is published annually by the State Examinations Commission. The publication occurs after the examinations have been undertaken.
9. The marking scheme for leaving certificate Mandarin Chinese is described as follows in the second affidavit sworn by the principal officer at the Department of Education:
 - a) In the Writing section of the Mandarin Chinese papers, questions are marked under the headings of Communication and Language. There are descriptors set out which describe high, moderate and low levels of achievement for both Communication and Language. In the case of each level of achievement i.e. high, moderate and low, there is a band of marks assigned.
 - b) The descriptors for Language refer to the following criteria: range of lexis, grammatical structures, word order, accuracy

in characters and substitute of characters (noting that traditional characters are referenced with others under substitute of characters).

- c) In order to be positioned in the high level of achievement band, there should be very few to no substitutes of characters using other languages or means including pinyin, traditional characters, first language, other phonetic symbols etc.
 - d) It should be noted that the consequence of the response falling short with respect to one of the examination criteria does not necessarily move the mark to the next band down if, for instance, the response is comfortably meeting or exceeding the standard with respect to the other criteria.”
10. As appears, the use of traditional characters is not necessarily marked as being incorrect. Rather, the highest band of marks are awarded to those candidates who make very few to no substitutes of characters, i.e. use simplified characters mainly.
11. It should also be explained that the marking scheme only attributes 15 to 20 per cent of the marks to written answers in Mandarin Chinese. The balance of the marks are awarded for the oral and aural components of the examination and for written answers in English.

EXPERT EVIDENCE

12. The principles governing the approach to be taken to expert evidence have recently been restated by the Court of Appeal in *Duffy v. McGee* [2022] IECA 254. The following points are germane to the present proceedings. First, an expert witness is there to assist the court, not to decide the case, and the court has no obligation to accept the evidence of any particular expert, even where it is uncontradicted. Secondly, the duty of an expert witness to assist the court overrides any obligation to any party paying the fee of the expert. Thirdly, an expert witness should state the facts or assumptions upon which his or her

opinion is based and should not omit to consider material facts which could detract from their concluded opinion. Finally, an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume the role of an advocate. Far too frequently, expert witnesses appear to fundamentally misunderstand their role and wrongly regard themselves as advocates for the cause of the party by whom they have been retained.

13. In the present case, expert evidence on linguistics was adduced by both sides. The extent of evidence led by the applicant, in particular, went far beyond that permitted by the rules in relation to expert evidence. Regrettably, a number of the expert witnesses assumed the role of advocate and purported to express views on legal issues which are within the exclusive purview of the High Court in these judicial review proceedings. In particular, one expert witness stated on a number of occasions that the terms of the marking scheme were discriminatory and exclusionary. Another expert witness opined that it is “*unfair, discriminative (sic) and counterproductive*” for the Department of Education to refuse to mark (as correct) answers in traditional characters.
14. With respect, the question of whether or not there has been unlawful discrimination is a matter for the court alone to determine. It is certainly not a matter in respect of which a witness, whose area of expertise is linguistics, is entitled to adduce opinion evidence. It is apparent from the tendentiousness of her evidence that one of the applicant’s witnesses has very strong political views on the choice of script system. The fact that she espouses such strong political views undermines her independence as an expert witness on linguistics and the court can attach little weight to her evidence.

15. The scope of issues in respect of which expert evidence is properly admissible in these proceedings is very narrow. The court requires assistance in understanding the practical distinction between simplified characters and traditional characters. The court also requires assistance in relation to the logistics of teaching and examining Mandarin Chinese by reference to one or other of the script systems. Thereafter, it is a matter for the court to assess whether, having regard to the evidence adduced by both sides, the policy choice to prefer simplified characters meets the legal standards applicable, i.e. proportionality and rationality.
16. Insofar as relevant to the issues which fall to be decided in this judgment, the following are my findings of fact in relation to the two script systems.
17. Traditional characters are considered to be complex and often feature multiple strokes. Simplified script, or simplified characters, is the same script with many (but not all) characters simplified. Characters have been simplified by using three methods: simplifying the structure of characters; deriving new characters from simplified and traditional characters; and eliminating variants of the same character.
18. It is generally accepted that *ab initio* students should not be expected to learn the two script systems simultaneously. Rather, such students should be introduced to one or other of the two script systems initially.
19. For the purposes of *ab initio* learning at secondary level, the general practice in many countries is to use simplified characters. The reasons for this include the greater availability of learning materials in this script system and the greater ease of locating teachers who are comfortable with simplified characters. In purely pedagogical terms, there is no consensus on which script system is preferable for

ab initio learners. The primary reason that the teaching of simplified characters has increased in popularity at the expense of traditional characters is the economic rise of the People’s Republic of China, and its prominence on the global stage, rather than any purely pedagogical consideration.

20. The European Bench marking of the Chinese Language (“*EBCL*”) suggests that the debate over which of the two script systems may be more suitable for teaching is primarily driven by political perspectives and that there is no actual objective empirical data available. In almost all institutions in Europe which teach Mandarin Chinese as a foreign language, simplified characters have become the standard writing system.
21. To facilitate candidates using either script system, it would be necessary to appoint examiners who are proficient in both traditional characters and simplified characters.

EDUCATION ACT 1998

22. Section 7 of the Education Act 1998 confers upon the Minister for Education the function, amongst others, of determining national education policy.
23. Section 30(1) of the Act provides as follows:

“The Minister may, from time to time, following such consultation with patrons of schools, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, as the Minister considers appropriate, prescribe the curriculum for recognised schools, namely—

- (a) the subjects to be offered in recognised schools,
- (b) the syllabus of each subject,
- (c) the amount of instruction time to be allotted to each subject, and

- (d) the guidance and counselling provision to be offered in schools.”

24. The term “*prescribed*” is defined, under section 2 of the Act, as meaning prescribed by regulations made by the Minister. It is further provided that cognate words shall be construed accordingly.

25. Section 33 of the Act provides relevantly as follows:

“The Minister, following consultation with patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, may make regulations for the purpose of giving effect to this Act and, without prejudice to the generality of the foregoing, the Minister may make regulations relating to all or any of the following matters:

[...]

- (1) the curriculum of schools.”

26. Section 5 of the Act provides as follows:

“Every regulation and every order made under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation or order is passed by either such House within the next 21 days on which that House has sat after the regulation or order is laid before it, the regulation or order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.”

ABSENCE OF MINISTERIAL REGULATIONS

27. It appears that the longstanding practice of successive Ministers has been to operate and govern the education system by way of non-statutory administrative circulars. For example, the syllabus for Mandarin Chinese is to be found in a document entitled “*Curriculum Specification*” which has been published, without any legal formality, by the Department of Education.

28. The complaint initially advanced by the applicant in these proceedings had been that the curriculum specification for Mandarin Chinese is *unlawful* because it has not been prescribed by Ministerial Regulations made pursuant to section 30 of the Education Act 1998. The applicant's case has since narrowed. At the hearing, counsel on behalf of the applicant explained that the relief sought is now confined to the marking scheme. This was stated a number of times. See, for example, the following extract from the transcript (Day 1, page 31):

“The applicant is simply asking that if the examiner picks up the paper and some of the answers or part of the answers have been made in traditional Chinese, that they should simply be marked as normal and not treated as being incorrect or not attracting the normal marks that would be given were it in simplified, Judge.”

29. Counsel emphasised that the applicant was not seeking to have two separate examination papers, still less was he seeking to challenge the decision to confine the curriculum specification to simplified characters.
30. The principal relief sought in this regard is that at paragraph (e)(6) of the statement of grounds as follows:

“An Order of Mandamus compelling the first and third named Respondents to provide that the marking of the Leaving Certificate Examination (both Ordinary and Higher Level) of Mandarin Chinese shall take into account any answer written in Traditional Mandarin Chinese characters.”

31. It follows, therefore, that the specific question which falls for determination in these judicial review proceedings is whether it is necessary that the marking scheme for the examination in a leaving certificate subject be made by way of Ministerial Regulations. For the reasons which follow, there is no such necessity.
32. The Minister's function under section 30 of the Education Act 1998 is to prescribe the “*curriculum*” for recognised schools. It is apparent from the

structure of the section that the statutory concept of “*curriculum*” is broadly drawn and includes not only the identification of the range of subjects to be offered but descends to the detail of the “*syllabus*” of each individual subject. The term “*syllabus*” is not defined under the Act. The ordinary and natural meaning of “*syllabus*” is an outline of a course of study. It does not embrace a marking scheme for an examination.

33. The function of organising the leaving certificate examination has been delegated by the Minister to the State Examinations Commission (“*SEC*”). The SEC has been established by Ministerial order made pursuant to section 54 of the Education Act 1998. (See S.I. No. 373 of 2003). The SEC is responsible, *inter alia*, for the preparation of examination papers and for the marking of the examination. This is done by reference to the syllabus published by the Minister. The responsibility for the preparation of a marking scheme thus resides with the SEC not with the Minister. There is no requirement that the marking scheme be embodied in Ministerial Regulations made under section 30 of the Education Act 1998. The marking scheme for any particular subject evolves over the course of the exercise of marking examination papers each year (as feedback is provided from those correcting answer papers) and the final version of the marking scheme is published at the end of the process. This facilitates the appeal process and also allows candidates undertaking the leaving certificate examination in subsequent years to understand the basis on which their examination will be marked.
34. In circumstances where the applicant has disavowed any challenge to the curriculum specification for Mandarin Chinese (strictly speaking, this should be referred to as the “*syllabus*” for the subject), his attempted reliance on section 30

of the Education Act 1998 is misplaced. That section has no application to a marking scheme *per se*.

35. For completeness, any suggestion that there is a mandatory requirement to embody the syllabus of any individual subject in a statutory instrument is incorrect. It is apparent from the express wording of section 30 that the Minister has a discretion (“*may*”) to embody the curriculum for designated schools in Ministerial Regulations. It is not mandatory for the Minister to do so. It is open to the Minister to introduce a new subject—as Mandarin Chinese was in 2022—by way of a non-statutory administrative circular. Such a circular will, of course, have a lesser status than Ministerial Regulations. An interesting question might arise as to what remedy the Minister would have if a particular recognised school declined to follow the circular. However, it is incorrect to say that such a circular is “*unlawful*” and liable to be set aside on judicial review.
36. As explained earlier, the applicant did not pursue a claim for declaratory relief in respect of the syllabus at the hearing. Indeed, it is difficult to understand what benefit would accrue to the applicant in questioning the legality of the decision to introduce Mandarin Chinese as a leaving certificate subject. The logical terminus of such an argument, if correct, would appear to be that the subject should not be examined as part of the leaving certificate. Obviously, this is not an outcome that the applicant seeks.
37. The question of whether the deployment of non-statutory administrative circulars is precluded by the Education Act 1998 has already been considered by the High Court in *F. v. Minister for Education and Skills* [2022] IEHC 379. That judgment was concerned with the provision made for students with special education needs. One of the arguments advanced by the applicant in that case

had been that provision should have been made by way of Ministerial Regulations.

38. The High Court (Barr J.) rejected this argument as follows (at paragraph 97):

“[...] The provisions in the [Education Act 1998], merely state that the Minister ‘may make’ regulations to give effect to the Act. It does not oblige the Minister to enact regulations when setting out a general policy for the provision of primary education for persons with special education needs. The court accepts the submission made by counsel that education policies had been implemented prior to the 1998 Act, by means of circular. That practice had not been condemned or prohibited in the 1998 Act. Furthermore, the court is satisfied that having regard to the nature of the policy, it is preferable that it be implemented by means of circulars, which allow the policy to be implemented and changed over time in a fast and efficient manner. Accordingly, the court refuses to grant any relief based on the fact that the new model was introduced by the means of circulars, rather than by regulation.”

39. The judgment in *F. v. Minister for Education and Skills* is not on all fours with the present case in that it did not involve consideration of section 30 of the Education Act 1998. Rather, that judgment was concerned with the general power to make regulations under section 33. Nevertheless, that judgment represents a strong endorsement of the principle that it continues to be permissible to deploy non-statutory administrative circulars following the enactment of the Education Act 1998. I am not persuaded that the criteria for departing from a judgment of co-ordinate jurisdiction have been met. (See *In Re Worldport Ireland Ltd (In Liquidation)* [2005] IEHC 189 and *A. v. Minister for Justice and Equality* [2020] IESC 70).

LANGUAGE AND CULTURAL NEEDS OF STUDENTS

40. Section 6 of the Education Act 1998 provides, relevantly, as follows:

“Every person concerned in the implementation of this Act shall have regard to the following objects in pursuance of which the Oireachtas has enacted this Act:

[...]

(k) to promote the language and cultural needs of students having regard to the choices of their parents;”

41. The applicant seeks to rely on these provisions as giving rise to an enforceable duty to modify the marking scheme for Mandarin Chinese so as to accommodate answers in traditional characters. With respect, this submission is not well founded for the following reasons.
42. The obligation under section 6 is to “*have regard to*” the stated objects. The nature and extent of the obligation imposed by a statutory requirement to “*have regard to*” an object or principle is well established. The addressee is required to inform itself of, and give reasonable consideration to, the object or principle. An obligation to have regard to an objective to promote the language and cultural needs of students does not equate to an enforceable right to have a course of instruction and examination in any particular language subject. Still less does it equate to an enforceable right to specify the marking scheme for a competitive examination in that language subject. The applicant is in a privileged position, when compared with many students with different heritage backgrounds than his, in that he is able to avail of a course of study and an examination in his heritage language. In the circumstances, it cannot sensibly be said that there has been a failure to “*have regard to*” the statutory objective to promote the language and cultural needs of students. The applicant’s language and cultural needs have been respected.

43. The applicant has also sought to rely, in a vague manner, on section 7 of the Education Act 1998. The applicant has failed, however, to identify a specific provision of that section which is relevant to the language issue raised in these proceedings. Moreover, and in any event, the obligation under section 7 is subject to the qualification that the Minister must have regard to, *inter alia*, the resources available and the need to secure, as far as possible, that the education system provides value for money. The uncontroverted evidence before the court is to the effect that the estimated costs of introducing a revised marking scheme would be in the order of €985,000.

MEMORANDUM WITH CHINESE MINISTRY OF EDUCATION

44. The applicant complains, mistakenly, that the Minister for Education had consulted with, and entered into a memorandum of understanding with, the Ministry of Education of the People's Republic of China *in advance of* drawing up the circular and curriculum specification. It is said that the Chinese Ministry of Education is not a permitted consultee for the purposes of section 30 of the Education Act 1998.
45. This submission is based on a factual error: the chronology of events is such that the curriculum specification had been published *prior* to the entering into of any memorandum of understanding with the Chinese Ministry of Education.
46. Aside entirely from this factual error, there is no legal basis for the complaint made. The list of potential consultees under section 30 of the Education Act 1998 is not intended to be exhaustive. It was legitimate for the Minister to consult with the Chinese Ministry of Education in circumstances where there was a mutual interest in relation to the qualification and recruitment of teachers.

EDUCATIONAL RIGHTS UNDER THE CONSTITUTION

47. Article 42 of the Constitution of Ireland provides, insofar as relevant, as follows:

“1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2 Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

[...]”.

48. The applicant has sought to invoke these constitutional provisions in support of his challenge to the marking scheme for Mandarin Chinese. With respect, this submission cannot be reconciled with the judgment in *Burke v. Minister for Education and Skills* [2022] IESC 1, [2022] 1 I.L.R.M. 73. There, the Supreme Court held that the “*freedom*” to provide education at home (so long as certain minimum standards are achieved) does not involve any right to demand that the State provide an examination system to measure that knowledge and skill.

EQUALITY: ALLEGED DISCRIMINATION

49. The applicant contends that the marking scheme unlawfully discriminates against persons whose heritage derives from a country or region where traditional characters are officially used. More specifically, the applicant submits that this represents a breach of the equality provision of the Constitution of Ireland (Article 40.1) and a breach of Article 14 of the European Convention on Human Rights when read in conjunction with Article 2 of the First Protocol.

Constitution of Ireland

50. Article 40.1 of the Constitution of Ireland provides as follows:

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

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

51. The principles governing a claim that there has been a breach of the equality provision have recently been summarised by the Supreme Court in *Donnelly v. Minister for Social Protection* [2022] IESC 31, [2022] 2 I.L.R.M. 185 (at paragraph 188):

- “(i) Article 40.1^o provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.
- (ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1^o.
- (iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.
- (iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.
- (v) Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.
- (vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party’s case.”

52. The approach to be adopted in the case of a “*pure*” equality claim, i.e. a claim where a claimant does not allege that a substantive right of theirs has been breached but rather that it is unfair, to the point of constitutional invalidity, to confer a benefit on others while excluding them, is summarised as follows (at paragraph 192):

“What might be termed a ‘pure’ equality claim may arise where the legislature has decided to confer a benefit on a class of persons, and the plaintiff is aggrieved at being excluded because he or she has at least some relevant similarity with those who are included. But the legislature is entitled to make policy choices, and therefore must be entitled to distinguish between classes of persons. To refer again to the text of Article 40.1°, the equality guarantee is not to be interpreted as meaning that the State shall not, in its enactments, have ‘due regard’ to differences of physical and moral capacity, and of social function. I consider, therefore, that the challenge can only succeed if the legislative exclusion is grounded upon some constitutionally illegitimate consideration, and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason. The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the class, would be ‘fairer’.”

53. The text of Article 40.1 refers to persons being equal “*before the law*” and to “*enactments*”. No specific argument has been raised in these judicial review proceedings by reference to these terms. Neither side addressed the question of whether, notwithstanding its *non-statutory* nature, a marking scheme for a state-sponsored competitive examination is capable of being benchmarked against the equality provision. It is unnecessary, for the purpose of resolving these proceedings, to consider this issue further in circumstances where, as explained presently, there is no inequality involved. Thus, even if one assumes that a non-statutory marking scheme is subject to the equality provision, the outcome of the proceedings would be the same.

European Convention on Human Rights

54. As to the claim under the European Convention, the applicant has sought a declaration of incompatibility, pursuant to section 5 of the European Convention on Human Rights Act 2003, to the effect that the rules governing the examination of Mandarin Chinese are incompatible with Article 2 of the First Protocol taken with Article 14 of the European Convention.
55. It should be observed that a declaration of incompatibility is only available in respect of a “*statutory provision or rule of law*”. Neither side has raised this as a specific issue. It is not necessary, for the purpose of resolving these proceedings, to decide whether a declaration of incompatibility would be available in respect of a marking scheme *per se*. This is because, for the reasons explained presently, the applicant has failed to establish a breach of Article 14. It is not necessary therefore to consider whether a marking scheme, produced by the State Examinations Commission, which has not been promulgated by way of a statutory instrument, is amenable to a declaration of incompatibility.
56. These judicial review proceedings were initially heard over two days in December 2023. The hearing of the proceedings was reopened, at the direction of the court, to allow the parties to address the implications of the case law of the European Court of Human Rights in relation to language rights. In particular, the parties were invited to address the judgment of the ECtHR in *Džibuti v. Latvia*, Application No. 225/20. That judgment builds upon the earlier judgment in *Valiullina v. Latvia*, Application No. 56928/19. The parties were given time to prepare and exchange written submissions on these two judgments and the hearing resumed on 26 April 2024.

57. The two judgments of the ECtHR confirm that Article 2 of Protocol No. 1 of the European Convention does not include the right to access education in a particular language; it guarantees the right to education in one of the official languages of the country concerned. The applicant cannot, therefore, assert that he enjoys a substantive right under the European Convention to be taught his heritage language, still less a substantive right to insist on a particular form of examination and marking scheme.
58. The absence of a substantive right does not necessarily preclude a claim under Article 14 of the European Convention. This is because the ECtHR has held that the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each Convention State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the State has *voluntarily* decided to make provision.
59. Only differences in treatment which do not have an “*objective and reasonable justification*” are discriminatory and consequently contrary to Article 14 of the European Convention. A difference in treatment “*lacks objective and reasonable justification*” if it does not pursue a legitimate aim and/or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
60. As discussed below, the judgment in *Džibuti v. Latvia* is relevant to the question of comparators and to the margin of appreciation afforded in relation to the teaching of foreign languages.

Discussion

61. One of the many unusual features of the claim for discrimination in the present case is that the discrimination is said to consist of the *difference* itself. To elaborate: in most instances, an equality claim will arise against a background whereby a benefit or privilege is afforded to a category of individuals. A common example is a particular form of social welfare payment. The party alleging discrimination will say that they are similarly situated to individuals in that category, yet they have been denied the benefit or privilege by reference to a characteristic such as, for example, gender, race, ethnicity or marital status.
62. Here, the benefit or privilege consists of the right to sit a competitive state-sponsored examination in the language subject. The results of that examination can then be relied upon for the purpose of an application for admission to third-level educational institutions. Crucially, the examination is open to all comers. This is so irrespective of the individual's nationality, ethnicity, or language heritage. It is not even necessary that the individual have studied the language subject in a recognised school: an individual may register to undertake the examination as an external candidate. As it happens, the applicant in the present case enjoys the *additional* benefit of being able to undertake a course of instruction in the language subject in his non-fee paying secondary school. The applicant makes no complaint in relation to this additional benefit.
63. In circumstances where the examination is open to all comers, the applicant cannot allege that there is any direct discrimination. Rather, the complaint made is that an aspect of the applicant's own characteristics, namely, his cultural and linguistic heritage, means that the benefit is less valuable to him than to an examination candidate whose cultural and linguistic heritage involves simplified characters.

64. The equality provision will rarely, if ever, be engaged by the syllabus or marking scheme of a competitive examination. (The principal potential exception being where a candidate has a disability which requires accommodation). By definition, one of the purposes of the leaving certificate examination process is to *differentiate* between candidates by reference to their academic ability. In the context of a language subject, an individual candidate's cultural and linguistic heritage may confer an initial advantage upon them. For example, in the context of a German language examination, a child with a German heritage will have an initial advantage over a child whose mother tongue is English and who has not learnt or spoken German previously.
65. The fact that a subset of candidates might, in consequence of their cultural and linguistic heritage, have an initial advantage over other candidates does not involve a breach of the equality provision. All candidates will have an equal opportunity to prepare for the examination and will be assessed objectively by reference to the same syllabus and marking scheme. The fact that a non-native speaker may have had to work harder to achieve the same grade as a native speaker does not amount to discrimination.
66. It is telling that the applicant has struggled to identify the category of candidates in comparison to which he has supposedly been treated unequally. The identification of a similarly situated comparator is an essential part of the analysis of a claim of discrimination. When pressed, counsel for the applicant suggested two comparators as follows at the hearing on 26 April 2024.
67. The first comparator posited is a candidate undertaking the leaving certificate examination in another foreign language, i.e. other than Mandarin Chinese, where leeway is allowed in the marking scheme to differentiation in language

models. The second comparator posited is a candidate undertaking the leaving certificate examination in Mandarin Chinese whose cultural and linguistic heritage involves the use of simplified characters. For the reasons which follow, neither comparator is apposite.

68. The approach to identifying a comparator has been explained as follows by the ECtHR in *Džibuti v. Latvia*, Application 225/20 (at paragraph 130):

“[...] However, the Court has clarified that the elements which characterise different situations and determine their comparability must be assessed in light of the subject matter, the objective of the impugned provision and the context in which the alleged discrimination is occurring. The assessment of the question of whether or not two persons or groups are in a comparable situation for the purposes of an analysis of differential treatment and discrimination is both specific and contextual; it can only be based on objective and verifiable elements, and the comparable situations must be considered as a whole, avoiding isolated or marginal aspects which would make the entire analysis artificial [...]”

69. The first proposed class of comparator is too broadly drawn and ill-defined. The applicant has merely referred to a number of other language subjects, i.e. Portuguese, Polish and Lithuanian. The applicant has not discharged the onus of proof by putting any direct evidence before the court which establishes the existence of marking schemes for these other languages which accommodate differences in letters/characters which are equivalent to those at issue in the case of Mandarin Chinese.

70. Moreover, this comparison breaks down in that the other language subjects referred to are materially different from Mandarin Chinese in that they are not introductory or *ab initio* courses. The position is explained as follows in the first affidavit sworn by a principal officer in the Department of Education:

“The Portuguese, Lithuanian, and Polish specifications were developed for students who already have some proficiency in the language, as well as those with no prior experience.

They are pitched at the same level as other language subjects such as French and German, subjects in which students may already have taken a three-year course of study. The Mandarin specification, on the other hand, was created as a foreign language specification for *ab initio* learners.

Consequently, the basis for the comparison made by the Applicants is misconceived. A deliberate policy choice was made – for multiple reasons – to pitch the specifications for Mandarin Chinese at *ab initio* learners, including the inherent complexity of learning the language and the resultant difficulties which such complexities might pose for a two-year, 180 hour course of study.

In light of the foregoing, it would be beyond the scope of any post-primary foreign language subject, pitched at *ab initio* level, to implement all the complexities and variations of the language. Accordingly, a policy choice was made to focus on the teaching and learning of simplified characters in the Curriculum Specification, and the assessment of learning which is carried out by way of the Examination therefore reflects this. As outlined at page 8 of the Consultation Report, the majority of feedback received in relation to the Curriculum Specifications was positive. Additionally, it should be noted that time is given to recognising different forms of writing such as pinyin and the traditional characters [...]”.

71. The second proposed class of comparator is too narrowly drawn. The applicant seeks, in effect, to subdivide the cohort of candidates sitting the leaving certificate examination in Mandarin Chinese and to confine the comparison exercise to the subset of candidates whose cultural and linguistic heritage involves simplified characters. The applicant then claims to be less favourably treated than individuals in this subset. With respect, this is precisely the type of artificial analysis which is deprecated by the ECtHR in the passage cited above. Any comparison must be carried out by reference to the overall cohort of candidates sitting the leaving certificate examination in Mandarin Chinese. (Tellingly, this is the comparator class which had initially been identified in the applicant’s own written submissions of November 2023). The applicant is, in

truth, in a privileged position when compared to most of his fellow candidates in that he enjoys an advantage in that he speaks Mandarin Chinese at home. Most of the other candidates have no such cultural and linguistic heritage. This reflects the fact that this is an *ab initio* course.

72. For these reasons, then, I have concluded that the applicant has failed to establish that he has been discriminated against by the terms of the marking scheme for the Mandarin Chinese leaving certificate examination.
73. Lest I be incorrect in this conclusion, however, I propose to consider *de bene esse* whether any supposed discrimination is justified. Even allowing that the applicant may have established that there is, in principle, discrimination, same would be lawful for the following reasons. These reasons apply both to the rationality-type analysis required under the Constitution of Ireland and the proportionality-type analysis required under the European Convention on Human Rights.
74. The ECtHR has recently emphasised that the Convention States have a wide margin of appreciation in organising their education system, particularly as regards which foreign languages are taught within their education system. (*Džibuti v. Latvia*, Application 225/20 (at paragraph 156)). It follows as a corollary that Convention States must also have discretion as to the logistics of the teaching and examination of any foreign language which they have *chosen* to teach.
75. The Mandarin Chinese leaving certificate course has been designed as an *ab initio* course. Most candidates will only have taken up the subject for the first time in their fifth year of secondary school. The course comprises only 180 contact hours. Hence, there is a need for a greater simplification in terms of the

level of the course relative to other language subjects which have been taught since first year. The expert evidence discloses a rationale for deciding that the course should be focused on simplified characters. The expert providing evidence on behalf of the respondents has indicated that there are potential difficulties in attempting to teach both forms of characters in what is intended as an *ab initio* course. The expert makes the point that whereas third level courses often teach both forms of characters, this is only ever done consecutively not concurrently. For the purposes of *ab initio* learning at secondary level, the general practice in many countries is to use simplified characters. The reasons for this include the greater availability of learning materials in this script and the greater ease of locating teachers who are comfortable with simplified characters.

76. It is rational to focus the marking scheme on the syllabus. The modification of the marking scheme so as to allow for the use of both simplified characters and traditional characters would present practical difficulties in terms of the recruitment of teachers and examiners. The operation of the modified marking scheme would require examiners to have a high level of competency in both simplified characters and traditional characters. Such competency would be necessary in order to allow the examiner to mark whichever approach has been taken by a particular student in relation to their examination answer paper.
77. The imposition of a requirement to correct examination answer papers in both script systems would present challenges in terms of the recruitment of examiners. The applicant's case seeks, incorrectly, to diminish these logistical difficulties. The skills required for the teaching and examining of a language subject extend beyond the ability to read the script system.

78. There are no concurrent initial teacher education programs which include Mandarin Chinese. In order to register as a teacher of Mandarin Chinese, therefore, it is necessary first to undertake Mandarin Chinese to degree level and then undertake the two-year professional masters in education.
79. It is reasonable for the State Examinations Commission to seek to appoint, as examiners, practising teachers or teachers who have had experience of teaching the syllabus. This will ensure that examiners are familiar with the aims, objectives and learning outcomes of the syllabus and with the level of attainment expected of candidates. It is reasonable not to regard a native speaker, without formal teaching qualifications or experience, as a suitable examiner. There is no guarantee that a native speaker who uses simplified characters would be competent to mark an examination answer paper written in traditional characters.
80. The modification of the marking scheme would necessitate an additional expenditure which has been estimated at €985,000.

CONCLUSION AND PROPOSED FORM OF ORDER

81. In summary, the applicant has failed to establish that the marking scheme for Mandarin Chinese is in breach of the requirements of the Education Act 1998. In particular, there is no requirement that the marking scheme be embodied in Ministerial Regulations made under section 30 of the Education Act 1998. Nor has there been a failure to “*have regard to*” the statutory objective to promote the language and cultural needs of students for the purposes of section 7 of the Act.
82. As to the equality claim, the fact that a subset of candidates for a leaving certificate examination in a language subject might, in consequence of their

cultural and linguistic heritage, have an initial advantage over other candidates does not amount to discrimination. All candidates will have an equal opportunity to prepare for the examination and will be assessed objectively by reference to the same syllabus and marking scheme. The fact that a non-native speaker may have had to work harder to achieve the same grade as a native speaker does not amount to discrimination.

83. Accordingly, the application for judicial review is dismissed in its entirety. As to the allocation of legal costs, the *default* position under the Legal Services Regulation Act 2015 would be that the respondents, having been entirely successful in resisting the application for judicial review, would be entitled to recover their costs against the losing side. As the first named applicant is a minor, any costs order would be made against his “*next friend*”, i.e. his litigation friend upon whose instructions the proceedings have been pursued in his name. Any costs order would be stayed pending an appeal.
84. To facilitate any appeal, an order will be made, pursuant to Order 123 of the Rules of the Superior Courts, allowing the parties to take up a copy of the transcript of the third day of the hearing on 26 April 2024. (There is already a transcript available in respect of the first two days of the hearing).
85. If either side wishes to contend for a different form of costs order than the default position, they should file and exchange written legal submissions by 10 June 2024. This matter will be listed before me on 14 June 2024 for final orders.

Appearances

Derek Shortall SC and Paul Gunning for the applicants instructed by KOD Lyons LLP
Brian Kennedy SC and Francis Kieran for the respondents instructed by the Chief State Solicitor